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Research Article

MORE EDUCATION OF JUVENILE OFFENDERS IN SENTENCES OF IMPRISONMENT: A REFORM AND JUSTIFICATION APPROACH AS A CONSEQUENCE OF NIKLAS LUHMANN'S SYSTEMS THEORY

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ABSTRACT

Background: In order to *meet the demands of contemporary society, German juvenile criminal law needs a necessary reform. Consequently, this article proposes the reintroduction of indeterminate sentencing as an instrument for an overall social benefit to this need for reform and to counter the existing determinate sentencing system in place today . This specific*

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sentencing system is understood to be the current guideline and norm currently implemented. According to Luhmann's systems theory, this contradicts the diversity of societies and the unique individuality of each member within them. In this perspective, individuals have the right to assert their rights and define their norms as long as they do not break the law or commit a criminal offence.

Methods: *The discussion surrounding indeterminate sentencing reached its conclusion in the late 1990 s, so a lack of scientific research exists. However, considering the societal transformation and development of the younger generation, the reintroduction of indeterminate sentencing seems opportune. Niklas Luhmann's flexible systems theory from the 1980 s is well suited to support this reintroduction. Based on a relevant literature review and the development of tightening in German juvenile law, this article adopts an analytical approach supported by social, legal and political research. It provides a framework elucidating the reasons and the appropriate form for reintroduc ing indeterminate sentencing as a useful method to increase resocialis ation among the youth . This framework includes practical approaches such as combining education, professional training and social education, all aimed at implementing a rehabilitative approach within the juvenile justice system, similar to the original law that was abandoned.*

Results and Conclusions: *If this occurs, the indeterminate sentence allows for a more individualised approach, establishing an individual-oriented minimum sentence while maintaining a maximum duration. Thus, it aligns with Luhmann's flexible systems theory approach and proves relevant to the current circumstances of the youth generation. Such an approach offers greater benefits by emphasising the integration of education within the prison sentence for resocialisation, surpassing the capabilities of the current determinate sentencing in juvenile criminal law .*

The actual recidivism rates average between 25% and 30% depending on the sentence. With an education-focused approach adjusted to the juvenile offender , coupled with a realistic future-oriented education system in and after the sentence, the process of resocialis ation stands a better chance of success . Although the research on this topic is in its early stages, this approach serves as an initial step towards instigating the necessary reform within juvenile law.

1 INTRODUCTION

The recognition that young people are the future and are still in a developmental phase [2] has led to the thought that juvenile offenders must be treated differently from adults, and offences must also be sanctioned in a differentiated manner. For this reason, a separate juvenile criminal law was developed in Germany to function as a so-called 'educational criminal law,'[3] with the primary aim of punishment being education and the subsequent resocialisation of juvenile offenders.

In order to achieve this goal, there is – in addition to outpatient measures – also the possibility of imposing prison sentences as an 'ultima ratio'.

In the case of imposing a custodial sentence, there were two forms of juvenile sentences in Germany until 1990: the determinate sentence according to Section 18 and the indeterminate

2 Bernd Dollinger, 'Professional Action in the Context of Juvenile Criminal Law: Conceptual Provisions and Empirical Evidence' (2012) 95 (1) Journal of Criminology and Penal Reform 6, doi: 10.1515/mks-2012-950101.

3 Axel Montenbruck, *German Criminal Theory I – IV: Textbook in four pts* (4th edn, Free University of Berlin 2020) 31.

sentence according to Section 19 JGG (Jugendgerichtsgesetz (German)/Youth Court Act (English)).[4] According to the law, an indeterminate sentence was intended for cases in which the duration required for successful resocialisation (achievement of the purpose of the sentence) could not be precisely determined. When sentencing, a minimum and maximum sentence was given, ranging from no less than half a year to a maximum of two years.

In 1990, the indeterminate sentence was abolished by the legislature on the grounds that it would take better account of the educational principles in juvenile criminal law.[5]

The present article exclusively deals with cases involving the imposition of a prison sentence and explores whether indeterminate sentencing could facilitate appropriate sentencing and provide enhanced opportunities for resocialisation.

Sentencing in trials is still a much-discussed topic today. One of the key challenges is the lack of decisive, valid instruments to ensure that the verdict does full justice to the nature of the offence, the surrounding circumstances, and the personal characteristics of the offender. The primary concern here is the predictability of an offender's resocialisation . It can never be clearly determined when and how resocialisation is really completed. Dahle formulated this in 2010:

> *What is required is an idiographic methodology (or at least the inclusion of such a methodology) that can analyse the dynamics of the offence realised in the concrete event and its background and to identify the factors responsible for this. In contrast, one searches in vain for further specifications regarding the content or methodology of prognosis assessments in the legal texts. The case law has not formulated any very far-reaching content or methodological requirements either. It is, therefore, not surprising that binding methodological standards for criminal prognosis assessments are not in sight for the time being.*[6]

If one must assume that the successful resocialisation of offenders cannot be predicted reliably by the majority, then no sentence could be determined with the particular conviction. In such a case, one could argue that to compensate for this uncertainty, even more drastic measures would need to be implemented in the penal system. Montenbruck makes it clear here:

'With the punishment, the state 'protects the right to freedom by violating the right to freedom', without really knowing whether this offender will ever commit a crime again'. Especially since anyone who assumes freedom of can hardly make this prognosis convincingly. It would then be consistent to develop a law of correction and security in the sense of para. 61 ff. StGB (Strafgesetzbuch (German)/Criminal Code (English)[7] and not to provide for a criminal law of guilt.[8]

However, since society generally acknowledges the need for punishment when laws are broken, imprisonment is often considered the ultima ratio if a threat from an offender

4 Youth Courts Act 'Jugendgerichtsgesetz (JGG)' (as amended of 25 June 2021) <https://www.gesetze-im-internet.de/englisch_jgg> accessed 10 March 2023.

5 Helmut Baier, 'Juvenile Sentencing' in K Laubenthal, H Baier and N Nestler (eds), *Juvenile Criminal Law* (3rd edn, Springer 2015) 338.

6 Klaus-Peter Dahle, *Psychological Criminal Prognosis: Towards an integrative methodology for assessing the probability of recidivism in prisoners* (Studies and Materials for Criminal penitentiary 23, 2nd edn, Centaurus 2010) V-VI, doi: 10.1007/978-3-86226-449-0.

7 German Criminal Code 'Strafgesetzbuch (StGB)' (as amended of 22 November 2021) <https://www.gesetze-im-internet.de/englisch_stgb> accessed 10 March 2023.
This includes preventive detention, compulsory admission to a psychiatric institution, etc. with revocation upon absolute proof of resocialisation.

8 Montenbruck (n 3) 249.

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cannot be averted in any other way. However, it is important to recognise that imprisonment ultimately does not integrate the offender into society but excludes him or her from it.

As a consequence, this approach proves to be too harsh in the context of juvenile criminal law since it is based on the fundamental belief that young individuals can still be educated. Thus, in the case of non-prognostic ability, the introduction of an indeterminate sentence from 6 months to 2 years would be a flexible instrument that, on the one hand, retains the punitive nature of the sentence , on the other hand, considers positive changes in the offender's behaviour. Additionally, it would allow for the full duration of the sentence to be served in situations where the need for continued punishment is warranted.

In connection with certain sentences, problem situations arise that can hinder the resocialisation of the offender. Determining the length of a sentence is thus difficult; while serving a sentence, significant negative psychological characteristics can become apparent in the offender, making resocialisation impossible and resulting in criminal behaviour or completed disengagement from society. Dollinger, among others, confirms this:

In view of the openness and plasticity of juvenile development, professional decisions even face the problem that – especially through 'harsh' measures – this development can be interfered with in a way that counters intentionally set negative tendencies in motion and promotes deviant careers. [...] Professionalism in the context of juvenile criminal law is therefore confronted with the fact that decisions must be made about facts that cannot be decided since sufficient bases for the decisions are usually not available. Those who have to make decisions find themselves confronted with principled, unsolvable dilemmas since they have to integrate contradictory requirements without ultimate certainties.[9]

In particular, the orientation of the negative forecast is linked to decision-making patterns that are used as predictors in judgements. Frommel argues:

However, since the negative predictors of an unregulated lifestyle, which are still propagated today, play a considerable role in negative prognoses, a class-specific selection from police registration to imprisonment is pre-programmed.[10]

This implies that subliminal stereotypes are formed in sentencing decisions that contradict reality. Based on this, the sentencing in such cases deviates from the principle of individualised consideration and instead gives rise to the generalised negative factors that influence the sentencing.

'Diversion largely follows administrative rationality (facilitation of work for the public prosecutor's office). Stratification discrimination does not take place directly but at most indirectly via decision-related criteria such as offence severity, criminal record, and provability. Not poor people, but a small group of poor criminals or criminals who are poor are increasingly negatively evaluated after previous formal labelling'.[11]

Diversity, however, determines society more today than was the case before the millennium. This shift can be attributed to the pervasive influence of globalisation across all areas of life and the widespread access to digital technology, which has transformed the information landscape for individuals. As a result, not only have societies become increasingly differentiated in their tendencies towards individualisation, but emancipations are also taking place that are based on a new body of knowledge. This realignment has encompassed

9 Dollinger (n 2) 6.

10 Monika Frommel, 'Feminist Criminology' in K Liebl (ed), *Criminology in the 21st Century* (VS Verlag für Sozialwissenschaften 2007) 109.

11 ibid 112.

norms, values, democracy, and social and group-specific actions and behaviours. Therefore, it is necessary to acknowledge and take these tendencies and lines of development into account within the realm of criminal law.

This appears to be particularly important in juvenile criminal law regarding the deprivation of liberty since, here, the effects of punishment can have a more substantial impact on the developmental trajectory of young individuals and their social groups . Imposing punishment solely for punishment's sake does little to prevent recidivism. What is needed is a more individual-oriented approach to punishment that combines punitive measures with simultaneous developmental opportunities for resocialisation. Within this context, it is also necessary to integrate education and training as integral components of the resocialisation process, thus establishing them as permanent instruments of education. This would entail creating structured educational programs to be built up within the juvenile system, thereby sharpening a clearer definition and understanding of the role of education in juvenile criminal law.

2 CRITICISM OF DETERMINATE SENTENCING AND THE NON-DEFINITION OF EDUCATION AND RESOCIALISATION IN GERMAN JUVENILE CRIMINAL LAW

Since the reform of the penal code in 1976, Germany has had a uniform penal system law in which resocialisation was set as the primary goal (Section 2 (1) StVollzG (Strafvollzugsgesetz (German)/(Penitentiary Act (English)).[12] The wording here is:

> In the execution of the custodial sentence, the prisoner should become capable of leading a life without criminal offences in the future in a socially responsible manner[13]

However, the term resocialisation is not subject to a clear definition by law and can only be derived from the wording of the StVollzG:

> [...] the sum of all efforts in the penal system for the purpose of enabling the prisoner to lead a life without criminal offences in the future in a socially responsible manner.[14]

The principle of resocialisation is different in juvenile penal law, which, in addition to personal efforts, places greater emphasis on the influence of education . However, here, too, there is a lack of a uniform, federal definition or implementation of what precisely constitutes "education"[15]. In 2019, Swoboda raised concerns about the absence of a legal definition of upbringing within case law.[16]

Dollinger sums up in this context that a clear definition with a targeted action plan would be necessary.

12 Thomas Vormbaum, *Introduction to Modern Criminal Law History* (2nd edn, Springer 2011) 254, doi: 10.1007/978-3-642-16788-1.

13 Act on the Execution of Prison Sentences and Measures of Reform and Prevention Involving Deprivation of Liberty (Prison Act) 'Gesetz über den Vollzug der Freiheitsstrafe und der freiheitsentziehenden Maßregeln der Besserung und Sicherung (StVollzG)' (as amended of 5 October 2021) <https://www.gesetze-im-internet.de/englisch_stvollzg/index.html> accessed 10 March 2023.

14 Klaus Laubenthal, *Penitentiary* (5th edn, Springer 2008) 97.

15 Florian Knauer, 'Current developments in Land legislation on youth detention' in DVJJ (ed), *Herein-, Heraus-, Heran- Let young people grow: Documentation of the 30th Youth Court Day, Berlin, 14-17 September 2017* (Forum Verlag Godesberg 2019) 206.

16 Sabine Swoboda, 'Critical Developments in Juvenile Criminal Law Since 2013: Lecture script at the NRW Youth Court Day Münster, 19 September 2019' (2020) 132 (4) Journal for the Entire Criminal Law Science 826, doi: 10.1515/zstw-2020-0031.

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Education as a concept itself lacks clear structure, necessitating a closer look at the actors involved to understand the consequences of educational demands.[17]

In German legal policy, juvenile criminal law serves as educational criminal law that aims to prevent the reoccurrence of offences and focuses on education in its legal consequences . Within this context, punitive punishment in the form of arrest and imprisonment is considered a last resort (ultima ratio) (cf. in terms of content para. 2, section 1 JGG; version 1990). Through a clear diversion[18] of circumstances, backgrounds, and offender profiles, punishments in the form of arrest or detention can be avoided, and solutions can be found through youth welfare or other organisations. In this way, previous convictions can be avoided, and stigmatisation prevented. However, in cases where measures to avoid imprisonment have proven unsuccessful for juvenile offenders and their delinquent behaviour persists, a custodial sentence becomes the necessary course of action.

However, this system is reinforced by the negative effects of determinate sentences. As fixed-term sentences, they not only produce negative behavioural consequences during the implementation of punishment but also fall short in terms of facilitating subsequent reintegration and enabling resocialisation. Thereby, they fail to achieve the educational objective . This observation was already recognised by Franz von Liszt at the beginning of the 20th century. Streng refers to this:

> Liszt found the determination of the sentence in the verdict to be problematic. Since the judge has only a very inadequate basis of assessment for the sentencing, the final sentencing should only occur during the execution of the sentence. For in the course of the execution of the sentence, a better knowledge of the person of the offender is to be gained.19

IsThe indeterminate sentence corresponds to this.

3 INDETERMINATE SENTENCING AS A SOLUTION APPROACH

The indeterminate sentence, as a solution-based approach outlined in paragraph 19 of the JGG, presents itself as follows:

If, when sentencing a juvenile to imprisonment at the time of the offence, the duration of the sentence required to achieve the purpose of the sentence cannot be determined in advance, the court may decide that the sentence must last within a certain minimum and maximum period until the purpose of the sentence has been achieved.[20]

Theoretically, this is defined as follows:

> If implemented consistently, the system would consist in dispensing with a statutory time limit for the types of punishment and the threats of punishment imposed on the individual offence (abolition of the penalty). The determination of the penalty

17 Dollinger (n 2) 2.

18 "Diversion" in German juvenile criminal law means the possibility of "diverting" a juvenile offender from full juvenile criminal proceedings, in particular to avoid the main hearing and early stigmatisation. There are different forms of diversion, ranging from a complete waiver of reaction to a waiver under specific conditions." See, Dirk Baier, 'Stigmatization of Juvenile Offenders: Stigma associated with committing crime at a young age can have a strong impact on identity' (2020) 4 Sozial Aktuell 20, doi: 10.21256/zhaw-20076.

19 Franz Streng, 'Franz v Liszt and Juvenile Criminal Law – A Look Back to the Future' (2017) 3 Journal for Juvenile criminal law and Youth Welfare 210.

20 RStG, 1929, art 72, para 9; Vormbaum (n 12) 166f.

> amounts would then be left to judicial discretion. The further development of the idea is that the judge's verdict also refrains from determining the size of the sentence, that the duration of a custodial sentence is only determined later and made dependent on the success of the sentence. An indeterminate sentence is, however, also conceivable within a maximum and minimum set by the law or by the judge.[21]

The purpose of the punishment depends on how the juvenile's development changes throughout the sentence . In cases where a genuine attitude of remorse and insight was demonstrated, the punishment could be reduced, and measures of the Reich Youth Welfare Act (RJWG (Reichsgesetz für Jugendwohlfahrt (German)) of 1923 were applied.[22]

This is not to be confused with the system of preventive detention, as this sentence extends beyond the sentence given and thus in no way corresponds to the actual purpose of indeterminate distribution. There is a defined maximum in the indeterminate sentence; beyond that, no further sentences are given for the present offence that requires an extension of imprisonment.

Hafter defines here:

> The difference, in essence, between punishments and measures must have an effect above all in the implementation. Since the measure is not a reaction to a culpably committed offence but is linked to the pathological, dangerous, anti-social state of an offender, the measure must, in principle, last as long as this state exists. It must cease as soon as it is no longer necessary. Unlike in sentencing, there is, therefore, no room for mitigating and aggravating circumstances for rules of assessment in general. As far as deprivations of liberty are concerned, the nature of the measure leads, in principle, to an indeterminate sentence because the judge, when passing a sentence, cannot possibly know how long a pathological, dangerous condition requiring special treatment will last in a person.[23]

With the abolition of indeterminate sentencing by the legislature in 1990, the question arises whether the legislature acted correctly here. As a result, the requirements of determinate sentencing continue to apply to juvenile sentences to this day, eliminating the flexibility of judicial decision-making power. This has created a legal loophole in cases where it is impossible to accurately predict when offenders will achieve full rehabilitation through education. It should be mentioned again that the 1990 version fails to provide a specific definition of education or incorporate it as a determinable measure.[24] Nevertheless, it is still utilised as a justification for punishments.

Actual or even perceived educational deficits are used as a justification for imposing harsher punishments than would be handed out in adult criminal law if the punishment were purely based on guilt.[25]

As a consequence of the reform, judges must now pass a certain sentence, disregarding the predictability of successful resocialisation (whether shorter, longer, or up to maximum sentence).

21 Ernst Hafter, *Textbook of Swiss criminal law: General Part* (Julius Springer Verlag 1926) 343f.

22 Klaus Laubenthal, 'Historical Development of the JGG' in K Laubenthal, H Baier and N Nestler (eds), *Juvenile Criminal Law* (3rd edn, Springer 2015) 12.

23 Hafter (n 21) 243.

24 DVJJ 2nd Juvenile Criminal Law Reform Commission, 'Proposals for a Reform of Juvenile Criminal Law: Final report of the commission's deliberations from March 2001 to August 2002' (2002) 5 DVJJ-Journal EXTRA 4 <https://www.dvjj.de/wp-content/uploads/2020/04/Kopierfassung_Extra_5.pdf> accessed 10 March 2023.

25 ibid.

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On the basis of systems theory and Luhmann's principle of individualisation theory , it is impossible to predict a judgement and thus assign a specific punishment. This is particularly true for adolescents who, in their developmental process, do not yet exhibit definitively fixed behaviour, thus making them still receptive to education.

The educational measures introduced here aimed to prevent lengthy imprisonment for juvenile offenders , which reflects the educational character of the law that has been already emphasised since 1923 and likewise seeks to strengthen crime prevention.[26]

4 SYSTEMS THEORY AND INDIVIDUALISATION THESIS OF SOCIETIES IN THE LEGAL SPHERE, ACCORDING TO LUHMANN, AS A THEORETICAL JUSTIFICATION FOR THE REINTRODUCTION OF INDETERMINATE SENTENCING

The predictability of resocialisation must therefore be regarded as impracticable in the majority of cases. This can be attributed to the increasing diversity of societies, which has become so differentiated that today one can no longer generally assume a single determinable unified society. Cultural backgrounds still determine ways of thinking and behaving, even in the context of current citizenship.

Generative differences are also emerging in public discourse, spanning topics such as digitalisation, environmental concerns , perspectives on art and culture, and so on . Moral concepts and norms are equally transforming, necessitating an interdisciplinary approach to criminology and jurisprudence. For these lines of development, Luhmann's systems theory which encompasses legal aspects comprehensively addresses all these developments and can be applied to juvenile criminal law in the context of indeterminate sentencing.

The connection between systems theory and the rationale for reintroducing indeterminate sentencing cited here can be derived from Luhmann's oeuvre as a whole. Quotations from Luhmann provide the rationales that would theoretically speak in favour of reintroduction.

Niklas Luhmann defines society and its self-perception in relation to the environment. According to Luhmann, systems can be categorised as follows:

Biological systems are alive. Cognitive systems operate in the form of consciousness processes such as perception and thinking. And the characteristic mode of operation of social systems [...] is communication. The operations of all three systems – however different the types and forms of operation may be – follow the same guiding principles. These are the system/environment difference and autopoiesis. According to Luhmann, everything is a system that operates in this way. Or conversely: that which does not have system/environment difference and autopoiesis is not a system.[27]

He further differentiates systems based on their modes of communication, with each communication representing a system and the collective communication between individual systems defining society as a whole . This perspective emphasises the individuality of each communicating system. [28] This individualisation thesis presupposes that each system is driven to act by individual incentives, which also includes criminal acts. From this standpoint, the reintroduction of indeterminate sentencing is justified based on the understanding that

26 Laubenthal (n 22) 13.

27 Margot Berghaus, *Luhmann Made Easy: An Introduction to Systems Theory* (3rd edn, Böhlau 2011) 38.

28 Niklas Luhmann, *Social Systems: Layout of a General Theory* (Suhrkamp 1984) 33.

individuals behave differently in punitive situations, rendering the prognosis of remorse and resocialisation by means of determinate sentencing insufficient . Luhmann himself speaks during the 1980s, a time of increasing pressure exerted by politics on the judiciary, thus denying the judiciary flexibility.[29] This ultimately led to the removal of indeterminate sentencing, despite its alignment with the existing social system.

For Luhmann, the legal legitimisation of judgements and judgement-making is determined as a process of development since the decisions are borne by several people who are involved in this legal process. Development occurs through a communicative act where the perspectives on decisions can continuously evolve. The process, referred to as a 'fair procedure', facilitates negotiation and bargaining that ultimately results in a judgement.[30] However, this judgement cannot be definitively predicted in terms of the chances of successful resocialisation. Luhmann speaks of '[...] real events and not about a normative relationship of meaning'.[31] There are thus determinants of influence in a decision-making process that are composed of social circumstances, life experiences and knowledge.

He assumes that due to the impossibility of a prognosis in the determination of punishment, a sentence can never do justice to convicted individuals since they are involved in a criminal act and react just as individually to the punishment.

A prognosis of the factual development cannot be justified on the present knowledge base. However, from a sociological perspective, understanding the positivity[32] of law reveals that problem solutions cannot be combined arbitrarily, and shifts in the area of system differentiation will therefore lead to consequences. Above all, it is crucial to acknowledge and properly value the special circumstances surrounding programming decision-making high complex situations . The rationality of programming decisions cannot be judged according to the criteria of the rationality of programmed decisions; this would mean misjudging the function of this differentiation. Legislation should not be equated with the application of the law, and therefore its effectiveness cannot be measured in the same standard .[33]

According to Luhmann, both state and private organisations serve as decision-making and implementation entities, forming the basis of constitutionalism . Consequently, t his constitutionalism is thus a basis for all organisations, regardless of how diverse they are in society. Luhmann does not assume a stringent constancy of organisations but speaks of an 'evolutionary system' in which social organisations can adapt to the respective environmental conditions of society as a whole.[34] This implies that certain systems and the organisations within them (here, the legislature and the judiciary) adapt to these through formal changes in the environment and thus conform to overall developments in societies, which transform them in a horizontally and vertically determining manner .[35]

It is an 'evolutionary achievement' because this system-building principle does not already determine but rather allows for the respective determination of which structural specifications are chosen in the course of its use and within the framework of its general possibilities. Irrespective of whether individual structural specifications can then prove themselves or not, this fundamental openness of the organisation to structural specifications

29 Niklas Luhmann, *Sociology of Law* (3rd edn, Westdeutscher Verlag 1987) 242.

30 Montenbruck (n 3) 117.

31 Luhmann (n 28) 37.

32 Luhmann (n 29) 294. According to Luhmann, this means that legal norms become the subject of selective decisions.

33 ibid 242.

34 Niklas Luhmann, *Functions and Consequences of Formal Organization* (Duncker & Humblot 1964).

35 Georg Kneer and Armin Nassehi, *Niklas Luhmann's Theory of Social Systems: An introduction* (Fink 1993) 38f.

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not only opens up the potential for variation and diversification but has the ability to adapt to the most diverse environmental conditions. Its openness also contributes to the social proving of this 'one-time invention'.[36]

Organisations have a high degree of legitimacy within society – especially politically and legally if they are recognised by the majority. The basis of legitimacy is formal acceptance, which is socially legitimised by ensuring equal access. An example of this is equality in court proceedings. [37] Courts are thus organisations that society considers capable of making decisions and asserting itself in court proceedings, where everyone participates in an egalitarian manner.[38]

For Luhmann, the legal legitimacy of decisions is determined through a developmental process involving multiple individuals who are part of systems within the legal process. Development occurs as a process that can be understood as a communicative act, and the decisions are subject to a constantly changing view of the systems.[39]

If one relates this further to sentencing according to the principle of indeterminate sentencing, punishment also corresponds to a behavioural and communicative process carried along by the instances, but also by the accused and influences him. The extent of these influences depends indirectly and directly on the degree of education and opportunities for participation.

'In modern societies, the social structure is more heterogeneous than in traditional societies; for example, there is not only 'above' and 'below'. Industrialisation and the social division of labour have expanded the spheres of production and consumption, the level of education and mobility has risen, and belief in gods and goddesses has been replaced by knowledge'.[40]

D efining law, the legal system and its institutions as an independent authority are inherently problematic from within the social system. This is because the law is fundamentally based on laws that form a legally binding norm that must be generally upheld. This applies to various levels of regulations, from the Ten Commandments to human rights to precisely defined laws . This is a fact for Niklas Luhmann, and he formulates this reality as follows:

In any case, the concept of a norm as a basic concept is also considered indispensable in the general theory of law. As a basic concept – but that means: as a concept defined by itself, as a short-circuited self-reference. The norm prescribes what is intended or expected. This establishes the essential distinction between norms and facts, which becomes an indispensable guiding principle . Facts are evaluated from the perspective of norms and can be judged as conforming or deviating from the standard. Already with these determinations, legal theory assigns itself to the legal system.[41]

As a result, if the 'hierarchy' is fully adhered to, change or flexibility of the law can only be introduced through the normative power of the legislature. Consequently, the determination of legal norms becomes a purely political decision, disregarding the core technical competence of the judiciary. This approach implies that legal decisions must strictly be implemented to the letter by judicial decision, which neither corresponds to reality as it disregards potential minor deviations that may occur. It also fails to accommodate the implementation of indeterminate sentencing, which demands a high degree of necessary

36 Maja Apelt and Veronika Tacke (eds), *Handbook of Types of Organisations* (Springer 2012) 12.
37 Annette Treibel, Introduction to Sociological Theories of the Present (7th edn, VS-Verlag GWV 2006) 28.
38 Niklas Luhmann, *Organization and Decision* (Westdeutscher Verlag 2000) 288f.
39 Berghaus (n 27) 62.
40 Treibel (n 37) 29.
41 Niklas Luhmann, *The Law in Society* (Suhrkamp Taschenbuch Wissenschaft 1183, Suhrkamp 1995) 12.

flexibility. In this context, decisions cannot be based on predetermined determinants. A judgement is not always made according to the pure content of legal texts but incorporates situational and environmental factors . This results in complexity, requiring a sustainable framework that manages to reduce and navigate its intricacies . [42]

The complexity of the world must not only be grasped imaginatively but also brought close to experience and action, i.e., reduced. [43]

This corresponds to the basic idea that legal theory and its practical implementation can always be linked to sociology and can, if not must, incorporate the social parameter at various levels, be it the individual, group-specific or society as a whole, into the decision-making process for legal cases.[44]

Niklas Luhmann recognises the increasing complexity of societies and the greater differentiation of individual identity groups as a challenge for state leadership. This includes the conception of law and the applicable law, which have to adapt to societal conditions. Complexity is both a problem area and an opportunity for new problem-solving approaches that can be used.[45] Nevertheless , high complexity also places high demands on society and its organisational elements such as politics, economy, justice, and police . Luhmann formulates this as follows:

Functional differentiation gives rise to social subsystems aimed at solving specific social problems. The problems relevant to this change become more refined during the course of social development, making increasingly abstract, more presuppositional, structurally risky differentiations possible. For example, systems arise not only for resource procurement but also for resource distribution, not only for forced goals such as child- rearing and defence but also for chosen goals such as research, including research on research. Similarly, systems exist not only for education but also for pedagogy, not solely for making collectively binding decisions but also for their political preparation, and not only for the administration of justice but also for legislation. The essential consequence of this process is an overproduction of possibilities that can only be realised to a very limited extent, thus requiring processes of increasingly conscious selection.[46]

As a result of society becoming increasingly diverse and multi-oriented , the task of establishing and upholding generally accepted norms and attitudes becomes more challenging. D ifferent interests are diametrically opposed to this, impacting all areas of society and even influencing political perception. In a democratic society, where legislative power is based on society's consensus, the principle should not be mistaken for a dictatorial approach. But in our democratic society, it presents itself as a major obstacle to swift and unified decision-making on fundamentally important problem areas.[47] Such issues also concern the question of juvenile criminal law. Since 1990, there have been no fundamental changes in the German juvenile justice system ; instead, only isolated decisions have been made whose effectiveness raises doubts .

42 Niklas Luhmann, 'Sociological Enlightenment (Inaugural Lecture Münster 1967)' in N Luhmann, *Sociological Enlightenment*, vol 1 (VS Verlag für Sozialwissenschaften 1970) 73.

43 ibid.

44 Luhmann (n 41) 15ff.

45 Luhmann (n 29) 190.

46 ibid 190.

47 One example is that everyone perceives environmental policy as important, but responsibility is shifted from one side to the other. Mentioned here is the construction of wind power plants and the Germany-wide interconnection. But the federal states reject this because it would harm the citizens and the landscape. Consequently, there is a wind farm in the North Sea, but no connection to the general electricity grid. There are too many individual interests clashing here, so in the end no decision is made.

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The abolition of indeterminate sentencing in the German juvenile justice system has ultimately created a legal loophole in handling custodial sentences that cannot be adequately addressed by determinate sentencing. This situation leads to determinate sentences without far-reaching resocialisation measures and targeted support for future prospectives, where imprisonment becomes the centre of the punitive measure. Yet , the consequences of prolonged imprisonment are demonstrably responsible for behavioural changes in a large proportion of those imprisoned, leading to their exclusion and otherness vis-à-vis the majority society. Psychological and, thus also, real resocialisation remains difficult in such cases and, in others, impossible without educational and training interventions during imprisonment.

5 DISCUSSION

The 30 years of incremental changes based on the legislature are deemed as insufficient as they do not fully align with the prevailing spirit of the times and the attitudes of society as a whole . They also no longer correspond to the realities in their implementations, as reflected in the development of juvenile delinquency.

In response to the complexity stated by Luhmann, it becomes apparent in these individual decisions that politics react to this complexity with additional complexity within individual decisions. These decisions are then imposed as norms, leaving little room for leeway for legal institutions, especially in juvenile delinquency, since the subjects within this domain are still considered capable of change and education, coming from different backgrounds and act according to different moral concepts, which cannot be equated 1:1 with the adult world. From this perspective, t he causality of the act requires a different sense of justice. This results in causes and preconditions to which a determination of punishment must do justice since the existing law must include the whole of society.[48] Consequently, a fundamental reform must be undertaken that provides additional material and human resources to effectively address these pressing issues faced by the new generation. This implies that while law is subject to contingency (the institutions and their tasks have a clear meaning and constancy), decision-making on law is subject to constant change and must exhibit flexibility in response to these broader societal changes when opportune .[49] Luhmann positions himself clearly in this regard :

Temporally, the law must be institutionalised as changeable without compromising its normative function. This is possible. The function of a structure does not presuppose absolute constancy but only requires that the structure is not problematised in the situations it structures. It is perfectly compatible with this that it is made the subject of decision in other situations (at other times, for other roles or persons), i.e., that it is variable. All that is then required is a clearly recognisable, firmly institutionalised boundary that separates these situations. The positivisation[50] of law consists of a contradictory treatment of structures based on system differentiation.[51]

Furthermore, it is more important for young people as they find themselves in a critical stage of character development, navigating various challenges on their way to adolescence.

Particularly in the age-development stage of adolescents, the processes of perceiving the

48 Luhmann (n 29) 208.
49 ibid 210.
50 ibid 294. According to Luhmann, this means that legal norms become the subject of selective decisions.
51 ibid 210.

environment, forming one's own perceptions and values, and undertaking developmental milestones are in a state of construction that will later help them to position themselves in the adult world. Four developmental tasks are pivotal here:

1. D evelopment of intellectual and social competence to cope with school or professional demands, ensuring a secure occupational foundation for the future.

2. D evelopment of a sense of personal identity concerning gender and accept ing one's own physical appearance to build a social bond with peers of the same or opposite sex and thus laying the foundation for starting a family later.

3. D evelopment of independent patterns of action for the use of the consumer goods market as well as the media to secure one's own lifestyle and make use of leisure opportunities .

4. D evelopment of a system of values and norms and ethical and political awareness to responsibly assume the role of a citizen in society.[52]

Change can thus be the return to a formerly positive sentencing factor, as represented by indeterminate sentencing. And if law and the finding of law is grasped as a phenomenon of society as a whole – Luhmann makes this explicitly clear – then it is necessary to carry out a reform even it is with an instrument that was formerly rejected, since it once again finds its clear justification in the current situation. Luhmann expresses himself as follows regarding the possibilities of a time- and society-oriented law:

The possibility of temporally different law is thus gained. Laws that did not apply yesterday and will possibly or probably, or certainly not apply tomorrow can apply today. Thus, contradictory law can apply if it is temporally separated [...]. Its validity can also be limited; an ongoing revision of the law [...] can be planned in advance and even standardised. The law can be provisionally put into force. Small reforms can be anticipated because the big ones cannot be brought to a decision so quickly. This seems to be no longer in the past but in an open future. All in all: the time dimension illustrates the complexity of law. Law thus embraces change in a legitimate and technically controllable way; it adjusts to the fact that in functionally differentiated societies, due to the high interdependence of all processes, time becomes scarce and begins to flow more rapidly.[53]

I ndeterminate sentencing, which takes into account the complexity and integration of various factors, such as life circumstances, preconditions in family situations, and educational background, can influence a judgement. But, at the same time, it reduces it by making further developments dependent on other relevant individuals (including the sentenced individual) and institutions. In Luhmanns's view, a court proceeding and the sentencing process form their own system that considers all factors inherent in the system and aligns them accordingly. However, juvenile offenders' l ack of trust in the legal system and the state through the omission of perspectives as an alternative to criminal behaviour prevents a change in behaviour through the feeling of exclusion. This creates an imbalance which undermines the purpose of juvenile criminal law as an educational law that enables resocialisation. Incorporating tangible prospects, such as education, training and support, would help reduce recidivism rates through a comprehensive understanding of punishment and a future avoidance strategy through socio-educational measures.

Dollinger's view is based precisely on recognising complexity in the context of juvenile criminal law.

52 Ruth Festl, *Perpetrators on the Internet: An Analysis of Individual and Structural Explanatory Factors of Cyberbullying in the School Context* (Springer 2015) 55 f.

53 Luhmann (n 29) 210f.

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Decisions on how to deal with young, accused individuals present considerable complexity – a complexity whose handling is primarily the responsibility of the individual professionals. Even scientific findings can only partially convey relevant certainties and revise imponderables in the handling of 'cases'. Diagnostic and prognostic instruments, for example, only allow for unsatisfactory decision-making certainties. Young people and adolescents are not fixed in their development, and recent longitudinal criminological research emphasises that criminal careers are highly contingent. Thus, predicting persistent delinquency based on early social conspicuousness is challenging. [54]

By introducing indeterminate sentencing, not only can the variable factor of the entire law be accommodated, [55] but involving juvenile offenders in the criminal process creates potential for personal growth. This approach not only shortens the punishment but also does justice to the character of punishment as education, prevention, and resocialisation.

As early as 1998, the Federal Constitutional Court issued a judgement obligating the legislature to establish and integrate a resocialisation concept into the penal system. The reasons for this judgement read as follows:

In the execution of the custodial sentence, the prisoner should become capable of leading a life without committing a crime in the future in a socially responsible manner (execution goal). The execution of the custodial sentence also serves to protect the general public from further criminal offences.[56]

Furthermore :

Resocialisation also serves to protect the community itself: The latter has a direct interest of its own in ensuring that the offender does not relapse and again harm his fellow citizens and the community.[57]

This was also commented on the factor of work as an educational measure in the penal system.

...work in prison, which is assigned to the prisoner as compulsory work, is only an effective means of resocialisation if the work done receives appropriate recognition. This recognition does not necessarily have to be financial. However, it must be suitable to show the prisoner the value of regular work for a future self-responsible and punishment-free life in the form of a tangible advantage for him.[58]

Although implementing work as a compulsory measure during imprisonment may seem reasonable , it ultimately falls short from a long-term perspective. Simply offering work as a compulsory measure during the period of imprisonment does not offer any perspective as to how it will continue once the offender is released back into society . This lack of perspective in the measures must be addressed by shifting the focus from mere employment to a training pathway that paves the way to fully recognised vocational qualification through suitable and recognised measures.

In terms of successful resocialisation, this pathway must extend beyond the period the young person has served his sentence and be brought to a successful conclusion upon

54 Dollinger (n 2) 6.

55 Luhmann (n 29) 294.

56 Cases nos 2 BvR 441/90, 2 BvR 493/90, 2 BvR 618/92, 2 BvR 212/93, 2 BvL 17/94 (BVerfG, 1 July 1998) <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1998/07/rs19980701_2bvr044190.html> 10 March 2023.

57 ibid.

58 ibid.

the juvenile offender's release. Any measures that do not follow this path fail to provide a meaningful perspective for the offender, as they are aware that their chances of entering the workforce without educational qualifications and the stigma of being an offender will be limited . The evolving conditions within the penal system towards greater social integration and empowerment, as addressed by Obergfell-Fuchs, are not yet sufficiently a topic of public discussion:

A particularly important aspect is the correlation between the quality of life and the previous target variables of the penal system, such as developmental progress or aspects of resocialisation. Not only is there the greatest need for research here, but such studies could be used to demonstrate empirically that the quality of life for prisoners in the penal system is not an unnecessary luxury but rather an important instrument for their rehabilitation, and thus, also for the prevention of future criminal offences.[59]

However, for these measures to be effective, they must require the support of organisations, experts, and the acceptance of society . Particularly, acceptance and support from the economy is important as it loses a potential worker with every juvenile convict. Integrating work and education in the form of further training and providing an honest chance of a smooth transition into a working life can contribute to a more effective resocialisation process. This approach promotes financial independence and helps resource formation and the overwell being of individuals.

Previous research has shown that factors leading to an exit from criminal activities or criminality as a unique factor of one's life are significantly influenced by certain factors. Among these factors, w ork plays an important role .

It is still emphasised that certain life events, such as establishing strong connections , starting a family or taking up work (interpreted as ties and informal social control) promote the exit from criminal life paths.[60]

Neubacher highlights the example of digitalisation as a factor in addressing the educational needs of individuals serving sentences to emphasise the importance of career opportunities after leaving the penal system.

His opinion is

[...] social challenges such as digitalis ation do not stop at the penal system. The security issues that go hand in hand with this are obvious and justified. Nevertheless, the prison system will not be able to stop at allowing a few prisoners access to computers or new media in occasional and small-scale model projects. Here, a clear distinction must be made between learning on the computer as a measure of vocational (or school) training and further qualification, which must no longer be denied against the background of the imperative of social reintegration into the work process [...].[61]

Nevertheless, the prison will not be able to stop at allowing a few prisoners access to computers

59 Joachim Obergfell-Fuchs, 'Quality of Life in the Penal System' in HJ Kerner, J Kinzig and R Wulf (eds), *Criminology and Penitentiary: Symposium on 19 March 2016* (Eberhard Karls University; Institute of Criminology 2017) 82.

60 Hans-Jörg Albrecht, 'Sanction Effects, Recidivism, and Criminal Careers' in A Dessecker, S Harrendorf and K Höffler (eds), *Applied Criminology – Justice-Related Research: 12th Criminology Colloquium and Symposium in Honour of Jörg-Martin Jehle, 22-23 June 2018* (Göttingen Studies in Criminology 36, Universitätsverlag Göttingen 2019) 173, doi: 10.17875/gup2019-1223.

61 Frank Neubacher, 'Priorities and Problems of Prison Research in Germany' in A Dessecker, S Harrendorf and K Höffler (eds), *Applied Criminology – Justice-Related Research: 12th Criminology Colloquium and Symposium in Honour of Jörg-Martin Jehle, 22-23 June 2018* (Göttingen Studies in Criminology 36, Universitätsverlag Göttingen 2019) 119, doi: 10.17875/gup2019-1223.

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or new media in occasional and small-scale model projects. Here, a clear differentiation must be made between learning on the computer as a measure of vocational (or school) training and further qualification, which must no longer be denied against the background of the requirement of social reintegration into the work process [...].[62]

Transformations of societies also occur without being initiated by state organisations or other institutions. They can also result from other causes in society. Digitalisation and all its technical possibilities are not only impulses but have become part of life and determine and develop themselves in their fields of use.[63]

Such digital transformation has led to a transformative process that encompasses all areas of life. However, state institutions have been relatively slow in fully embracing this transformation. Manuel Castells, Professor of Sociology at the University of California, explains:

During the last quarter of the 20th century, a technological revolution centred on information has transformed the way we think, produce, trade, manage, communicate, live, die, wage war and love each other. Across the planet, a dynamic global economy has emerged, linking valuable people and activities around the world, while people and territories deemed irrelevant from the perspective of dominant interests have been shut down from networks of power and wealth. [64]

This observation aligns with the principle of systems theory, according to Luhmann, which assumes an evolutionary development that repeatedly demands new conditions for the organisation of societies and their inherent institutions. According to Luhmann, new complexities continue to arise as differences between smaller groups continue to grow. Thus, the ongoing process of digitalization brings about new challenges and complexities that societies and their institutions must navigate and address.

Recent developments in systems theory make it more difficult, rather than easier, to address and solve this problem. For if one has to start from the closed nature of systems and their structural determinations, it becomes all the more difficult to understand (1) how structural changes can occur at all and (2) why directions of change sometimes become discernible (not necessarily, or do they?) such as the diversification of the ways of life or the increasing complexity of the social system. Understanding these questions become difficult as the complexity of the problem intensifies. As the problem becomes more specific and concise, the demands on the theoretical apparatus considered to be a solution also become more demanding. The criteria under which something can be considered as an offering for evolution must meet higher standards. It is clear that evolution can only come about when there is a simultaneous preservation of difference and adaptation in the relationship between a system and its environment. Without these elements, the object of evolution would disappear.[65]

Adjustments made in juvenile justice, based on the principles of education and resocialisation, must adapt to changes in such a way to allow access to new requirements in practically all professions. This thus includes providing education and training that equip young individuals with the necessary skills for a successful and socially acceptable future .

62 ibid 128.

63 Klaus Mainzer, *Artificial Intelligence – When Will the Machines Take Over?* (2nd edn, Springer 2019) doi: 10.1007/978-3-662-58046-2.

64 Manuel Castells, *Millennium: The information age, Economy, Society, Culture*, vol 3 (2nd edn, Springer 2017) doi: 10.1007/978-3-658-11272-1.

65 Luhmann (n 41) 240.

The principle of prevention in avoiding delinquency must be an integral part of the punishment process as well. Implementing a punishment in juvenile criminal law must not lose its character to retain its deterrent effect. In its enforcement, it must have a strong preventive character to ensure juvenile individuals do not repeat criminal behaviour and avoid falling into a cycle of limited opportunities that can foster criminal careers.

Education is a field anchored in juvenile criminal law. However, its implementation differs from the broader sociological-pedagogical idea of education.[66] This does not imply that the delinquents have never received any form of education before.

'Such an assertion would already be nonsensical in view of the ubiquitous and transitory character of juvenile delinquency and cannot serve as a justification for substantially intervening in the lives of young people and adolescents.'[67]

Education operates on multiple levels and is thus linked to educational upbringing, training and insight, which plays a crucial role in shaping an individual's character and thereby enabling them to lead a socially accepted life. However, education must be more oriented towards the needs of the young individual and his or her perceptions rather than being imposed by a generation already further removed from the present generation. This implies that measures in juvenile justice must be more oriented towards the expectations and aspirations of young people for their future, focusing on what they consider meaningful and purposeful. In the rarest of cases, this is a criminal career.

In contrast, the determinate sentence partially removes the educational idea in connection with an integrated educational mode for delinquent juveniles completely. This applies to offences of particular severity and offenders who become adults during imprisonment. In general, juvenile criminal law tends to pursue more the idea of retribution for guilt rather than emphasising education and, thus, successful resocialisation.[68]

The high recidivism rates in Germany[69] and other European countries indicate that the current prevention, resocialisation and education system is ineffective because the dominant focus on punishment and resocialisation loses its effect during and after serving a sentence.

However, this completely contradicts the actual idea of education, which is still theoretically anchored as a basis in juvenile criminal law but lacks practical efficiency . A punitive measure in the correctional system should be focused on the resocialisation of the inmate, ensuring their reintegration into society as integral and productive individuals. [70] In this way, t he prisoner remains an integral part of society, and work should be done in the correctional system to ensure that their return is completely successful and well-equipped. [71]

It follows from this that the extrinsic factor of punishment does not foster the intrinsic motivation to improve. Indeterminate sentencing, coupled with the active influence of

66 Bernd Dollinger and Henning Schmidt-Semisch, 'Social Pedagogy and Criminology in Dialogue: Introductory Perspectives on the Event of Juvenile Delinquency' in B Dollinger and H Schmidt-Semisch (eds), *Juvenile Delinquency Manual: Criminology and Social Education in Dialogue* (3rd edn, Springer Fachmedien 2018) 14.

67 ibid.

68 Swoboda (n 16).

69 The figures in Germany are 30% after fines, approx. 40% for custodial sentences with probation and approx. 47% for custodial sentences without probation. See, Jörg-Martin Jehle and others, *Legal Probation after Criminal Sanctions: A Nationwide Recidivism Study 2010 to 2013 and 2004 to 2013* (Federal Ministry of Justice 2016) 56.

70 Karl Heinz Auer, *The Human Image as a Legal-Ethical Dimension of Jurisprudence* (Law: Research and Science 2, LIT Verlag 2005) 180.

71 ibid; Heinz Cornel, 'Retribution, Custody, Treatment, or Therapy: What Happened to the Prison Reform?' (2003) 28 (12) Social Magazine, The Journal for Social Work 18.

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the offender during the sentence, provides an opportunity to address motivational factors. However, a thorough examination of their 'sincerity of repentance' is necessary to achieve genuine societal integration. With the certain sentence without a direct effect on the attitude, evaluating the success of resocialisation is very difficult. While sentence reductions apply in the case of good behaviour, a large measure of the punishments have already been served, and changes in behaviour may have already occurred. Furthermore, prisoners who have completed their sentence often are confronted with psychological behavioural changes that further alienate them from the rest of society. [72]

Education, training, and resocialisation are consequently not different aspects of criminal law, but they are interconnected and inseparable and must be implemented as a normative framework. To do so, this approach requires broad recognition and establishing a holistic system that allows young people to be truly resocialis ed. The normative focus is fundamentally important here because it includes the perspective of society as a whole, i.e., politics, the public, the police, and legal authorities, as well as the economy. However, at the same time, it also includes the perspective of the juvenile offenders, taking into account their expectations and intrinsic wishes. This perspective also entails equal participation in social opportunities. Perspective is thus not only the point of view but also the expectation of a future life without the negative factor of crime. This is in the interest of both sides since the absolute majority of young people do not want to be criminals but become criminals through circumstances, wrong decisions, bad influences, and lack of financial and social resources. In this regard, Dollinger states,

'Prevention is supposed to deal effectively with juvenile delinquency, and this expectation of effectiveness is adhered to even if problems become apparent in empirical terms, i.e., if measures are not successful, because the underlying principle of prevention is accepted.'[73]

This is especially true within the context of punishment, as prevention is not solely aimed at ensuring that young people do not become criminals in the first place (optimal case). However, that prevention is also continued in punishment so that no repetition occurs . However, this can only succeed if the perspectives of young individuals are also implemented even more strongly in the prevention work. In addition to an educational approach , an emphasis on education-based strategies is necessary, offering young offenders access to professional and financial opportunities that make delinquency appear unnecessary or less appealing . By combining punishment, prevention, education and perspectives, we can maximise their full effect and efficiently reduce recidivism rates.

The responsibility for establishing the legal framework to ensure conditions that give prevention, education, and resocialisation in juvenile law lies with politics rather than solely resting on the shoulders of the police or legal authorities. However, the current reality looks different.

Reforms that have been carried out in recent years – and only partially – show that policy decisions are rarely based on scientific findings and implemented. While the introduction of outpatient measures implemented through the reform of the JGG in 1990 was a good approach towards alternative strategies to avoid imprisonment, it has become clear that the social institutions and support programmes are inadequately equipped. As Drewniak states noted in 2018:

72 Andrea Seelich, *Handbook Prison Architecture: Parameters of Contemporary Prison* Planning (Springer 2009) 52.

73 Bernd Dollinger, 'The Construction of Evidence in Prevention Work: Implications and Perspectives of Impact-Oriented Crime Prevention' in M Walsh and others (edn), *Evidence-Oriented Crime Prevention in Germany: A Guide for Policy and Practice* (Springer 2018) 189, doi: 10.1007/978-3-658-20506-5.

Nationwide qualified youth welfare services are crucial for effectively addressing the needs of young people who have committed serious offences. This group of young people and adolescents must be understood by the youth welfare services as their target group. The conceptual design of the outpatient measures must ensure the provision of individual needs-based socio-educational support services in order to foster the development of young people into independent and community-minded individuals. [74]

This also applies to youth detention and the demand and partial implementation of higher penalties. The majority opinion among experts in criminology, psychology, and jurisprudence are against this, arguing that these aggravating measures have the opposite effect.[75] Graebsch formulates this in very sharp terms:

The legislature relies on the expansion of criminal sanctions in constantly expanded offences and on incarceration even when this is even capable of producing counterproductive effects so that in a pointed reversal of the otherwise common attributions, one can also speak of the legislature as a 'dangerous repeat offender', which invites experts to committee hearings but only rarely hears them [...].[76]

Consequently, relying solely on harsher punishment does not equate to more successful resocialisation. Similarly to the outpatient measures, the state must be willing to invest in effective measures that provide inmates with adequate prospects and opportunities, ultimately minimising the likelihood of reoffending. However, this has not happened.

By adopting such attitudes, politicians are blocking prevention, education, or resocialisation by incarcerating individuals more quickly and easily, thus exposing them to the lack of prospects mentioned above . Ostendorf is very clear here.

'The harsher the punishment, the greater the risk of recidivism. This does not have to be due to the punishment alone, but it is difficult to learn how to use freedom when imprisoned with other offenders and dangerous persons.[77]

In 2003, a valid empirical study was conducted by Jehle, Heinz and Sutterer that examined the correlation between various measures and recidivism rates. The findings revealed that a juvenile sentence without probation resulted in 77.8% recidivism. Even w ith probation, the rate remained high at 59.6%. Outpatient sanctions resulted in a 31.7% recidivism rate, while after detention was 70% .[78] The study continued to gather results from 2010 to 2016, whereby a period of three years was included in which recidivism could occur. Imprisonment still exhibited a significant recidivism rate of 60%, indicating that without extended and targeted measures, it remains one of the largest reasons for repeat offences . Other sentencing measures also displayed high rates ranging from 30 – 45%. All rates combined resulted in an average of 35% which illustrates the explosive nature of the problem. [79] In addition, previous research on recidivism has clearly stated that imposing severe sanctions by means

74 Regine Drewinak, 'Outpatient Socio-Educational Services as Alternatives to Imprisonment' in B Dollinger and H Schmidt-Semisch (edn), *Handbook Juvenile Crime* (3rd edn, Springer 2018) 470, doi: 10.1007/978-3-531-19953-5_24.

75 Dollinger (n 73) 190.

76 Christine Graebsch, 'Evidence Orientation of Criminal Sanctions – Opportunities, Risks and Side Effects' in M Walsh and others (edn), *Evidence-Oriented Crime Prevention in Germany: A Guide for Policy and Practice* (Springer 2018) 205.

77 Heribert Ostendorf, 'Juvenile Criminal Law – Ultimo Ratio of the Social Control of Young People' in DVJJ (ed), *Herein-, Heraus-, Heran- Let young people grow: Documentation of the 30th Youth Court Day, Berlin, 14-17 September 2017* (Forum Verlag Godesberg 2019) 663.

78 See in detail in Jörg-Martin Jehle, Wolfgang Heinz and Peter Sutterer, *Legal Probation after Criminal Sanctions: A Commented Recidivism Statistic* (Federal Ministry of Justice 2003).

79 Jehle and others (n 69) 15.

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of deprivation of liberty contributes to an increase in the recidivism rate, potentially leading to the development of criminal careers.[80]

Furthermore, it prevents the normative acceptance of prevention, education in punishment and resocialisation, leading to a lack of viable alternatives for the public, who often unquestionably and unreflectively follow prevailing norms .[81] This is exacerbated by media portrayals of criminality that subliminally promote this opinion but disregards the reality of the decline in juvenile delinquency, especially violent crimes. Castells sees a connection between perception and the direct consequences of imprisonment.

The prison environment perpetuates and promotes a culture of criminality so that those who end up in prison have substantially reduced chances of social integration, both because of the social stigma and psychological trauma . [82]

In summary, this means that punishment and resocialisation cannot be considered valid by a judge's decision within a fixed framework of the punishment period. It contradicts the idea of individualisation and can only be translated into a measure appropriate to the circumstances of life through flexibility in the punishment, motivation by the offender and extrinsic motivation by the legal institutions.

Thus, alongside the laws [...] plans are formed which, as congruent generalised expectations, convey orientation similar to law, above all, open up certainties and possibilities of prognosis but cannot be justified. The regulatory intentions that still assert themselves under such circumstances are no longer determined or even expressed by laws. Instead, they become hindered and redirected through alternative pathways that correspond neither to a weighed legislative intention nor to the actual conception of the planner.[83]

The success of resocialisation is an important and relevant factor for society and also has a strong impact on the national economy. If the consequences of crime can be effectively addressed and ex-offenders are supported by opportunities to enter educational systems and professions, then there are moments of advantage on many levels and also real savings.

However, i t remains to be stated that the predictability of resocialisation successes and the duration until they occur is not given. Consequently, criminal law measures alone do not offer a promising solution for achieving a good educational effect through specific convictions . The reasoning for this opinion stems from the fact that juveniles, for the most part, are not yet developed a stable personality that allows them to establish a character and thus a clear view of future behaviour regarding criminal acts. Given the diametrical differences among individuals , employing indeterminate sentencing becomes an adequate means of meeting the requirement for punishment (reflecting the courts' social responsibility towards the law) while simultaneously observing the social development of the juvenile offender. The custodial sentences can be shortened based on a remorseful attitude, initiative towards resocialis ation , and willingness to reform . This should not be done solely based on existing probation guidelines serving half or two-thirds of the sentence. Negative behavioural changes can already occur here, leading to negative feedback and promoting further criminality if the prisoner were to repent prematurely. According to Baier, the consequence of this perception would be :

On the one hand, as the talk of 'identity' points out, it is assumed that contacts with law enforcement agencies change a person's self-image. Experiences with the police, the legal

80 ibid 84; Albrecht (60) 169.
81 Dollinger (n 73) 190.
82 Castells (n 64) 171.
83 Luhmann (n 29) 331.

profession or judges that are perceived as aversive encourage young people to maintain subcultural, norm-defying attitudes and values. The label 'lawbreaker' becomes the self-definition of being a lawbreaker, who is then also reflected in future behaviour'.[84]

The flexibilis ation of parole must be continued with indeterminate sentencing to ensure that measures extend into freedom and provide a promising perspective. Special attention should be paid to educational opportunities and training that enable gainful employment, thereby preventing further criminality.

If we look at the international comparison of juvenile criminal law, the discussion about more and harsher punishments was increasingly held until the 2010s and was also incorporated in different ways into the respective national laws.[85] However, the trend here is towards a more moderate legal structure. The USA, in particular, tightened up its juvenile criminal law from the 1990s by lowering the age limits for applying adult criminal law. In the meantime, however, a move away from greater punitiveness is discernible here.

Over the past decade , many states have recognised the need for reform and have taken steps to withdraw the punitive measures. Eleven states, including Illinois, Louisiana, Massachusetts and New York, have also included age groups that were previously traditionally excluded from the juvenile court system by raising the maximum age limit for jurisdiction (Campaign for Youth Justice 2011; National Conference of State Legislatures 2015).[86]

Dünkel summarises here in detail on the international level:

The causes of a tightening of juvenile criminal law that can be observed in some countries are manifold. Certainly, the (Anglo-American) 'punitive' trend with borrowings from retribution- and offence-oriented penal philosophies from the USA has not remained without effect to some extent. However, one can hardly speak of a 'new penal lust' in juvenile criminal law – also in view of clear international guidelines. Punishment-oriented concepts have gained importance, especially in countries with increasing problems with migrants and ethnic minorities and difficulties in the labour market with a considerable and increasing share of poorly educated young people with hardly any prospects. In this context, a certain helplessness in dealing with multiple offenders also plays a role. Therefore, tendencies to increase punishment are often limited to multiple offenders or recidivists, as evidenced in particular by developments in France or Scandinavia.[87]

The Netherlands remains a good benchmark in the context of European comparisons concerning these issues.

Another alternative [...] is the possibility of enforcement in the form of an education and training programme. This is, according to the Dutch legislator, 'a combination of activities in which minors may participate for the purpose of carrying out the execution of a custodial sentence or other custodial measure relating to their stay in an institution.'[88]

In the case of juvenile offenders, incorporating education and training within the framework of indeterminate sentencing provides the opportunity to combine a sentence with an

84 Baier (n 18) 18.

85 Heribert Ostendorf, 'From Punishment Expectations to the "Right" Punishment for Juvenile/Adolescent Offenders' in B Dollinger and H Schmidt-Semisch, *Handbook of Juvenile Crime* (3rd edn, Springer 2018) 159, doi: 10.1007/978-3-531-19953-5_8.

86 Marcus Schaerff, 'Juvenile Delinquency and the Punitive Turn in US Juvenile Criminal Law' in B Dollinger and H Schmidt-Semisch, *Handbook of Juvenile Crime* (3rd edn, Springer 2018) 155.

87 Frieder Dünkel, 'International Trends in Dealing with Juvenile Delinquency' in B Dollinger and H Schmidt-Semisch, *Handbook of Juvenile Crime* (3rd edn, Springer 2018) 110.

88 Anton M van Kalmthout and Zarif Bahtiyar, 'The Netherlands' in F Dünkel and others (eds), *Juvenile Justice Systems in Europe*, vol 2 (2nd edn, Forum Verlag 2011) 949.

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integrated educational approach and thereby fostering the development of prospects and opportunities. Furthermore, pre-trial detention avoidance projects have been organised in the past in the Netherlands. During that time, factors such as education , work and training were seen as determinants for the successful reintegration of juvenile offenders for minor offences. These factors were actively implemented .[89] The legal view was that the premise of children and adolescents must be one of protection and that if parental duty failed, children and adolescents must be placed in the care of the legal organisation [90.] . This meant that children and adolescents were placed in state institutions. Here, the institution was responsible for the moral and educational task of upbringing, including the development of basic skills and training for the professional field. In the Netherlands, at the turn of the 17th/18th centuries, recidivism rates of only about 7% per year were recorded. [91]

According to van Kalmthout, this approach 'anticipates the subsequent imposition of punishment', based on the principle that a 'sanction is all the more effective, the sooner it follows the commission of the offence.' [92]

If a uniform juvenile criminal law was agreed upon in EU circles, incorporating indeterminate sentencing with educational and training- focused concepts, it could contribute to more effective resocialisation .

Regardless of whether it takes place nationally or internationally, r eform is urgently needed. However, for any meaningful transformation to take place, there must also be a willingness on the part of the state to explore new avenues.

6 CONCLUSIONS

The rationale behind reintroducing indeterminate sentencing in juvenile criminal law lies in its potential to combine punishment with the right conditions and opportunities for the offender's own contribution to resocialisation. It needs catalysts that promote personal qualities. Although t he legislator has named the principle in law by speaking of a right to education, no results have been achieved.

Prospects for accepted life plans are defined in meritocracies by one's professional life and achievements . Images of people and perceptions of other members of society are constituted by normative general ideas and are not subject to a scientifical definition. [93]

Because of this, an individual cannot generate a motivational attitude to join a resocialisation process. Imprisonment reinforces feelings of inadequacy and hinders the return as a fully recognised member of society. This leads to further rejection and perpetuates criminal careers.

The multitude of tasks that young people face leads to confusion and can result in a departure from societal norms . This can also promote criminal activities.[94]

89 Hans-Jörg Albrecht, *Juvenile Criminal Law: History of Juvenile Delinquency* (University of Freiburg; Fachbereich Jura 2007) 10.

90 Lloyd DeMause (ed), *Do You Hear the Children Crying? A Psychogenetic History of Childhood* (Suhrkamp Verlag 1980).

91 CW Wimmer, *Description of a Journey Through the Kingdom of the Netherlands* (Pustet 1826) 155.

92 Kalmthout and Bahtiyar (n 88) 245; Bastian Dorenburg, *Pre-Trial Detention and Pre-Trial Detention Avoidance Among Juveniles and Adolescents in Germany and Europe* (Forum Verlag 2017) 174.

93 Anna Bunk, *Resocialisation and the Penal System – a lived principle? An Empirical Study on the Image of Humanity of the General Correctional Service* (University of Bonn 2017) 27.

94 ibid.

It becomes evident that the current system of determinate sentencing cannot be seen as purposeful here. Luhmann confirms that the determination of punishment cannot be pronounced in this way that it corresponds to a proportional measure. Here, prosecutors and judges in relevant professional fields face a dilemma. They are confronted with shortened and stressful decision-making processes that carry ambivalence within juvenile criminal law.

In juvenile criminal law, it is crucial to recognise that the law and professionals working within it are bound to comprehensive value orientations by the educational claim. However, according to para. 37 JGG, the r esearch examining the pedagogical knowledge of juvenile court judges and prosecutors yields rather sobering findings. Moreover, the orientation of juvenile court assistance does not seem to be clearly pedagogical either .[95]

In light of these findings, it becomes imperative to expand the range of m easures available, , adapt the determination of punishment on a more individualised basis , and increase human resources to effectively provide pass on education and training tasks to young people in a targeted manner.

It, therefore, remains doubtful that the existing criminal law prevents young people from relapsing into crime and may even encourage it.[96] The approaches of pure punishment are, therefore, not to be regarded as the ultimate solution but must be embedded more in an overall context. In this context, the individual case decision-making process contributes significantly to the likelihood of success while at the same time retaining punishment as a punitive measure if the success of rehabilitation is at risk. Ultimately, a sanction's success depends on so many factors, making it difficult to draw definitive conclusions in recidivism research . Dölling states in this regard:

When assessing the effectiveness of a sanction, a differentiated approach is appropriate. For example, a sanction may be effective for a certain period of time, but lose its relevance to behaviour after a longer time. If recidivism occurs after a longer period , the sanction cannot be considered ineffective across the board. […] In addition to the sanction, numerous other crime-inhibiting and crime-promoting factors can affect the convicted person's legal behaviour. The stronger the crime-promoting factors are, the lower the chances are that the sanction will prevent the convicted person from re-offending.[97]

Indeterminate sentencing is to be regarded as an adequate solution as it takes both factors into account: involves the offender and, crucially, accompanying measures of resocialisation in education, training and shaping of perspectives to reintegration that is ultimately sought without negative factors. In line with Luhmann's perspective, it requires a flexible application to the law, where individual circumstances of the cases and offenders must be carefully considered to achieve meaningful outcomes .

It must be added to the consideration that increasing flexibility in sentences does not lead to success in the case of harsher sanctions. In fact, the recidivism rate increases statistically. It is, therefore, not primarily about the punitive aspect of the sanction but rather about the juvenile's background and his previous history, allowing for the implementation of appropriate, tailored measures that are more likely to be implemented with greater success. [98]

95 Dollinger (n 2) 12.

96 Dieter Dölling, 'Criminal Sanctions and Recidivism' in A Dessecker, S Harrendorf and K Höffler (eds), *Applied Criminology – Justice-Related Research: 12th Criminology Colloquium and Symposium in Honour of Jörg-Martin Jehle, 22-23 June 2018* (Göttingen Studies in Criminology 36, Universitätsverlag Göttingen 2019) 182, doi: 10.17875/gup2019-1223.

97 ibid.

98 Bernd-Dieter Meier, 'Research Desiderata on the Effects of Criminal Sanctions' in A Dessecker, S Harrendorf and K Höffler (eds), *Applied Criminology – Justice-Related Research: 12th Criminology Colloquium and Symposium in Honour of Jörg-Martin Jehle, 22-23 June 2018* (Göttingen Studies in Criminology 36, Universitätsverlag Göttingen 2019) 216, doi: 10.17875/gup2019-1223.

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With indeterminate sentencing, another form of interchangeability of sanctioning is possible for the area of juvenile criminal law, in that the personality of the offender is taken into account, and recognisable deficits can be addressed through appropriate methods.[99]

This includes the implementation of targeted counselling and psychological support, which take effect as soon as the sentence begins. This is diametrically different from approaches that exist to date, which sometimes involve a psychologist's assessment of the offender's capacity to understand prior to criminal prosecution .[100]

In addition, the establishment of educationally supportive measures and also educationally supportive courses in the penal system is necessary to bring a future-oriented and perspective-promoting element to punishment, ensuring that it is not solely seen as a punitive act of atonement for guilt but also as an opportunity that motivates the active participation of offenders.

The state must recognise the positive impact of such measures. Not only do they prevent recidivism, but they have resocialising and reintegrating effects that contribute to the overall health of the national economy. On the side of the offender , such measures result in reduced reliance on social welfare benefits due to improved access to the labour market. .[101] Failure to consistently prioritise this treatment can lead to additional negative effects .

To initiate further development on reforming juvenile criminal law, the legislature needs to rely on scientific research and findings. Additionally, there is a need for key stakeholders within the relevant areas of the justice system, including the police judges and public prosecutors, to effectively address the requirements for change.

However, to reach the problem area of the poorly functioning resocialisation of youths, there is a need for medium-term investments in personnel and facilities that support resocialis ation. Social agencies are overstretched in the private sector and increasingly threaten public agencies.

The success of resociali sation is a relevant factor for both society and national economies. If consequences of crime can be contained and ex-offenders are supported with access to education and career opportunities , it leads to numerous benefits on many levels and also tangible savings.

For young people, it is crucial to ensure that, even in the event of a misdemeanour, they do not lose the opportunity to pursue a clearly defined chance in the future to steer their own life plan into a legal path.

If, therefore, the improvement in education listed, among other things, would have a preventive factor, it should continue to be used and expanded, not only in Germany but to the whole of Europe .[102]

By shifting the focus towards punitive measures while simultaneously focusing the educational idea with more practical and immediately usable effects, resocialisation and upstream prevention can succeed.

In the process, investments in resocialising institutions are a crucial step towards achieving success. Apart from the societal benefits of resocialisation and low recidivism rates, economic advantages can be gained.

99 ibid 218.

100 Heribert Ostendorf and Kristin Drenkhahn, *Juvenile Criminal Law* (9th edn, Nomos 2017) 49.

101 Christoffer Glaubitz and others, 'What is the cost of juvenile delinquency? An Approach' (2016) 99 (2) Journal of Criminology and Penal Reform 123, doi: 10.1515/mks-2016-990203.

102 Tobias Kollmann and Holger Schmidt, *Germany 4.0: How the Digital Transformation Succeeds* (Springer 2016) 17.

Given the absence of indeterminate sentencing for the past 30 years, comprehensive research is required to adapt to the social conditions in juvenile criminal law. Conducting i ndividual research by pilot projects examining the efficiency of juvenile punishment in correctional facilities would be necessary. To this end, it is recommended to integrate relevant disciplines within such projects to generate a holistic spectrum of results encompassing all effects, opportunities and still-existing problems .

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