

The Youth Sanction – a Punishment in Disguise

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1 Introduction

In Denmark, the youth sanction came into being in great haste in 2001,¹ following an unusually accelerated committee procedure with an unusually precisely worded remit.² Since then, much has been said and written about it.³

Even though there has not yet been a large number of cases or the elapse of a long time, it appears that the youth sanction is here to stay.

All the authorities involved – and there are many – have to take account of the youth sanction in their daily routines and considerations. On the one hand this concerns in particular the children and young persons' departments and the care homes of the social services authorities and on the other hand it concerns the prosecution authorities and the courts. The prison service is less involved, but still involved to some degree. From time to time the youth sanction is referred to as the reincarnation of the old youth detention which was done away with in 1973 following widespread criticism.

In this paper section 2 starts with a short description of the aims and background to the youth sanction. In particular there is emphasis on those aspects that relate to treatment and/or punishment. The section also contains a short description of the scope of the youth sanction etc. In sections 3 and 4 there is a critical examination of the criminal law problems concerning the youth sanction in conjunction with Chapters 9 and 10 of the Criminal Code. The main emphasis is on taking account of time spent in remand custody, in the light of the principle of proportionality in criminal law and the inherent concern for treatment in the youth sanction, as well as how new and newly discovered criminality affects a sentence to youth sanction.⁴ Section 5 concludes with comments on help and punishment in relation to juvenile offenders.

2 The Aims, Background and Scope of the Youth Sanction

The youth sanction is included in Chapter 9 of the Criminal Code,⁵ which deals with legal consequences other than punishment.

In line with other measures in Chapter 9 of the Criminal Code, the youth sanction in § 74a must be 'appropriate' for the prevention of further offences,

1 L 469. 07.06.2001.

2 See e.g. Gorm Toftegaard Nielsen: *Sanktionerne* (2005), p. 59.

3 See e.g. a long and thorough review of the background and the initial cases by Jørn Vestergaard; *Den særlige ungdomssanktion* in *Tidsskrift for Kriminalret* 1/2003, as well as a number of reports of the Research and Documentation Division of the Ministry of Justice (www.jm.dk).

4 The choice of topic is not a matter of chance, but is directly prompted by one of the many recent discussions at the Afdelingen for Proces- og Kriminalret (the Department for Criminal Law and Procedure) at Aarhus University, on the initiative of Gorm Toftegaard Nielsen.

5 Unless otherwise indicated, a reference to an act or a provision in an act is to Straffeloven (the Criminal Code), lbk No 1000 of 5 October 2006.

and the means is a structured and controlled social pedagogic treatment for two years. According to § 74a(2), the overall time spent in an institution is one and a half years, with a maximum of 12 months spent in a secure residential institution (phase 1). After the stay in a secure institution there follows a stay in a more open institution (phase 2), and finally there is a period spent outside an institution, but with support from the social services. In the pre-legislative documentation to L 469/2001⁶ and in RM 4/2007,⁷ it is assumed that the courts will always decide the length of stay in each type of institution and that ‘in general’ 2 months will be spent in a secure institution and 12 months in an open institution. However, it is not directly stated in the law that the courts should determine these lengths of stay, but this is indirectly indicated in § 74a(2), as the juvenile offender concerned is given the right to a judicial review of an administrative extension of a stay ‘beyond the period provided for in the judgment’.

The level of criminality which will lead to the imposition of a youth sanction is the commission of a serious offence endangering persons, or some other serious offence, such as assault, robbery or rape, or a serious case of theft, embezzlement or vandalism. In general it is assumed that, if a court were not to choose a youth sanction, it would have imposed a jail sentence of between 30 days and about 1 year, or even up to 18 months.

In order to be considered for the youth sanction, the offender must be above the age for criminal responsibility but not yet 18 at the time of the offence.⁸

In addition to the requirements as to the seriousness and extent of the offence, it is assumed that the juvenile offender’s social profile will show clear problems of social maladjustment, and inappropriate or abnormal forms of reaction, including criminal behaviour of a particularly violent nature.

It is for the social services to take the initiative to propose the appropriateness of a youth sanction. A proposal is often made on the basis of the authority’s own examination of the juvenile offender, but it can also be based on a personal examination⁹ carried out by the probation service (*Kriminalforsorgen i Frihed*). In RM 4/2007¹⁰ the requirement for appropriateness is expressed as a requirement that the juvenile offender should ‘not be found unsuitable for treatment’. On the basis of the normal understanding of language it must be assumed that more cases will fall within such a defensively expressed target group than a more offensively expressed requirement for appropriateness. Moreover, in the same text it is stated that ‘only wholly exceptionally will a juvenile offender who matches the “social profile” be found unsuitable for treatment’.¹¹

6 FT 2000/01 A, 6495.

7 Notice from the Director of Public Prosecutions to the country’s prosecution authorities.

8 There have been a few cases where judgment has been given after the offender had reached 18. There were three such cases in 2005; see *Danmarks Statistik: Kriminalitet 2005*.

9 In accordance with § 808 of the Administration of Justice Act.

10 RM 4/2007, section 4.5, of 12 June 2007, which replaced RM 2/2004.

11 This wording is the same in the Notices both from 2004 and from 2007.

As stated in the introduction, the imposition of a youth sanction assumes the involvement of and coordination between different authorities. The system involves elements both of the prison system and the social system. Even though it may seem paradoxical that a measure under Chapter 9 of the Criminal Code is strictly bound by Chapter 10, which deals with the quantum of punishment, this is nevertheless the case.

This connection leads to a number of complications and contradictions. There follows a review of some of the general criminal law characteristics of the youth sanction. This is followed by a description of characteristics which point towards the social law aspects of the youth sanction.

Those aspects which most reflect a criminal law approach are that:

- A youth sanction can be combined with the same conditions as apply to a conditional prison sentence (see § 57 of the Criminal Code).
- The consequences of breaching conditions are set out in § 60 and imply the possibility of further legal action.
- The commission of new criminal offences during the period of a youth sanction can lead to an extension of the overall length of the youth sanction as well as a referral back to an institution and an extension of the time spent in an institution.
- Neither the guilty party nor the parents can consent to, or otherwise be consulted on the form of treatment or choice of institution. The ‘client’ can neither change nor opt out of the treatment.
- The youth sanction is imposed in response to a criminal offence and cannot be used in other contexts.
- The duration of the element of confinement is laid down by the court (possibly in the form of a guideline).
- Any exceeding of the guideline can be referred to the court by the juvenile offender.
- § 124 of the Criminal Code, which concerns the crime of escaping from prison, also applies to absconding from youth sanction according to paragraph 5 of the article. But according to the same paragraph the provision does not deal with others sentenced to treatment¹² under Chapter 9.¹³

12 See Jørgen Jochimsen, Tfk 2002.139.

13 The criminalisation of absconding from detention under § 124 of the Criminal Code concerns those placed under preventive detention and those sentenced to youth sanction (both under Chapter 9), but not those sentenced to be given treatment (people suffering from mental or psychiatric illness etc.), where the legal response is also regulated in Chapter 9.

Those aspects which most reflect the treatment approach are that:

- The main element of the youth sanction is structured and controlled social pedagogic *treatment*. The period of treatment imposed is longer than the punishment which would have been imposed.
- § 80 of the Criminal Code, on regard for the uniformity of sentencing, does not apply to the youth sanction.
- The 2 years for which the youth sanction lasts is divided, according to individual need, between a stay in an institution and supported living in the community.
- The social services authorities often decide the length of stay in an institution (within the guidelines of the sentence), and they can also send the juvenile offender back to a secure institution if this is considered appropriate.
- If sending the juvenile offender back to an institution is referred to the courts, this does not have suspensive effect.
- If a juvenile offender of between 15 and 17 years of age has committed a criminal offence together with a person of 18 years of age, and they are liable to punishment of equal duration, the younger may well be sentenced to youth sanction while the older is jailed which a) can in all circumstances be shorter than the youth sanction, b) will be reduced by the amount of time spent in remand custody, and c) if the sentence is for 3 months or more, it is highly probable that early release on licence will be allowed after 2/3rds of the sentence has been served.

It is not in line with the principles of criminal law on proportionality or the idea that a sentence or treatment should ‘fit the crime’ that:

- The youth sanction is always for 2 years, uninterrupted. This cannot be adjusted either with regard to the treatment needs of the individual or in relation to the offence.

In 2002, which was the first full year of the youth sanction, it was imposed 60 times. Since then its use has increased considerably. In 2005 and 2006 the number of cases where it was imposed was 102 and 114 respectively, and in 2007 youth sanctions were imposed 107 times.¹⁴

To start with the age distribution of those receiving the youth sanction was evenly spread. Subsequently the weighting has been more towards the younger end. In 2005 nearly half receiving the youth sanction were 16, and in 2006 nearly half were 15.

14 “www.justitsministeriet.dk/fileadmin/downloads/Forskning_og_dokumentation/Redegoerelse_november_2008.pdf”.

The total number of serious sanctions¹⁵ imposed on juvenile offenders increased from 2002 (276) to 2006 (455). However, from 2005 to 2006 and 2007 there has been a fall of all kinds of convictions, due to a large extent to the organisational problems in implementing the new police structure.¹⁶

In 2006, 75 % of those sentenced to youth sanction had been remanded in custody (pre-trial prison). The same applied to about half of those in the same age group who were sentenced to imprisonment. Of all those aged 15, 16 or 17 remanded in 2006, 22 % had been exclusively remanded in custody, while about 45 % had been both remanded in custody and some alternative. The proportion of those who were exclusively remanded in custody was higher for 17 year olds than for 15 year olds.

The average time which juvenile offender convicted of a crime spent in custody increased from 2005 (72 days for those ended up in youth sanction, and 57 days for those who were sentenced to in unconditional imprisonment) to 2006 (76 days for those who were sentenced to youth sanction, and 59 days for those sentenced to unconditional imprisonment). According to the annual statistical report of the Prison and Probation Service,¹⁷ the average number of juvenile offenders aged 15-17 in jail or in detention in 2005 was 20.¹⁸ This was equally divided between jail and detention/remand in custody.

In 74 % of the sentences for youth sanctions (2006) the period in a secure institution was required to be for ‘up to 1 month’ or (in the great majority of cases) ‘up to 2 months’.

A review of 147 sentences for youth sanctions which could be traced over 2 years shows that 120 (82 %) of the juvenile offenders committed new offences within 2 years after the start of the youth sanction. In 28 cases the youth sanction was terminated in connection with punishment for the new offence. It is emphasised in the review that it is not possible to say anything about the effectiveness of the sanction purely on the basis of the review.¹⁹

15 Youth sanctions and unconditional jail sentences together.

16 “www.justitsministeriet.dk/fileadmin/downloads/Forskning_og_dokumentation/Redegoerelse_november_2008.pdf”.

17 Kriminalforsorgen: *Statistik*, 2005, p. 24.

18 This was the longest period of detention for juvenile offenders in 1998-2005. The shortest was 11 (of which 4 were without sentence) in 2001.

19 Statistics Denmark: *Reported criminal offences, 2002 and 2005*. See also the reports of the Research and Documentation Division of the Ministry of Justice: November 2006, *Ungdomssanktionens forløb*; and June 2007, *Redegørelse om ungdomssanktioner og ubetingede fængselsstraffe til unge lovovertrædere, 1. januar 2006 til december 2006*.

3 Time Spent on Remand in Custody – Regard for Equality vs. Regard for Treatment

With an unconditional sentence for imprisonment,²⁰ the length of the sentence is reduced by the amount of time the juvenile offender has spent in custody prior to sentencing in the case.²¹ This applies according to § 86 of the Criminal Code, and it applies regardless of whether there has been detention, remand custody or referral for a mental examination, and regardless of the length of the prison sentence.

When young people between 15 and 18 are remanded, they should normally be given an alternative to remand in custody.²² In principle this will be in a secure residential institution. Occasionally an open institution can be used as an alternative to remand in custody. Putting young offenders on remand in custody is not desirable, but it is not explicitly excluded.²³

Provided that the juvenile offender's social profile and the nature of the offence²⁴ are in line with the conditions for the youth sanction, with regard to the punishment tariff²⁵ there are two main reasons why a juvenile offender between 15 and 17 is not sentenced to a youth sanction are: 1) the offence is not serious enough (liable to imprisonment for less than 30 days or a milder punishment than imprisonment), or 2) the offence is so serious that the tariff is too long. In both cases this can result in an unconditional prison sentence.

If a young offender between 15 and 17 is sentenced to imprisonment, an attempt is made to ensure that the sentence is served in an appropriate institution; see *Straffuldbyrdelsesloven* (the Law on the serving of sentences) § 78.²⁶ This can be a secure residential institution, for example the same institution where the young offender has spent time as an alternative to remand custody. The period in a secure institution is equivalent to the length of the prison sentence but it must be reduced by the amount of time spent in remand custody.

According to the pre-legislative documentation to L 469/2001 as well as the structure and wording of the Criminal Code, this reduction of sentence does not apply to a youth sanction. The case reported at U 2003.2655 Ø, which concerns

20 444 offenders aged 15-17 were sentenced to such imprisonment in 2005; see Statistics Denmark: *Reported criminal offences*, 2005, Table 3.02A.

21 Remission for remand custody is at the rate of 1:1. If the offender has been in solitary confinement, the sentence is further reduced by 1 day for every 3 days spent in solitary confinement.

22 *Retsplejeloven* (the Law on the Administration of justice) § 765, and RM 4/2007, paragraph 3.3.2.

23 See above on the extent of this.

24 See the case reported at U 2004.1438 Ø, where the High Court changed the sentence to youth sanction to a partial conditional sentence of imprisonment, in which 3 of the 4 months were made conditional as the Court did not find that the offence committed fell within the scope of § 74a.

25 Provided that the requirements as to the social profile are met.

26 Each time there is a reference to § 78, the reference is to the Law on the serving of sentences.

the extension of a youth sanction, clearly states that: ‘§ 86 of the Criminal Code, which only concerns reductions in prison sentences, does not apply in these cases’.

The Annotated Criminal Code also confirms that time spent in remand custody does not reduce neither the overall period, nor the time which a juvenile offender must spend in a secure institution.²⁷ And RM 4/2007 states: ‘The time which a juvenile offender may have spent in remand custody before or after sentencing in the case that has resulted in a youth sanction, is not be deducted when calculating the periods under § 74a(2) of the Criminal Code. This must also be assumed if a juvenile offender is given an alternative to remand in custody, and in this connection is placed in the same secure institution as they subsequently spend time at as part of serving the first phase of the youth sanction’.²⁸

It should thus be beyond doubt that there is no reduction of the youth sanction or of phase 1 because of any time spent in remand custody. This seems logical as long as it is maintained that the key characteristic of the youth sanction is treatment and not punishment. And this is even more the case if the remand period is spent in detention.

If the remand period is not spent in detention (which is the aim with juvenile offenders), but in an institution of exactly the same kind as that to which the young person is transferred after sentencing (perhaps even the same institution), the approach is less convincing and the failure to reduce the sentence is more difficult to justify. This seems, at least, to be the reasoning behind the acknowledgement of the Director of Public Prosecutions elsewhere in RM 4/2007: ‘If the juvenile offender has been placed in a secure institution as an alternative to remand custody, and a pedagogic examination is carried out which shows that the young offender does not need to be in a secure institution, there is nothing to prevent the social services authorities recommending that the youth sanction should begin at an ordinary residential institution/residence.’²⁹ In this connection, if the juvenile offender has been in an alternative to remand in custody, the prosecution authority is open to flexibility with regard to the time to be spent in a secure institution. Finally, the Director of Public Prosecutions allows for the possibility that ‘in wholly exceptional cases’, ‘especially ... if the juvenile offender in the case has been placed in a secure institution as an alternative to remand custody, where the necessary pedagogic examination is carried out’, ‘in consultation with the social services authorities, the prosecution authority can refrain from requesting a period of residence in a secure institution’.

27 *Kommenteret Straffelov (Annotated Criminal Code) Vol. 1, 8th revised ed. p. 346.* ‘The period spent in a residential institution (or approved residence) is 18 months, of which a maximum of 12 months is spent in a secure institution. This does not include any time spent in a secure institution as an alternative to remand custody, nor can a reduction be made for periods spent in remand custody’.

28 RM 4/2007, paragraph 4.5, p. 5.

29 The same wording is used in RM 2/2004 and RM 4/2007.

An example of such an ‘exceptional case’ is that referred to in RM and reported at U 2002.1303 V, which concerned a 16 year old girl who was found guilty under §§ 244 (assault) and 245 (serious assault). The District Court sentenced the girl to a period in a secure institution for up to 2 months. The decision was appealed against by the girl. Between the hearing of the case in the District Court and in the High Court, the girl had been in the secure institution for 4 months and when the case came before the High Court she had moved on to an open institution. In the meantime a psychological report had been obtained which said that the girl would be best served by spending time in an open environment. The social services authority agreed with this. The prosecution authority argued that the original decision should be upheld, but with an amendment to the effect that there should not be a period in a secure institution. The High Court overturned the District Court’s ruling concerning the period in the secure institution.

In the case reported at U 2007.1412 V the High Court also overturned the decision of the District Court concerning the inclusion of a period in a secure institution. In addition to the unanimous witness statements, the High Court reasoned that ‘the accused had been in an alternative remand custody in the period from 22 June 2006 to 31 August 2006’. The remand custody was prior to and immediately leading up to the verdict of the District Court. The decision was appealed against by the accused, with a claim for ordinary punishment. The prosecution authorities argued that the decision should stand.

According to the Director of Public Prosecutions and the practice followed, a period in a secure institution can be omitted from the obligatory phase 1 of a youth sanction if there has already been a period in a secure institution in connection with the case and if the social-pedagogue/psychologist experts advise against (do not recommend) a further period in a secure institution.

This does not constitute a shortening of the sentence in criminal law terms, but a change based on the treatment needs.

In the case reported at U 2007.1465 Ø, the requirement concerning a secure institution was dropped entirely:

The social services authorities recommended a 15 year old robber for a youth sanction. The young offender had been detained from 5 to 10 October 2006. It is not clear from the case where he had been detained, nor is it stated whether a pedagogic examination was carried out.³⁰

The social services authority recommended that the offender should be placed immediately in the institution where phase 2 should be spent and where, at the time of the judgment, he had already been sent or was just about to be sent.³¹ But, among other things, the District Court stated: ‘*Given the nature of the crime*, the Court decides that, regardless of the statement of the social services authorities, T must be placed in a secure section of a residential

30 On the basis of the High Court’s decision (see further on) it is reasonable to assume that the young person spent 5 days in detention. However, it is not impossible that he was in the institution at Godhavn, which is not a secure institution.

31 The judgment of the District Court was given on 6 November 2006, and it appears that the social services authorities decided to place the young offender in the institution ‘in November’.

institution for children and young people for up to 2 months'. The decision was appealed by T, claiming mitigation of the sentence by repealing the provision on spending up to 2 months in a secure section. The prosecution argued that the sentence should stand. The appeal had suspensive effect as in the intervening period the young offender had spent about 3 months at the social services authority's recommended non-secure institution. In the appeal, the High Court stated: 'The High Court is of the view that, *given the circumstances* at the time when the case was before the District Court, it was right to impose conditions placing the offender in a secure institution for up to 2 months. At this stage, *without being placed in a secure institution*, T has spent about 3 months at the institution at Godhavn. According to the statement submitted to the High Court, overriding pedagogic considerations indicate that T should not now be placed in a secure institution elsewhere. The High Court therefore repeals the ruling on this.' (Author's italics)

The most surprising aspect of the District Court's decision reported at U 2007.1465 Ø is that regard for proportionality and the aims of penal policy are explicitly expressed in the reasons for requiring a stay in a secure institution. This reasoning is indirectly supported by the High Court, which only refers to the circumstances prevailing at the time of the decision of the District Court, even though the only 'circumstance' stated by the District Court was the 'nature of the crime'.

However, the High Court decided to overrule the judgment on this point, and to repeal the order for a placement in a secure institution, even though such a placement had not taken place. From a criminal law angle this can be criticised as being both contrary to the principle of uniformity of sentencing, and not least because the pre-legislative documentation and other literature clearly require there to be a stay in a secure institution. However, the High Court emphasised the fact that the young offender had been shown to be making good progress without a stay in a secure institution, and an interruption of the progress was assessed by the experts as being risky. The High Court allowed individual considerations to prevail. From a treatment-based point of view, and if the youth sanction is to be considered as a measure which must be appropriate, it is difficult to criticise the High Court's decision.

4 The Youth Sanction and new Offences

New offences can be relevant to serving a youth sanction in 2 ways. There can be a situation where a person who is serving a youth sanction commits a new offence. This situation is provided for in the provision on the youth sanction in the Criminal Code and is also referred to in RM 4/2007. On the other hand, provision is not made for the second possibility that while a youth sanction is being served new evidence comes to light that the offender committed an offence *before* the youth sanction was imposed. The relevance of this situation naturally depends on the criminal liability for the offence not having expired.

4.1 *Offences Committed while Serving a Youth Sanction*

If a person who is in the process of serving a youth sanction commits a new offence and is brought before a court before the 2 year period of the youth sanction ends, the court can *either* impose a new punishment for the new offence, or extend any of the youth sanction's three phases by up to 6 months.³²³³

There is something to suggest that the Director of Public Prosecutions³⁴ wants increased attention to be paid to this possibility, as the only change in relation to the corresponding section of the previous RM³⁵ is a supplementary comment as follows: 'In cases where a young offender who is serving a youth sanction commits a new offence, the prosecution authorities should as far as possible be aware that an extension of the existing youth sanction can be more motivating for the development of the young offender than the imposition of punishment for the new offence'. However, it is not stated what scale of offence or what level of punishment there must be in order to trigger this possibility. In two published reports concerning the extension of a sanction³⁶ one concerned a breach of §§ 245 and 124 as well as of the Law on weapons, and in the other case the offender was convicted for breach of § 285, cf. § 276 (breaking and entering with theft of over DKK 200,000), § 293a and road traffic offences. In both cases the offences involved breaches of several provisions and in both cases the youth sanction was extended by 6 months (the provision says 'up to 6 months'). Neither of the cases indicated the quantum of the punishment which could have been imposed if the extension of the youth sanction had not been applied.

On the relationship between the subsequent sanction/punishment and the existing youth sanction, RM 4/2007 also stated that if a fine is payable, this is to be paid and the youth sanction should be continued, possibly adjusted to take account of the conduct which has led to the imposition of the fine. If a case is concluded by the withdrawal of charges, the youth sanction is also to be continued, but in this case it is considered natural to adjust the process of the sanction, possibly making use of the possibility allowing for the referral of the offender back to a less open regime.

The Director of Public Prosecutions also seems to suggest that the youth sanction should be continued if the offence is punished by unconditional imprisonment for less than 1 year. 'It is then up to the executing authorities to decide how the punishment is to be served'. The reference to the executing authorities suggests that an assessment should be made of whether an alternative form of imprisonment under § 78, of the Law on the serving of sentences may be

32 RM 4/2007, paragraph 4.5.6.

33 § 74a(2) of the Criminal Code states: 'If a person who is subject to a measure in accordance with paragraph 1 commits a new offence, instead of imposing a punishment, the court can prolong the measure, including the longest periods under paragraph 2, by up to 6 months'.

34 And possibly the Ministry of Justice, as it is stated in the introduction to RM 4/2007 that this can be instituted in a dialogue with the Ministry.

35 RM 2/2004.

36 U 2003.2655 Ø and TfK 2006.588 Ø.

relevant.³⁷ In practice, a sentence for unconditional imprisonment would probably involve an administrative decision to refer back to the secure institution for the rest of the period of the youth sanction, after which the offender would go directly over to serving a prison sentence under § 78, i.e. in the same institution. If the offender is released on parole after serving the sentence, this would be under the supervision of the probation service, and with the usual social support to follow a non-criminal way of life. If the offender is not released on parole, there is no scope for supervision by the probation service, and if the offender is over 18, support from local government services for children and young persons will not be applicable.

The Director of Public Prosecutions writes that, with an unconditional jail sentence for about 1 year or more, any unserved part of a youth sanction should normally lapse in accordance with § 89a(2). The same applies in cases where, with shorter sentences for new offences, the young person is regarded as being beyond the scope of treatment ‘in particular if the sentence for the new offence is passed at a time when the majority of the youth sanction has already been served.’³⁸ The concluding remark can be read in two ways. It can either be understood as meaning that there really must be certainty that treatment has had a proper chance, or expressing the idea that the offender would get off too lightly if, shortly after being sentenced to a 2 year sanction, the offender can get it replaced by a shorter sentence by committing a new offence.

It is not made clear what should happen in the (not entirely rare) cases³⁹ where a young offender is subject to a conditional sentence. Moreover, it does not seem to have been considered that the young offender will become older in the course of serving the 2 year youth sanction and may thus have ‘grown out of’ the institutions used for it.

If one looks at the requirements for the seriousness of the offence and the punishment tariff for it which is necessary for a youth sanction sentence in the first instance, and compare it with the guidelines of the Director of Public Prosecutions, it is not obvious that a fine or a withdrawal of charges in connection with a new offence should, in principle, trigger an extension of the youth sanction.⁴⁰

It must be assumed that the punishment tariff must be either conditional or unconditional imprisonment in order for an extension in accordance with § 74a(2) to be considered. But it is not suggested that the courts should otherwise be more precise about the length of the prison sentence. This applies both to the choice of the youth sanction in the first instance and to an extension of a youth sanction.

37 *Kommenteret Straffelov (Annotated Criminal Code) Vol. 1, 8th revised ed. p. 346.*

38 In general, the Notice of the Director of Public Prosecutions seems to be in line with the aims behind the inclusion of youth sanction in the Criminal Code.

39 A total of 1,488 conditional prison sentences were passed on 15, 16 and 17 year-olds in 2005. It is not known whether any of these involved anyone who was in the process of serving a youth sanction.

40 Nor can the withdrawal of charges be categorised as punishment under the structure of the Criminal Code.

4.2 *New Evidence of an Offence Committed before a Youth Sanction is Imposed*

The situation where a new offence is committed and comes before the courts while a youth sanction is being served has been foreseen and to some extent been provided for. The situation is different when, while a youth sanction is being served, evidence comes to light of an offence committed by the young offender before being sentenced to the youth sanction.

There is nothing to prevent a youth sanction being imposed even if the young offender has committed several offences. In addition to the social criteria, the condition is that there should be a serious offence endangering persons or some other serious offence, or a serious case of theft etc., and that the punishment due should be unconditional imprisonment for between 30 days and 1 year, or perhaps up to 18 months.

If the youth sanction were considered as punishment, the situation would be regulated by § 89 of the Criminal Code, which deals with supplementary punishment for newly discovered offences. In this case supplementary punishment that took account of the principle of the quantum of punishment which moderates cumulative punishment would be applicable, and used to calculate the overall sentencing of the offender.

If a person who is sentenced to a youth sanction is, at the same time, sentenced to punishment, the court can decide, under § 88(4), that the punishment shall not apply, so that the youth sanction can apply, which is probably the most appropriate. But if the circumstances which lead to the imposition of punishment first come to the attention of the court after a sentence for youth sanction has been imposed, this rule does not apply.

§ 89a(2) deals with the situation described above where, among other things, an offender serving a youth sanction commits a (serious) new crime, which indicates that the sanction is not leading the offender in the right direction. Revoking the youth sanction and imposing a prison sentence can be a necessary consequence. However, it makes no sense to consider this provision in connection with offences committed prior to the beginning of the youth sanction.⁴¹

If the newly discovered circumstances only call for a fine of a moderate amount, the problem is mainly one of principle but not very great in practice. But it would be undeniably awkward to allow the offenders to complete their youth sanction and then require them to serve a prison sentence. The idea is that after completing a youth sanction a person should be better equipped to stand on their own feet. To serve a prison sentence immediately after a youth sanction would be directly counter-productive. Even if the sentence could be served under the § 78 regime,⁴² it would not be optimal to refer someone back to an institution after they had been prepared for independent living by the third phase of the youth sanction.

41 See also the pre-legislative documentation to Law FT 2000/01 A, 6506: ‘... in cases where the offender is sentenced to normal punishment for the commission of a new offence ...’

42 Which is an administrative decision and not a decision of the court. See *Straffuldbyrdseloven* (the Law on the serving of sentences).

There is no authority for interrupting the youth sanction with a view to serving a prison sentence and then going back to the youth sanction. The youth sanction runs uninterrupted for 2 years, unless extended in accordance with § 74a(2), third sentence.⁴³ And as seen above, the possibility of an extension is not applicable, as it expressly refers to offences committed during the period of the youth sanction.

There then arises the question of the quantum of punishment for the newly discovered offence. Should this take account of the principle of the moderation of cumulative punishment, or should the offence be judged on its own? Can the court apply the principle in § 89, or should § 89 be interpreted differently since the youth sanction is not a punishment, but a rehabilitation measure?

In short, it very much appears that this situation has simply not been thought about when bringing the youth sanction into existence. It is probable that the problem has arisen in practice, but the author has no information about how such cases have been dealt with.

In the view of the author, it would be most natural for the principle of the moderation of cumulative punishment to apply, so that sentence should be passed as if the offences had been dealt with together. Since the youth sanction is applicable where the punishment tariff is from 30 days to 1 year (or even 18 months), it is not unlikely that there will be scope for supplementary punishment, so the newly discovered offence will not have an independent effect. If the newly discovered offence is so serious that the punishment tariff for it does not fall within the scope of a youth sanction, the situation ought nevertheless to be treated as if the offences were dealt with together, so the court will have the possibility of remitting punishment under § 88(4).

There are at least two important reasons why it is inappropriate to impose a new punishment, to be served in extension of the youth sanction. First, it is in the interests of clients that the two years invested in straightening out their lives should have the chance of having effect, without stumbling over further obstacles. Even if there is not an expectation of proportionality, the disproportionality is clear from the client's point of view; first, an offence for which the tariff is e.g. 6 months imprisonment is converted to 2 years youth sanction, and when that is finished, it is followed by imprisonment for an offence which could have been cleared up before the sentence for youth sanction, and therefore rolled up in it. The offender thus suffers for being sentenced before the investigations against them are complete. Second, it is a waste of society's resources to provide expensive treatment and then to impose an expensive stay in jail which makes it more difficult for the treatment to have its intended effect.

5 Does Reincarnation Always Result in Greater Perfection?

As stated in the introduction, the youth sanction has been referred to as the reincarnation of the old youth detention. However, youth detention was subject

⁴³ See RM 4/2007, paragraph 4.5.3.

to much justified criticism, not least for its indeterminate length and thus the associated lack of proportionality to the crime committed. Youth detention was governed by §§ 41-43 of the Criminal Code of 1930. Youth detention could be applicable to offenders from 15 to 21 years old (and in special cases 23), when appropriate. Under normal circumstances prisoners could be released after at least 1 year and at most 3 years in youth detention. Decisions on release were taken by the Prisons Board on the recommendation of the board of the institution. Thus, the length of the sentence was not laid down by the court.

In the case of man-made reincarnation it is to be expected that on the one hand, previously acknowledged problems should be avoided, and on the other hand, attempts should be made to avoid creating new problems. If this is achieved, there is nothing inherently wrong with reincarnation.

With a fixed limit of 2 years, the youth sanction cannot be characterised as being for an indeterminate time. However, first it is long in relation to the punishment it replaces, and second the elements involving loss of liberty⁴⁴ are to a large extent left to administrative authorities.

Moreover, time spent in remand custody prior to sentencing does not *in principle* shorten the period of the youth sanction, not even the phase involving loss of liberty.

In the context of treatment, a ‘decompression’ stage, with restricted freedom, is not unusual. This restriction on freedom is not regarded as being some confrontation between the citizen and the state, as its whole purpose is to help the citizen get a better life. From the view of criminal law, loss of liberty is a punishment which is only imposed on the basis of guilt. If a period of loss of liberty is ‘taken in advance’ by the state, it must obviously be ‘repaid’ by setting it off against the period of imprisonment served. To the extent that the youth sanction constitutes a form of treatment, and is not punishment, it is not surprising that the period spent in remand custody should not shorten the period of the youth sanction.

However, the overall concept surrounding the youth sanction is opaque. The youth sanction presupposes guilt –as a sentence to imprisonment does. It constitutes an alternative to imprisonment which is in all cases longer than the alternative prison sentence. Also, a period in remand custody is added to the total time. However, the most restrictive phase of the youth sanction can be shortened to some extent if the offender is lucky enough to be held for remand custody in an institution where the treatment can be prepared or begun. No-one decides for themselves *how long or where* they are held in remand custody, but those who are held in a secure institution can perhaps omit or shorten phase 1. There are doubtless good professional reasons for this, but the time which is otherwise so generously provided will suffer yet another loss with regard to certainty. Young offenders serving a youth sanction are not only subject to a significantly longer sentence than those who are imprisoned, they are also subject to unequal terms which are not at all justified by the circumstances or situation.

44 A stay in a secure institution involves at least as much loss of liberty as a stay in a closed prison. A stay in a non-secure institution also involves loss of liberty, though less severe.

Some may take the view that time is not a key factor in relation to the youth sanction because, as distinct from youth detention, it is included in the chapter of the Criminal Code which deals with legal consequences other than punishment. This concerns appropriate help rather than punishment! But this view is not tenable. The penal characteristics of the youth sanction are too dominant. First and foremost it is self-contradictory to pre-determine the duration (not just the longest period). In no other form of treatment is it possible to say beforehand precisely how long it will take. Furthermore, the sanction bears the characteristics of punishment on several other points, including: 1) the commission of a criminal offence is a prerequisite for being considered for it; 2) it is not possible to opt out of it or exchange it; 3) just like other prisoners, a 'client' can be punished for escaping from it; and 4) further offences can lead to more youth sanction.

The youth sanction can best be described as a punishment dressed up as treatment. The attempt to strike a balance between punishment and treatment appears to be as challenging as trying to walk a tightrope blindfolded. It would have been wiser, and more valuable for society, if one had offered the right help and support, including the necessary institutional regimes, to all who need them, without them having to qualify by committing an offence. Next, without exception, all punishments should be subject to the central and most essential principles of punishment, such as the uniform application of the law, certainty with regard to duration and proportionality between the offence and the punishment.

Much has been said about the youth sanction – but not enough! Its predecessor, youth detention, was done away with because of its faults and failings. It might have been expected that its reincarnation would be misshapen.