The rise of the principle of education in the German juvenile justice system

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Introduction

The issue of whether and how young offenders should be punished is not one of modern origin. Throughout history attempts have been made to create an appropriate system for responding to youth crime. At the one extreme is the justice model according to which the young are dealt with within the criminal justice framework containing the possibility of punishment. At the other is the welfare model where the young are removed from the criminal justice system and are ‘treated’ by welfare measures. The former approach is based on individual responsibility and choice and aims to ensure that any measures applied are based on the guilty commission of a criminal act. The latter approach tends to view the crime of the young as a sign of the need for intervention and responds to the causes of the criminal behaviour (for further discussion see for instance Freeman, 1983, pp. 81–86). Most juvenile justice systems are not found at either end of this spectrum but are often a mixture of both models. The German juvenile justice system is quite clearly based on the justice model, however, there are significant concessions to the welfare approach. The age level for entering the criminal justice system is quite high compared to common law jurisdictions. A child under fourteen is irrebuttably presumed criminally incapable and between fourteen and eighteen the young person must be proven to have criminal capacity according to a strict test. But, perhaps the most significant feature of the German juvenile justice system is that it is permeated by the principle of education.

This article aims to trace the historic development of the German system of juvenile justice. It will show how the concept of education became embedded as the principle underscoring the whole system and how the rise of this concept was fundamentally intertwined with the debate surrounding the age of, and tests for, criminal responsibility. This article will explore how the approach to young offenders migrated over time from merely setting an age under which certain more brutal forms of adult punishment would not be applied to the young, to the belief that only those capable of guilt should be punished, to the
desire to treat the young, even if found criminally responsible, in a totally different way to adults. It will be seen that as the conviction grew that the social circumstances in which the young lived were fuelling crime, the youth crime problem was increasingly addressed through the imposition of educational measures. This increasing acceptance of the role of education in combating crime led to conflicting opinions on the relationship of education to punishment. The reformers argued that education should be the only response to youth crime and therefore pushed for educational measures and a high age level of criminal responsibility to ensure that the young would be excluded from the criminal justice system. The aim was for young offenders to be dealt with side by side with the neglected in the emerging welfare system. Others saw the role of education as subsidiary to punishment. They viewed the increasing crime rates as evidence of the need to retain the possibility of punishing the young. Based on these findings this article will show that the system existing in Germany today is characterised by a compromise between these opposing views on the role of education and punishment.

The early period

In ancient Germanic times special provisions regarding the young are rarely found. The head of the family was held responsible for the wrongs committed by members of his household and generally the wealth of the family or father was at risk of forfeiture for wrongful acts. The exclusive right to punish the child resided in the head of the family, which could extend to killing the child if this was necessary for the father to fulfil his duty to ensure discipline and order in his household (Schwab, 1978, p. 718). This authority of the pater familias did not end when the child came of age, which was around puberty, but lasted until they made themselves independent (such as by marrying) and left the father’s household (Müller, 1954, p. 3).

In the Middle Ages the state began to take a more interventionary approach to family affairs with the aims of ensuring loyalty to the state and religious education. This entailed the state assuming the authority to punish for wrongful acts, leaving the father merely with the right to discipline the children (Schwab, 1978, pp. 720–721). As the state took over the role of punishment the principle was formed that below a certain age, around the age of reaching puberty, punishment should be milder than that which an adult would receive. There was no concept of subjecting the young offender to totally different methods of punishment, rather there was merely an exclusion on the more brutal forms of physical punishment. The Sachsenspiegel (1220–1235) and the Schwabenspiegel (1282) are examples of codes which determined that under the age of 12 (Sachsenspiegel II 65 I 1) and 14 (Schwabenspiegel Ldr. L 177) respectively, a child was not to be sentenced to death or maimed.