McAuley, Mary. "Lessons from Other Countries: Germany, Italy and Finland." *Children in Custody: Anglo-Russian Perspectives*. London: Bloomsbury Academic, 2010. 191–215. *Bloomsbury Collections*. Web. 26 Apr. 2023. <<http://dx.doi.org/10.5040/9781849661027.ch-008>>.

Downloaded from Bloomsbury Collections, www.bloomsburycollections.com, 26 April 2023, 13:40 UTC.

Copyright © Mary McAuley 2010. You may share this work for non-commercial purposes only, provided you give attribution to the copyright holder and the publisher, and provide a link to the Creative Commons licence.

CHAPTER 8

Lessons from Other Countries: Germany, Italy and Finland

Diversion, depenalization, and decarceration.

Albrecht 2004: 449

From the nineteenth century onwards, in all our societies, the three key institutions responsible for dealing with young offenders have been the criminal justice system, state welfare agencies, and charitable or voluntary organizations. It is the mix between these three, and the scope of their responsibilities, that differs from country to country. Yet this is a complicated relationship because the criminal justice systems themselves, while sharing some common features, also vary in ways that make a substantial difference to the treatment of young offenders. The role of the state, and the way authority is distributed between central and local agencies, also has consequences. The type and role of non-governmental organizations may be very different. This variety of combinations frustrates attempts to classify juvenile justice systems, and attempts to do so on the basis of their underlying principles (retribution, welfare, etc.) proves equally hard (Muncie 2004).¹

No single set of ways exists to be emulated or copied. Nor are international conventions or guidelines for action at their most helpful when they offer too detailed prescriptions for institutional arrangements or procedures. They are better thought of as documents setting out aspirations and/or minimum standards against which governments should measure their achievements or failings, and which can be employed by NGOs, experts and by international agencies to try to hold governments to account for their actions.

In the original book, written for a Russian readership, I argued that, if the experience is to be relevant to Russia, it made little sense to look to societies where the legal system and the state–society configuration is markedly different from that in Russia. Rather, we should look to countries with a continental (civil) legal system, a welfare-state orientation, and preferably with what we can call a bureaucratic-statist tradition. It would be unhelpful, I argued, to choose countries with a very strong voluntary sector, or those

where there are strong traditions of individual responsibility and individual rights. Their experience is unlikely, in the near future, to resonate in Russia. This left quite a range of countries, and I chose three which, for different reasons, should be of particular interest to Russian policy-makers and reformers: Germany, Italy and Finland. They are three societies, with very different histories and state–society relations, but each with some elements in common with Russia. Each has a continental criminal justice system and emphasizes concern for the welfare of the young. In Germany and Italy the age of criminal responsibility is 14, in Finland it is 15, while in Russia it is 14 for more serious, 16 for less serious crimes. Younger children are the responsibility of local government social welfare agencies, or local boards. The main differences come in the institutions, procedures and practices of the criminal justice systems, the relationship with state or non-governmental agencies, and the type of sanctions employed.

Germany and Italy both have low detention rates, and Finland's was high but is now together with its Nordic neighbours at the bottom of the league table. Russia is very near the top, as are England and Wales. How then do the others achieve this? There is no evidence that their young people are more law-abiding than their Russian or English peers. The overriding conclusion – or finding – is that while the ways in which they limit the numbers held in detention are quite distinct, all three countries share a commitment to certain basic principles or strategies, and it is these that are responsible for their success in keeping custody low. And such strategies, I began to realize, are as relevant for the United Kingdom (or for the United States). The differences in legal systems, and state–society relations, do not make them unworkable. There are lessons here both for Russia and for England and Wales.

Germany

Those who today write on juvenile justice in the Federal Republic still quote approvingly from Franz von Liszt, a leading figure of a century ago: 'If a juvenile commits a criminal offense and we let him get away with it, then the risk of relapse into crime is lower than the risk we face after having him punished' (1905) (quoted by Albrecht 2004: 444; Dunkel 2003). The Youth Welfare Law of 1922 and the Youth Court Law of 1923 laid the foundations for a system in which imprisonment was only to be used as 'a measure of last resort to implement education within the juvenile justice system' (the first youth court

was set up in Germany in 1908) and this has remained a key principle (Albrecht 2004: 447). Apart from a short period under Nazism when the age of criminal responsibility was lowered and harsher penalties introduced (1943), the system has remained largely unchanged since the early 1920s. The 1943 amendments were abolished shortly after the war; further amendments, introduced in 1953 and in 1990, re-emphasized the priority to be given to welfare measures through education, including, for example, community service. The reunification of Germany in 1990 has not presented any particular problems for the working of the system – something we shall return to later.

The key features of the German system today are the following:²

- Young people between the ages of 14 and 18, suspected of committing offences, after investigation by the police are referred to the prosecutor. The prosecutor can adopt one of several measures: dismiss the case with or without setting conditions (educational training, parental or school supervision, the involvement of welfare agencies), or file a formal charge.
- If a formal charge is filed, the youth court aide (a trained social worker employed by the local municipality) must be notified, and s/he prepares a report for the judge on an appropriate sentence.
- Remand is only used in exceptional cases (attempts to escape or no fixed residence). These amount to 500–700 cases a year (and probably include a disproportionate number of foreign nationals, that is, children without fixed residence – see below for the Italian example).

Most marked is the practice of diversion, that is, action by the prosecutor to divert cases out of the criminal justice system. Recorded crime rates by young people, stable during the 1980s, rose throughout the 1990s (initially largely owing to a sharp increase in the five new Federal states) before levelling off at the turn of the century. Crimes of robbery and violence have, however, shown an increase (Albrecht 2004; Dunkel 2003; Jehle 2005). However, regardless of the trends in the 1990s, prosecutors have steadily continued to dismiss more cases, either with or without imposing conditions: from 22 per cent of cases in 1981 to 55 per cent in 1999. The basis for such action is the belief that the overwhelming majority of crimes committed by young people are not serious, and are not repeated, and this is borne out by the data.

Perhaps one in ten of 14–17-year-olds will attract police attention, but less than half of these will come before a judge. Judges too dismiss perhaps a further 15–20 per cent of cases. These policies have meant that the rise in recorded offences, particularly marked in the 1990s, has not led to increased adjudication and sentencing by the courts.

- Cases for which the maximum sanction is one year's imprisonment will be heard by a single judge in a youth court. More serious cases will be heard by three judges, and two lay assessors. The accused has the right of defence, and the hearings are closed (except to parents, and court aide). There is only one right of appeal.
- The judge is obliged to consider, first, educational measures (educational training, community service, mediation, supervision by a social worker, etc.). Disciplinary sanctions (a formal caution, fine, community service, probation or short-term arrest of up to a maximum of four weeks) should be imposed only if educational measures are deemed insufficient. Youth imprisonment (minimum six months, maximum five years, but 10 years for offences for which an adult serves more than 10 years) can only be a measure of last resort. Sentences of up to two years can be suspended.

Perhaps 1 in 100 children of the 14–17-year-old age group will receive a sentence, but the emphasis in sentencing is depenalization. By the end of the twentieth century, community service was the most popular sanction used by the judges (in over a third of the cases), followed by cautioning (30 per cent), then fines and educational training (each 20 per cent); short-term arrest, that is, up to four weeks' detention (18 per cent), suspended prison sentences, increasingly used also for those cases where the maximum sentence was two years, accompanied by probation (12 per cent), and imprisonment (7 per cent).³

Here a word of caution. Under the German system 18–20-year-olds can be prosecuted as juveniles, through the youth court system, and sentenced accordingly. The majority of young adults are dealt with in this way. Hence when the statistics refer to youth court decisions they include judgments for 14–17-year-olds and 18–20-year-olds. Young adults, including those up to the age of 24, may serve prison sentences together with the younger offenders. This can lead to a misunderstanding, in comparative terms, of the numbers of young

offenders sentenced to or serving prison sentences in Germany. For example, in 2003 7,023 received prison sentences in a youth court but only 758 of these were aged 14–17 and less than fifty of these were girls (Jehle 2005: Table 19a, p. 49; Albrecht 2004; Dunkel 2003). Germany's population is approximately 82 million, compared with that of 53 million for England and Wales.

The German system has a strong welfare orientation, but welfare within a strong criminal justice system. The punitive mood and policies that are making their appearance in some of its western neighbours have not made ground here. The German approach to its young offenders clearly ought to be looked at carefully by those who believe that 'welfare' and 'justice' should and can be pursued simultaneously. We shall come back to other issues (regionalism, changing a penal culture, and the use of mediation) after an initial comparison with Italy and Finland.

Italy

At first sight the Italian system looks similar to the German, and it is inspired by the same welfare ideology, but there are marked differences in the roles played by its officials and in the ways young offenders are treated. Juvenile courts were introduced in Italy in 1934, but the relationship between the justice system and local government bodies has changed more than once. Today's arrangements date from legislation in the 1970s and in particular from the Juvenile Justice Procedure Act of 1988, which has reasserted the role of the Justice Ministry as the key institution. 'The main aim' of today's procedures, it is suggested, 'is to limit exposure of minors to the system of justice' (Maurizio 2003: 42). 'The judge takes into account the prejudice the trial can cause to the minor and, case by case, considers if it is appropriate to go on with the proceedings or if it is better to interrupt them, with a view to educational purposes' (Ciappi, Brutto and Padovani 2008). If we understand by this bringing youth cases to trial in court, this certainly seems to be true.

Under the 1988 Act juvenile courts or tribunals are linked together with their own police, prosecutors and juvenile services departments, sometimes housed together in the same building, and responsible for civil, administrative and criminal cases involving minors. The local reception centres (for short-term remand) and juvenile prisons (for detention while awaiting trial, or serving sentences) also come under the Ministry of Justice. The legislation of the 1970s had established that the implementation of civil and administrative decisions should be the responsibility of the local social

services departments. These local agencies are expected to work closely with the youth services departments attached to the courts. Given that the judge 'shall give the offender specific orders aimed at his/her educational and cultural growth' (Maurizio 2003: 42), which may require the provision of education, training, therapy, or family support, both local government and justice services departments should be involved.

- Young people between the ages of 14 and 18, suspected of committing an offence, can be held for up to four days at a reception centre. Within 48 hours the prosecutor must bring the youngster before the juvenile magistrate who, at this stage of preliminary investigation, can dismiss the case either for lack of evidence or because the offence was trivial, or refer the case on for a future preliminary hearing.

A much smaller proportion of youngsters between the ages of 14 and 18 are reported to the police in Italy than in Germany (whether this is because they commit fewer offences or because they are not reported we cannot say). Youth crime is not high on the list of the public's concerns and there has been no support for tougher sanctions. During the 1990s the absolute numbers of young offenders declined to their lowest level in 2000, before beginning to rise slightly and then to level off. These figures, however, need to be looked at more closely. The size of the juvenile population declined significantly before it too stabilized in recent years. The rate of offending among the age group rose but, now comes a further complication: the percentage of foreign nationals in the age group increases, and this affects the crime rate. The difference between indigenous and immigrant, and their treatment, is an important one, which we shall come back to later in the chapter. For the moment we are talking of the young offenders as a whole. Throughout the 1990s between 65 and 80 per cent of the suspects faced prosecution; by the new millennium this had fallen to around 55 per cent.⁴ Presumably prosecutors and magistrates were dismissing more of the cases or passing them to the social services.

Where the case is referred on to the next stage – the preliminary hearing – the magistrate may order the youngster to be detained in the juvenile prison, if the offence is one that could carry a prison sentence of two years. In Italy there are the two institutions: the reception centres and the juvenile prisons. Between 3,000 and 4,000 children, annually, spend the four days

in the Reception Centres and, of them, approximately 750 will go on to pre-trial detention in the juvenile prisons. They will be joined there by a smaller number, also awaiting trial but previously at liberty, and by an even smaller number who have received a custodial sentence following their conviction. All these figures show a decline since 2000. If in 1991 the total number entering juvenile prisons was 1,954, by 2003 it had fallen to 1,581. We note that these figures (remand and custody combined) are higher than those for Germany, and for a smaller population (the German population is approximately 82 million compared with 58 million for Italy). If, however, one includes short-term arrest in the German figures, they become more comparable.

- The preliminary hearing, which may not take place for several weeks or months after the offence was committed, is conducted by one magistrate and two lay assessors in a youth court. The magistrate may dismiss the case on the grounds of 'diminished responsibility', or grant 'a judicial pardon' (if he considers the accused is not likely to reoffend), or 'suspend the proceedings for a trial period' (which can be for as long as three years) during which the individual must follow a programme devised for him by the Justice Ministry's youth services department and those of the local authority. This measure '*messa alla prova*' is not the equivalent of a suspended sentence because no 'trial' and 'sentencing' has taken place. The great majority of cases are disposed of, or diverted away from the criminal justice system, at this stage.
- Of the minority that finally comes to trial, only perhaps 20 per cent end in a conviction, perhaps because the only real sentence is imprisonment. Again the magistrates (now two of them acting together) prefer to use judicial pardons, and 'suspension' under probation. Custodial sentences (usually one-third of an adult sentence) have fallen from between 300–500 per annum to less than 200 since 2001. Very few of these are girls. The juvenile prisons, as we mentioned, house both those awaiting trial and the small number of convicted: taken together the average daily figure for the number of inmates has ranged between 356 in 1991 to 551 in 1995 to 474 in 2000 (Ministero della giustizia web site). In 2005 it stood at 279 (Italians) and (479 foreign nationals), the majority on remand (Ciappi, Brutto and Padovani 2008).

When we compare the process and outcomes with the German system, we find that both employ the practice of dismissing or diverting cases, and passing them on – in one way or another – to their own and local social services' departments. In Germany it is the prosecutors who play this 'gatekeeper' role, getting rid of 50–60 per cent of all those suspected or charged. In Italy it is the prosecutor and magistrate who, either at the preliminary investigation or at the preliminary hearing, will dispatch even more. And in both countries they propose measures involving education, training, social services support, etc. The difference at this stage is that the Italian magistrates can 'suspend proceedings' for a lengthy specified period, which in effect, although not legally, is the equivalent of a suspended sentence.

If we look at judges' responses to those cases that finally make it to court, we note that again, in both cases, the judges use diversion measures, but the Italians more so than the Germans. The German courts are dealing with a far larger number of cases and use a far greater array of sanctions: community service, cautioning, fines, short-term arrest, suspended prison sentence; perhaps only 700 youngsters will receive an unconditional prison sentence. In Italy, where there are fewer sanctions at the magistrate's disposal, suspension under probation and the 'judicial pardon' come into play; a higher proportion of those convicted may receive a prison sentence but in terms of numbers this will be less than 200. But then we have to remember that the Italians use pre-trial detention more frequently, and perhaps as a way of punishing an individual who has not and probably never will be convicted of a crime.

How do the Finns organize their response?

Finland

Finland, similar to its Nordic colleagues has no juvenile courts.

One can argue that there is no special juvenile criminal system in Finland – in the sense that this concept is understood in the continental legal systems. There are no juvenile courts and the number of specific penalties only applicable to juveniles has been quite restricted. (Marttunen 2003: 170)

It also, until the reforms of the 1970s, had a rigid sentencing framework for adults and for juveniles. This, and a traditional disposition to view detention

as a normal measure for adults and for young people, had resulted in high detention rates. In the 1960s Finland, with crime rates very similar to its Nordic neighbours, was locking up three to four times as many of its adults and young people. The question then that faced experts and policy-makers was: why should this be? Why are we doing this, when we know that prison is damaging for the individual and does not deter him or others from offending? In the 1970s certain measures were introduced that slowly began to bring detention rates down, and further measures in the late 1990s have introduced more flexibility into the system.

Finland's justice system is similar to the Russian. It is then of particular interest that, in a relatively short span of time, policies were introduced that have dramatically replaced detention by alternative sanctions. Lappi-Seppälä has identified the following as relevant players: the political leadership, experts, members of the judiciary, and the media. The 'experts' – the professionals, criminologists, and experts working within the criminal justice system – had a critical role to play in persuading politicians and civil servants that locking up young people will have adverse consequences for the society. They were helped by the fact that a Nordic group of countries existed of which Finnish politicians and others felt themselves a part – and here obvious and unattractive comparisons could be made (see our Figure 6 above). The question: 'why are we locking up four times as many of our citizens as our Nordic neighbours while our crime rates are similar?' could not simply be dismissed.⁵

It was also important that the Minister for Justice has tended to be drawn from the research community, and this allowed the influence of research to be felt at a high level. Finnish politicians respond to research. In addition, civil servants, judges and prison authorities all recognized that change was needed. And not least important, the way the Finnish media is structured, without short-term competition for readers, meant there was no sensational and sustained 'crime' reporting to support an anti-reform campaign (Lappi-Seppälä 1998). A sudden spate of homicides by teenagers between 1999 and 2002 brought cries in the media for a lowering of the age of criminal responsibility but, as the numbers fell again, so did the campaign (Lappi-Seppälä 2008).

Over the past two decades reported crime rates for young people have remained relatively stable. Theft by 15–17-year-olds has declined, while assaults increased in the 1990s (although the data here reflected a change

in the definition of assault) but have shown a slight decrease since 2000. The same is true of robbery and drug-related crimes for this age group (Marttunen 2003; Lappi-Seppälä 2005, 2008).

- The police can only question a 15–17-year-old in the presence of parent or guardian and a welfare officer. They should either dismiss the case, or turn it over to the social welfare agency, or issue an arrest, within 24 hours. If they wish to press charges, the case is referred to the prosecutor, who in turn can choose to dismiss it or pass it to social welfare, while simultaneously cautioning the youngster.
- If the prosecutor decides to press charges, and the action could result in a sanction more serious than a fine, the case must be referred to the welfare officer or the probation officer to prepare a report on the young person. (This also applies to 18–20-year-olds, who can be placed under supervision until the age of 21.) The probation officer draws up an appropriate programme for the young person (similar to the role of the juvenile aide in Italy) but in Finland too the judge takes the final decision on sentence and conditions. In very few cases are youngsters held on remand.

In Finland, age is used to divert cases, then both police and prosecutors employ diversion (in perhaps 20 per cent of cases). Referral to mediation is also employed (see below). The judge's ability to divert or dismiss was, until the 1990s, very limited, as was the range of sanctions he could choose between: a fine, a suspended custodial sentence or custody. The new measures of the 1970s made it easier to dismiss and divert cases, and to use conditional sentences, and ruled that custody should only be used for under-18s if 'extraordinary reasons demanded it'. For first-time offenders, any sentence of up to one year is suspended. However, the reforms, which substantially reduced the adult prison population (changing the sanctions for drunken driving, and introducing community service in lieu of a custodial sentence of up to eight months), had few consequences for young offenders. Since custody should only be used as a measure of last resort for youngsters, and community service could only be imposed in lieu of a custodial sentence, it was impossible to apply the new community service sanction in any but a few cases.

In 1997 an experiment was introduced – to insert 'juvenile punishment' into the ladder of sanctions, to come after a suspended sentence and before

custody – a young person could be sentenced to complete from 10 to 60 hours of unpaid work and/or to attend training under supervision for a 4–12 month period (Marttunen 2003a). In 2005, following a review of the experiment, the Juvenile Punishment Act attempted to find a compromise between the arguments in favour of punishment and those defending a welfare approach.

If the judge decides that a fine is too lenient a sentence, and custody is not warranted, he can either impose a suspended sentence, under supervision by the probation service, or he can impose 'juvenile punishment' for a period of 4–12 months. This, under a probation officer, 'consists of supervision, different activities and programmes to promote coping in society, and an orientation to working life and work, to occupy at most 8 hours per week' (Kriminaalihoitolaitis: <<http://www.kriminaalihoito.fi/16935.htm>> and <www.rikosseuraamus.fi/16918.htm>).

It remains to be seen how the judges will respond to choosing between the juvenile punishment sanction and a suspended sentence (in 2004, still an experimental year, the figures were 57 to 219). During the 1990s and today the fine continues to dominate (around 65 per cent of sentences), suspended sentences hover just above 20 per cent, and custody has dropped from about 4 per cent to less than 2 per cent. By 2006 some 60–70 15–17-year-olds were being sentenced to imprisonment each year. They can be sentenced for as little as 14 days to a maximum of 12 years, but with parole coming in after a third of the sentence has been served. The usual sentence span is between six months and four years. Between the mid-1980s and the early years of the new millennium, the numbers of 15–17-year-olds held in detention fell from between 35 and 45 to single figures; in 2007 there were five in prison. They accounted for 1 per cent of the prison population, and are held in adult prisons (Kriminaalihoitolaitis n.d.; Marttunen 2003a; Seppälä 2008). The population of Finland is slightly more than 5 million. If in England and Wales there was the same percentage behind bars, the custody figures would come out at 50, rather than over 2,500 (see Figure 12).⁶

Finland is more similar to Italy in that the system gives the judge few options when sentencing a young person who has finally made it to trial. The Italians have chosen to avoid custodial sentencing by giving the magistrate the power to 'suspend a sentence' for a long period (without a conviction); the Finns have introduced what elsewhere would probably be called 'community service' under a new heading 'juvenile punishment'. Given the

Figure 12: Numbers of 15–17-year-olds in custody, various countries, 2002–2006

Note: all figures per 100,000 of age cohort. *For the Nordic countries, average figures for the five-year period; for England and Wales 2006 data.*

Source: Lappi-Seppala, presentation, International Juvenile Justice Conference, Valencia, 2008.

similarity of the Finnish system with the Russian (state welfare agencies, adult courts, limited sanctions, previously high detention rates), the Finnish reforms should be of particular interest. Here, at a minimum, are measures that could be adopted. But there may be better solutions.

In all three countries, although the routes followed are different, the figures for those held in detention are low and roughly comparable, given the size of the populations. All employ strategies to keep young people out of the criminal justice system, either by charging justice officials with the task of passing miscreants on to others (local government, social welfare or probation agencies, mediation services) or by giving a greater role to these agencies in the first place. In all instances the role of their representatives – social workers, juvenile court aide, probation officers – who may or may not be under the Ministry of Justice is critical. Even where the judges sentence, they rely heavily on these agencies to implement their rulings.

‘Diversion, depenalization, and decarceration’, the three characteristics chosen by Albrecht to describe the German system, describe all three countries. But, then, is there not something odd? It seems the societies are engaged in devising a strategy for dealing with children’s behaviour that is based on *negating* key features of a system for adults. Should one not start by trying to create one based on principles that are relevant for children? We do not construct an educational or health system for children by adapting those that we think are appropriate for adults. We recognize children need something different.

Restorative justice?

Restorative justice, we remind the reader, aims to shift the focus away from that of either punishing or rehabilitating the offender. The central person in a restorative framework is the victim, not the offender. The concern is with 'appropriate compensation' for the harm done, 'restoring rights' to the victim. Only where the victim feels that either an apology or punishment of the offender will make him or her feel better would sanctions come in. Yet, in practice restorative justice programmes in Europe are as much focused on the offender as on the victim, and have a strong educational component. One reason is that restorative justice offers a more humane approach to young offenders than traditional approaches and in this lies a good part of its appeal (Weitekamp 2001).

We have seen Albrecht's observation that '... formal interventions do not make a difference with respect to exiting from criminal lifestyles, but, on the contrary, formal interventions add to juvenile offenders' difficulties in adjusting to societal demands' (see Ch.4) repeated by many of the professionals who work with young offenders in Russia, and in the UK. An awareness of this, Albrecht suggests, leads current research to focus 'on the feasibility of replacing formal juvenile court responses with restitution and victim–offender reconciliation schemes' (2004: 465–7). These differ depending upon whom is administering them. In Germany, for example, mediation programmes were started by parole or probation services whose focus was the offender, and the emphasis, consequently, is on rehabilitation. Germans refer to 'offender–victim mediation', not 'victim–offender mediation'. But even here three different models are found:

- The juvenile aide worker, or the probation officer, already responsible for the child is in charge of the mediation. This, Weitekamp argues, is the worst kind of programme because 'mediator' and 'juvenile aide' are simultaneously playing two roles, and the mediator cannot be neutral.
- A juvenile aide worker or probation officer administers mediation programmes for those children for whom he or she is not primarily responsible, and does not know.
- Specialized 'mediation officers' who are not employed as juvenile aides or probation officers are responsible for the programmes.

Albrecht refers to reconciliation and restitution schemes receiving 'strong support outside and inside the criminal justice system', and Dunkel suggests that the 1990 amendments to the Youth Court Act offered 'many opportunities for arranging mediation or damage restitution', which are taken up by the prosecutors. It is difficult to judge how widely they are used, and mediation cannot be imposed by a judge as a compulsory educational measure because it is intended to be voluntary. From data provided by Dunkel (2003: 127, 132) it seems to occupy a modest place in the work of the youth welfare departments in both the older and newer German states.

In Finland the Criminal Code now allows the court to waive or mitigate a sentence if the two sides have agreed on a resolution of the case. In 2006 a Law on Mediation was passed, which extended the practice to the whole country. As in Germany, the prosecutor can pass the case to social welfare, which is responsible for organizing a mediation office whose members are unpaid volunteers, with 30 hours' training. Most cases come to the office from police and prosecutors; they usually relate to minor offences. Approximately 2,000 cases a year involving juveniles are handled in this way (Marttunen 2003; Lappi Seppala 2008).

In contrast mediation is little used in Italy, and compensation to victims can assume a largely formal character: a written apology to the victim, a token donation to a charitable organization. The first mediation programme was set up in the juvenile prosecutor's office in Turin in 1995, and by 2000 eight such services existed. The programmes tend to be funded by the regional authority, sometimes with help from the Ministry of Justice; magistrates play the key role in their setting up and organization; they are staffed by court and municipal social workers, most of whom require some elementary training. Magistrates may recommend that the youth services department or the local social welfare department engage in mediation, but only a very small proportion of cases are referred in this way. In 2000 a mediation service was dealing, on average, with fewer than ten cases a year, and an attempt to set up an independent, non-government funded, mediation service in Rome failed – from lack of financial support and a 'silent boycott' by magistrates and court social workers (Mestitz 2002). However, Ciappi (2008) suggests, 'Many mediation offices have been constituted, relatively independent from the Court, composed of educators, psychologists and criminologists', and there is scope for its expansion. The law allows for mediation at any stage: during preliminary investigations, during preliminary hearing or while under probation.

The Italian case is relevant for Russia:

experience seems to suggest the non-written rule that a strong agreement with juvenile magistrates, as well as the agreement and collaboration of court social workers, are needed – at least in the phase of implementation – to launch functioning VOM services in Italy. (Mestitz 2002)⁷

The relevant actors may be different in Russia but, without support for these alternative procedures from those who play the key roles in the criminal justice system, mediation and restoration will be relegated to the sidelines, or left off the field altogether. We come back to this in the final chapter.

Key issues raised by the case studies

1. Why the emphasis on diverting cases out of the criminal justice system?

Is it because criminal justice systems, even with youth courts, are not appropriate for dealing with young people? The answer is – yes – if one wants to exclude punishment and the stigmatizing of young people. Try as you might, if you use a criminal justice system for young people, you will include punishment as part of your sentencing strategy. You may insist that the emphasis be on rehabilitation, but punishment will come in.

Both Germany and Italy make strong claims that their youth criminal justice systems are focused on the welfare of the individual and education or rehabilitation. When, during the 1960s and 1970s a debate took place in Germany over the benefits of taking cases of 14–15-year-olds out of the criminal justice system and transferring them to the welfare agencies (as, for example, was done in Scotland), the welfarists in Germany lost to the criminal justice professionals. The argument that the criminal justice system can focus on the offender rather than the offence, make individual deterrence the sole sentencing goal, and education the key ‘sanction’ won the day. But, suggests Albrecht, if the aim of the sentence is to deter the individual from reoffending, then any educational measures that are intended to go beyond ‘an individual relapse into crime’ can be argued to infringe an individual’s rights, and ‘in practical terms [this approach] overestimates the capabilities of any justice system’ (Albrecht 2002: 176–7). The Youth Court Law itself refers to ‘educational measures’ and to ‘punishment’, which allows for different interpretations. Despite the claims, he suggests, sentencing really

imitates the aims it follows when dealing with adults, which include general deterrence and punishment (Albrecht 2004).

And the Italian response? All the agencies believe that 'in principle the juvenile criminal proceedings should be governed by the goal of imparting some sort of moral education to people under age', but this does not exclude punishment. Punishment and welfare are pursued 'in the traditionally paternalistic, informal and confidential style of the juvenile judiciary' (Mestitz 2000: 226–7), which happens to be not particularly punitive. The magistrate has a high degree of discretionary power and may well consider that, after a short spell in detention while awaiting trial, the more serious offenders may be sent back to the business of growing up in the community. Any further punishment would seem inappropriate, apart from in exceptional cases.

Can one conceive of a criminal justice system in which punishment has no place? The evidence suggests not. The idea of punishment is so deeply embedded in criminal justice that even the most welfare-oriented system will not be able to dispense with it altogether.

But does one want to exclude punishment? This is a question that has to be answered by anyone seeking a response to youth crime. If the answer is in favour of punishment *in certain cases* (in which? and why?), then an argument for using a criminal justice system for this limited number of cases can be advanced. The Finns more readily accept this as an issue. Given that punishment is part of criminal justice, the Finns reckon that 14-year-olds are too young to be treated as 'criminals' but punishment should be administered to 15–20-year-olds when the offence is truly serious. Punishment should be softer, and used less frequently for 15–17-year-olds than for 18–20-year-olds, the majority of whom are also best treated by educational and support strategies, but it is an appropriate sanction.

2. If criminal justice systems threaten children by their tendency to punish, might they provide for fairer treatment or a better defence of rights than social welfare agencies?

Some argue that a criminal justice system offers certain safeguards to the individual ('fair and equal treatment', the right of defence, of appeal). Criminal justice systems have rules that ensure 'fairness' in treating like with like. The problem with this argument is that criminal justice requires a set of institutional actors: police, courts, prosecutors and bar associations,

and the practices, conventions and attitudes of those who staff them will affect outcomes.

Let us take the police as an example. All criminal justice systems rely upon a police force as the body, at grassroots level, that is responsible for maintaining order and making arrests. The police are the first point of contact for young people suspected of causing trouble. As those responsible for maintaining order, the police have a great deal of discretion on when to stop and search, when to bring someone in, when to respond to reports of a crime being committed. This means that their attitudes, and the resources they can command, will influence the identification of crime.

The majority of criminal acts are never recorded. Most school children admit to having committed an offence at some time, but the vast majority of these will leave no official trace. Ask an audience of law-abiding adults whether they, during the past year, have done anything illegal and, if they are honest, they will have to admit that, well, yes, there was a small matter of not declaring x ... If the police actually arrested everyone who committed a crime, the system would collapse, and society come to a halt. In every sphere there will be far more 'illegal' activity occurring than the police can ever cope with.

So whom will the police target and why? They will be influenced by instructions from on high (drug-dealing or child pornography is to be a priority), or by their own views on whom are the most likely to be engaged in criminal activities (it may be young black youths or Azerbaijani traders), or their own chances of catching the offender and getting a conviction. All will influence 'the picture' of crime that emerges and the chances of 'fair treatment'. If the Russian police stops and searches twice as many young people from the Caucasus as their Russian peers, the statistics will suggest that Caucasians are more heavily into narcotics, whereas equal treatment might have revealed quite the opposite. If the police in England and Wales stop a disproportionate number of black youths, they automatically appear as more criminal in the statistics (Muncie 1999).⁸ If the police are rewarded on the basis of crimes solved, they will record far fewer of those that are unlikely to be solved; and, as we suggested in chapter 1, they may respond in different ways to changes in the legislation.

In England there are marked differences in policing – and hence in the subsequent fate of young offenders – in *adjacent counties*. Cautioning rates before 1998 varied substantially between police forces in ways that could

not be explained by differences in crime profiles, and research suggest these persist under the new reprimand system. In 2001 the diversion rate for indictable offences for 12–14-year-olds ranged from 68 per cent in Northamptonshire to a low of 50 per cent on Merseyside. In 2002, only 32 per cent of the 15–17-year-olds in Merseyside received a reprimand or final warning rather than a prosecution compared with 72 per cent in Surrey (Muncie 1999; Bottoms and Dignan 2004: 98; NACRO 2005: 29).

Just as the behaviour of the police may vary, even within one society, so will that of prosecutors and judges, and of doctors, teachers, social workers. The difference is that the three last professions are focused on treating the individual, the former on the offence. In England judges in different parts of the country interpret legislation and their role differently. Between October 2000 and September 2001 in some parts of the country the ratio of custodial sentences to community service orders was one in three, in others one in twenty-six, and differences in sentencing practice do not seem to relate to patterns of crime (Bottoms and Dignan 2004: 107–8; NACRO 2005).

In Germany too regional patterns are clear: the sentencing/discharge ratios are higher in the southern than in the northern states; the four-week arrest is more popular in the north, a two-year suspended sentence and probation more common in the south. In Italy there are marked differences in the judicial practices between regions (with the magistrates in the north-east rarely resorting to detention, those in the central regions and the south much more inclined to place children in custody, even if only for short periods). In Canada, too, there are differences between police practices and judges' behaviour in different states (Mehlbye and Walgrave 1998; Dunkel 2003; Ministero della giustizia website; Tonry and Doob 2004 for Canada).

Despite the claims it begins to look as though, far from being an impartial and fair arbiter, the criminal justice system is subject to a variety of influences. Criminal justice officials are part of their society, and their attitudes will reflect some of those attitudes. Which ones, however, is a key question. In many countries, but most marked in Italy, it is the disproportionate number of immigrant ethnic minority youth who are charged and proceed through the system to end up in detention.

The immigrant children coming to Italy are mostly from Eastern Europe, particularly from Romania, the former Yugoslavia and Albania, and from North Africa. Their environment is one of illegal immigration, incomplete families and poverty, which together encourage criminal behaviour; further,

these circumstances increase their chances of ending up in detention once they have been detained by the police (Gatti and Verde 2002). Only 2 per cent of Italian children before the court will be sentenced to detention, but for immigrant children the figure varies between 8 and 12 per cent, despite the proportion of their crimes that are linked to serious violence being significantly less. They find themselves behind bars for theft and violation of drug laws. 'In other words, if a prison sentence is justifiable for an Italian minor for serious offences, for foreign minors, even a predatory crime is enough to open the door to juvenile detention' (Ciappi, Brutto and Padovani 2008).

Why? One reason is that the use of alternative sanctions (community orders) is dependent upon a home and family environment that will be supportive. But this is precisely what the young immigrants lack. Holding them on remand is a way of holding on to them. The welfare services have no provision for them. 'Imprisonment', suggests Ciappi, 'continues to be a social deposit and a place to contain people when alternative solutions are either absent or fail.' Hence the juvenile prisons become a place for marginalized immigrant youth, as borne out by the dominance of their numbers. In one of the largest juvenile prisons, Milan's 'Cesare Beccaria', the percentage of foreign occupants, for some years, has reached – and at times exceeded – 85 per cent of the total of detained minors. Hence, Ciappi argues, drawing upon Gatti and Verde, incarceration is used as a sort of emergency response to social situations that are difficult to handle. Measures such as diversion and probation seem to be available to the more fortunate sector of the target population, while prison ends up as a receptacle for those minors who are less fortunate, like foreign juveniles.

The role of social structural causes is clear (unemployed, homeless, lack of identity papers), plus a welfare system that has no funding for them. But maybe too police and justice officials interpret their role as one of defending a host community against newcomers?

In England and Wales, where a disproportionate number of young black children find themselves behind bars, research studies have attempted to disentangle the reasons for this. In addition, the House of Commons Select Committee on Home Affairs focused its Second Report in 2007 on the overrepresentation of ethnic minorities in the crime and justice figures for young people. Black people constitute 2.7 per cent of the population aged 10–17, but represent 8.5 per cent of those of that age group arrested in England and Wales. As a group, they are more likely to be stopped and searched by

the police, less likely to be given unconditional bail and more likely to be remanded in custody than white young offenders. Is this because they commit more, and more serious, crimes? The Select Committee concluded that:

The evidence we received suggests young black people are overrepresented as suspects for certain crimes such as robbery, drugs offences and – in some areas – firearms offences. ... [but] We can say with greater certainty that the patterns of offending vary between different ethnic groups than that the level of offending varies significantly.

The black and Asian children are not recent immigrants but, the Select Committee recorded, ‘Eighty per cent of Black African and Black Caribbean communities live in Neighbourhood Renewal Fund areas, those identified as England’s most deprived areas.’ Features of the Italian environment reappear:

Social exclusion is a key underlying cause of young black people’s overrepresentation as both victims and suspects. Not only does it fuel involvement in crime directly, it makes young people vulnerable to a host of other risk factors, such as living in neighbourhoods where crime is high and underachieving at school. ... The association between socio-economic disadvantage and involvement in crime among people of all ethnic groups is well-established.

Leaving aside the disproportionate use of stop-and-search for black boys, once they have been charged, the criminal justice system does seem to respond more punitively towards them than to young white offenders. Young black and young Asian offenders are more likely to be remanded in custody than their white counterparts. In 2004/05, the figures were 8.1 per cent for black youngsters, 5.1 per cent for Asian and 4.4 per cent for white people of the same age group. It is difficult to see the response as one prompted by the absence of a welfare system or the need to keep track of them, as in Italy. Perhaps more significant, a greater proportion of those remanded do not receive a conviction, for want of sufficient evidence.

Young black offenders accounted for 6 per cent of youth offences in 2004/05, and received 11.6 per cent of all custodial sentences. Again this could be because of the kind of crimes they were involved in. The Select Committee found no direct evidence of discrimination as regards

sentencing to custody; other research has suggested that black boys may be no more likely to receive a custodial sentence for an equivalent offence than their white peers, but it will be for longer. They are nearly seven times more likely than whites to get custodial sentences of more than 12 months. Asian boys are more likely than their white peers to be sentenced to custody. Further, all minority ethnic groups had a slightly higher chance of being committed to the Crown court than white males – which increases the chances of a custodial sentence (*Young Black People and the Criminal Justice System 2006–7* [Second Report]; Youth Justice Board study (n.d.) reported by Select Committee; Feilzer and Hood, quoted in Morgan and Newburn).⁹

As of now, in Russia, this is not an issue, but it is one to be aware of as immigration increases and right-wing groups adopt racist positions. It suggests that using a criminal justice system for youth will not equally defend the rights of all the children: it may result in some of the most disadvantaged suffering worst of all. Prison becomes the place for those children society, and families, cannot cope with.

Yet, while institutions develop their own practices and cultural traditions, they can change. It is particularly interesting, in this respect, to compare the treatment of young offenders in the former West German and East German states after reunification. Here the assumption was that police, prosecutors and judges in East Germany, accustomed to operating in a more severe and repressive penal culture, would continue to act differently from their counterparts in the West. However the statistics show that diversion rates in the new federal states are as high, and in some cases higher, than in the western states. (This could, as Dunkel suggests, in part reflect a higher reporting rate for petty offences in the former East German states, offences that the prosecutors then dismiss.) A comparison of the rates of unconditional detention for robbery convictions by young people (in 1997) indicated a lower rate in the former East German courts; the behaviour of youth welfare departments in the new and old federal states as early as 1993 was remarkably similar in their use of alternative sanctions: mediation was least used, then care orders, followed by social training courses (but less used in the new federal states), and finally, in both cases, the measure far outweighing all the rest combined, community service (Dunkel 2003).

Any attempt to reform the justice system for young offenders in Russia should therefore look seriously at the attitudes and conventions of those

who operate the system. Some have made their appearance in previous chapters. The more punitive the attitudes of justice officials, the more important it is to divert children out of the justice system. Judges and procurators, in particular, will need to adopt a new way of thinking if the system is to move in a new direction, but the examples of both Finland and Germany suggest that this can happen.

In England and Wales, experience suggests, both police and judges respond to policy directions from above, yet bring their own views to bear on implementation. Their behaviour of the 1970s and 1980s compared with that of the recent past is witness to that. It would be naïve to discount evidence of racism, but there is no evidence that police and judges share a particularly punitive view of how best to respond to youth. There is no reason to suppose they would not adjust to new directives.

3. Using social welfare services, a probation service, voluntary or specialist organizations in place of a criminal justice system?

Without a good system of social welfare support, even a more enlightened criminal justice system is helpless – it cannot serve the interests of the child or the community. For there to be a real alternative to custody, there have to be agencies, individuals or institutions to take responsibility for the errant young person.

In Germany a probation service emerged after the Second World War, in different guises in different regions, but today, in many regions, it operates under the jurisdiction of the Higher Regional Court. Its officers are responsible for young people, both those serving suspended sentences, community service or released on parole, and they work closely with local government welfare departments. In Italy the juvenile court services should work together with social services departments to devise and supervise the programmes ordered by the magistrate. Their effectiveness varies from region to region and in poorer regions, where funding is very limited, social services' ability or willingness to provide certain programmes will influence the measures a magistrate can impose.¹⁰ Both magistrates and local authorities may turn to the church or political youth organizations to take charge of troublesome young people. Ciappi suggests that non-governmental organizations are important for providing post-release support, running community service programmes

and providing job assistance and training for those convicted to non-custodial sanctions.

In Finland, a voluntary association offering assistance to prisoners was reorganized in 2001 to form a Probation Service. It was brought, together with the Prison Service, under the Ministry of Justice as part of a new Criminal Sanctions Agency, and is now staffed by professionally trained probation officers. They are in charge of the supervision and enforcement of community sanctions or juvenile punishment, the supervision of conditionally sentenced young offenders and of parolees. Hence here a government agency, of professionally trained individuals, who work with the social welfare agencies, employers and voluntary, sometimes specialist organizations, is responsible for the majority of young offenders.

This draws our attention to the existence of different state–society relations. In Germany local government authorities have the resources and power to act with a great deal of autonomy. In Finland funding is more centralized, and a centralized Ministry (of Justice) plays a more important role. In Italy a centralized Ministry of Justice, controlling part of the funding, may be competing with local interests, whose patronage will decide the allocation of posts. In one society, religious, voluntary organizations and local private business may constitute an active community, as important as the local government (perhaps truest in Italy), in another they may be weak and the elected local government take far more responsibility for local ‘community’ affairs: ‘Germans’ unwillingness to pass responsibility to non-state organizations appears to reflect a continuing faith in the *Rechtsstaat*’ (Lacey and Zedner 1998: 12).

Social welfare may be well developed, and state-funded, as in Finland, and accompanied by a network of voluntary associations, or be subject to considerable regional variations (Italy). Of course, these relationships may change over time, but it is important that reform projects assess the present constellation that will influence the feasibility of reforms. This is not an argument for no change. As we have seen, governments make radical changes to their youth justice systems, with clear consequences. It is rather an argument for identifying those features in the present environment that offer opportunities for change, and, at the same time, recognizing where the problems are likely to arise. The new federal states in Germany may not have favoured social training courses simply because they had no one to implement them and few resources for them. In localities in Italy, where

welfare services are poorly developed, the judges' ability to order educational and support programmes is limited.

If criminal justice agencies are poor at treating children, welfare agencies may cater no better to the child's needs. We have no space to deal with this here but any system of compulsory secure residential care for children must be sparingly used and closely monitored. Germany has had its scandals over children's homes. In both Finland and Germany children may be placed in foster or residential care (open or closed) for shorter or longer periods. Finland operates an extensive network of foster care, residential homes and has six reformatories for 12–18-year-olds whom, it is reckoned, are in need of particular treatment and attention. When the figures for these placements (sometimes in secure institutions) are included in the statistics, the Finnish figures rise substantially.

The dividing line between the treatment of (and consequences for) young people being put under 'care' in a residential institution and sent to a 'young offender' institution may, in some cases, be wide, in others barely distinguishable. Those in a reformatory, a special school, a children's home will not appear in the prison statistics of that country, although their treatment may be little different from that experienced by their peers in their own or another country who are serving a sentence. The importance of independent monitoring and control either through non-governmental bodies or by independent although state-appointed commissions cannot be overstated.

Russia has a tradition of state welfare that could surely be drawn upon, but selectively, and with attention to today's dysfunctional features – too many institutions seeking to control social activities while remaining themselves immune from social control. The seeking of solutions in the detaining of more young children in state institutions is an example, while the reluctance on the part of authorities at central or local level to encourage or even tolerate activist social organizations is worrying. The very strong 'statist' tradition makes the need for social control even more imperative. At all stages (from attention by the police, to placement in a special school, to sentencing to custody and then release) the child, in any society, requires a defender or guardian.

England and Wales too has a tradition of state welfare but a more robust set of institutions, better-funded, and monitoring mechanisms, plus an active voluntary sector. The Inspector of Prisons issues hard-hitting reports. Prison visitors carry out inspections, without warning. The Youth Justice

Board issues reports. Here the question seems to be whether the government is interested in listening.

4. Alternative sanctions?

The recognition that criminal justice systems are not good at treating young people's behaviour has led law enforcement officials in Germany, Italy and Finland to try to ensure that only a minority of offenders actually face trial. Yet, while all seek to make diversion out of the criminal justice system the key tactic, they recognize that there will always be some who will be convicted as criminals and receive a sentence. Hence, at this stage, if one is serious that custody only be used as a measure of last resort, there must be realistic alternatives for the judge to use. The Germans approach this by giving the judge a wide variety of alternative sentences and favouring community service; the Italians have far fewer alternatives but resort to allowing long 'probationary periods' or suspended sentences; the Finns use fines, and suspended sentences, and have recently adopted community service as an option. In all three countries judges make wide use of suspended sentences, but accompanied by educational or training programmes.

The Finnish case would seem to offer most to Russian reformers but it shows only too clearly, as do the other two cases, that alternatives to detention must be buttressed by a comprehensive system of local/community support whether organized by local government, the ministry of justice (probation) or voluntary organizations. The role of local agencies – government welfare departments, probation services or voluntary organizations – is critically important both for young people serving sentences in the community and for those released, either on parole or unconditionally, from detention. It is difficult to overemphasize this. Again they play different roles in the three societies and interact differently, but are an integral part of the juvenile justice system. Yet here, and in England and Wales, the main lesson seems to be that what is needed is a government prepared to advance a new agenda, one that recognizes that a criminal justice system cannot and should not be called upon to repair the damage done by adult society to its children.