

Forms of De Facto Decriminalization: Diversion and Defense

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1 Introduction

The previous discussion for and against diversion has paid hardly any attention to the role that the defense takes or should take in diversion procedures (Deichsel, 1987: 163; Hansen-Siedler, 1990: 40). As far as positions are available, these cover the broadest possible spectrum of conceivable opinions: Defense is characterized as the "upholder" of diversion (Zieger, 1986: 132) or as the "agent of diversion par excellence" (Deichsel, 1987: 163; Hansen-Siedler, 1990: 41). Against this background, Juvenile Justice Act commentaries or conference papers also assign defense concrete tasks within the context of diversion programs, namely, that they should take the "initiative themselves in the sense of diversion through dismissal or withdrawal of charges" (Ostendorf, 1991, Section 68, marginal number 5; Eisenberg, 1991a, Section 56, marginal number 12), or that they should work together with the public prosecutor by pulling "pedagogical strings" within diversion proceedings (Breymann, 1987: 113-114). In contrast, it has also been questioned whether defense attorneys, by the nature of their profession, do not belong to the "group who criticize diversion on constitutional grounds" (Hansen-Siedler, 1990: 45). The available definitions of the position of defense in relation to diversion could not be more contradictory.

This article investigates whether there are common points of reference between defense and diversion and where the differences, if any, lie. The perspective requires the inclusion of a superior aspect - that of decriminalization - as a focus of attention.

2 The Common Point of Reference: Decriminalization

Diversion is understood here as refraining from further prosecution after the official determination of a penal norm violation (Kaiser, 1985: 72). Despite strong controversy within science and jurisprudence on the legal position and task of the defense (Beulke, 1980; Eisenberg, 1991b: 1257), it should be unproblematic to summarize defense in criminal proceedings as follows: The defense attorney's task,

as the professional support of the accused, is to express everything that is in the interests of the accused and is appropriate to exonerate him or her; or - as Alsberg (1930: 11, translated) succinctly formulated it - "to prevent the high-minded, rash reaching for the truth". In this context, the term defense is not understood in terms of the broader concept of substantive defense. This would mean the "assertion of that which can serve to ascertain the innocence or reduced guilt of the accused, be it through this person him or herself, through the judge, or even through the public prosecutor" (Schott, 1886: 1, translated). In the present context, defense is understood in terms of formal defense, that is, as the "legally regulated (formal) protection of the interests of an accused by a person who is particularly assigned this task" (Schott, 1886: 2, translated). When defense is discussed in the following, I do not mean the broad content of the term in the sense of substantive defense but the legal institution of defense or the practice of substantive defense by the formal defender.

Even this short glance at defense and diversion should suffice to show that both have a common point of reference in their interest in decriminalization. Here, decriminalization is understood as everything that avoids punishment, that fends off the intervention of penal law on the level of the characteristics constituting the criminal act or the sanctions (for a more precise definition, see Naucke, 1984: 199). In this context, both diversion and defense aim toward avoiding punishment *de facto* or at least minimizing it. In this sense, diversion and defense represent various ways of striving toward *de facto* decriminalization (Kaiser, 1989: 174) that, despite different historical,¹ disciplinary,² and normative origins, can be linked together by the common bond of the idea of decriminalization. The following investigates these two forms of possible decriminalization more closely.

3 A Contrast of Forms of Decriminalization

Although the common reference point - the goal - of diversion and defense is identical, that is, decriminalization, there are major differences in the paths toward it. The means and methods adopted by diversion and defense to achieve decriminalization could not be further apart.

3.1 *Deformalization: Formal Guarantees*

Diversion means withdrawal from a formal penal social control - with not only its rigorous penal sanctions but also its rigorous legal guarantees of strict criminal procedure for the accused (e.g., assumption of innocence, basic principles of oral proceeding, immediacy of the main proceedings, and giving the accused the benefit of the doubt) - in favor of informal social control. Thus, the path taken

toward formalizing conflict is reversed. Although informal social control is associated with softer, under some conditions, less disruptive and more flexible sanctions for the accused, there is also a tendency to lose the legal guarantees given in criminal procedure and the constitution. Proceedings occur increasingly behind closed doors, the guarantees regarding the immediacy and oral proceeding of the trial process, the presumption of innocence and giving the accused the benefit of the doubt lose their rigidity.³ In this way, diversion means a deformalization of proceedings.

Defense is completely different. The task of the defense is also to monitor the legality of proceedings in the interest of the accused. In this sense, defense watches over the law (Dahs, 1983: marginal number 3), not least, with regard to the formality of proceedings. Without formal procedural guarantees, defense would be inconceivable. It is not just that the legal institution of defense is itself the expression of a formal procedural guarantee - namely, the right to legal counsel (Spaniol, 1990: 198 ff.) - but that the defense can only exert an influence and only have an impact by successfully appealing to formally guaranteed procedural rights, or, at least, being able to appeal to them when necessary. Insofar, it does not matter whether the defense always acts by appealing to formal legal guarantees. The possibility of activating these guarantees if required enables it to be regularly active in the vanguard of current procedural conflicts and to exert influence on them.

Thus, if diversion stands for decriminalization through deformalization, defense means the existence and, if necessary, extension of formal guarantees. Without formalized procedure, defense would be inconceivable. At times, stressing formal guarantees is the only possible way for defense to lead to decriminalization.

3.2 Preconditions, Methods, and Side Effects of Decriminalization Through Diversion or Defense

It is evident that a successful decriminalization as a result of diversion or defense requires different surroundings. The environmental niche in which diversion prospers requires the consensus of those involved; diversion can function only when all participants take a harmonious attitude to each other. If just one of the participants withdraws from this consensus, the chances of decriminalization through diversion are rendered much more difficult if not blocked. This particularly applies to the accused and his or her defense attorney.

Successful defense can, in contrast, happily accept conflict. Defense can and must if necessary raise objections and engage in proceedings contentiously, and sometimes even aggressively: "defense is battle" (Dahs, 1983, marginal number 1, translated). At least it has this potential. Decriminalization through defense does not need a consensus between the legal professionals. At times, it can succeed

only when the defense attorney does not shy away from battle and perhaps even seeks conflict - sometimes, even for its own sake - in order to achieve the best possible outcome for the accused.

From the perspective of possible effects that increase or decrease the burdens on proceedings, this means that decriminalization through diversion is, to a large extent, an attempt to relieve the authorities of penal social control from some of their work burden.⁴ Diversion serves to lessen the load of the justice system.

Defense is a grain of sand in the gears of justice or can at least be such. The function of defense or the outcome of its activities can certainly be to make the adjudication of legal authorities more difficult. Defense tends to have a justice-inhibiting function;⁵ it does not make the work of judges and public prosecutors easier but more difficult. Viehmann (1987) has seen this very clearly, and thus points out that defense and diversion do not fit together:

"Diversion proceedings should be dealt with quickly and simply The involvement of defense attorneys may have a disproportionate impact on such proceedings, lead to a great deal of complication, to exaggeration, contribute to a solidification of fronts, and may lead to real impairments through ignorance of particular aspects of the Juvenile Justice Act and thereby serve to put the breaks on a desirable exploitation of informal means of adjudication For these reasons, I would tend to advise against any broadening of the inclusion of defense attorneys in the field of diversion." (p. 110, translated)

Breymann (1987) goes even further in that he wishes to resolve the potential tension between unburdening the justice system through diversion and burdening the justice system through defense. He calls for the defense to speed up proceedings in the interests of diversion and in this sense even abandon central rights and duties of defense⁶ in order to promote diversion. The content of such a concept of defense would lead to the abolition of any true defense.

In addition, defense and diversion differ in their normative status, in their legal foundations. The right to defense - the exercise of substantive defense by the formal defense attorney - is, to some extent, a central element of the classical and liberal law of criminal procedure⁷ and is codified in central sections of the German Code of Criminal Procedure (StPO). However, the rules for applying diversion (the diversion models) are not fixed in law (apart from the standard tags, that is, Section 153 of the Code of Criminal Procedure and Sections 45, 47 of the Juvenile Justice Act [JGG]) but are regulated in ministerial decrees,⁸ directives from attorneys general, or other forms of executive activity. Thus, diversion is based on "soft law", is modern "reflexive law", while decriminalization through defense is based on the "hard", clear, and more durable standards of penal procedure.

Diversion and defense differ not only in the means and methods of planning decriminalization but also in their side effects. In other words, they have different latent functions.⁹ Dealing with a norm violation through diversion means that the

penal norm itself is not questioned, that the validity and steadfastness of the penal rule or prohibition is confirmed symbolically. Diversion in the face of a delinquent's clear expression of opposition to the norm would appear to contradict the system.

Although defense does not need to attack norms, and generally also does not do so, it has this potential. We only need to consider the defense of "crimes of conviction" or the defense of the abortion process at Memmingen in which the defense created a forum for changes in crime policy.¹⁰ This alone represents a major difference between decriminalization through defense or through diversion.

Naturally, everyday, normal defense is not characterized by an active struggle against the validity of penal norms. Defense attorneys would be overburdened if they were turned into professional crime policy makers. Explicit revolt against the legitimacy of penal norms must remain restricted to exceptional cases. However, even everyday, unspectacular defense is quite capable of evoking sudden insight in those involved in diversion and eventually the general public by discussing the questionability of state punishment and the problem of individual responsibility for social (mis)behavior. Sack (1979) formulates this more critically¹¹ when he assigns defense the function of "processing crime for productive learning processes in society and its normative structures. In concrete cases of conflict and crime, the defense attorney should show why society has had false expectations regarding his or her client" (p. 148, translated).

In this way, any defense can form a thorn in the side of criminal law; at least any good defense is a protection against exaggerated punitive claims of the state and contains the seeds of a rejection of the state and penal law.

In summary, the two forms of decriminalization, defense and diversion, differ considerably in their means, methods, and side effects. Although both aim at decriminalization in the concrete case, diversion can, nevertheless, in some ways be seen as a "sovereignly" organized decriminalization under the auspices of the shared, "well-understood" interests of the delinquent and justice in an economical application of prevention and resocialization. On the other hand, defense is a decriminalization "from below". Defense primarily acts in the private interest of the accused and may additionally - understood against the background of a clash of interests between the state and private interests - fulfill direct social functions (initiation of learning processes).

4 Defense and Diversion in Practice

If the above-mentioned contrast between "sovereign" decriminalization and decriminalization "from below" is accurate, it could be anticipated that there are also few common points of reference between defense and diversion - particularly in practice. Above all, it could be assumed that defense attorneys do not really

know what to do with diversion in their everyday activities. This assumption can be investigated by looking at a study by Hansen-Siedler (1990).

Part of this work on defense in juvenile court proceedings, which was presented as a master's thesis in criminology at Hamburg, is based on interviews¹² with 10 lawyers who had been appointed as juvenile defense attorneys by the Hamburg justice department (see pp. 70, 73).¹³ Although the study was conceived as an exploratory prestudy and makes no claims to be representative, its findings are essentially generalizable.

The study shows that defense attorneys on all levels had "few practical experiences" (p. 102, translated) with the Hamburg diversion model.¹⁴ Although the majority knew that a diversion program has also been implemented at Hamburg, this knowledge did not come from their activity as defense attorneys but from personal contacts with the program initiators or from the crime policy discussion that it had elicited in legal circles (see p. 83). However, in their work, defense attorneys had had almost no contact with the diversion program. They also saw hardly any opportunities of including diversion in their activities, as the majority of cases they dealt with were cases of compulsory representation in which they were court-appointed counsels. The pretrial opportunities for diversion stipulated in Section 45 of the Juvenile Justice Act failed because defense attorneys were appointed only at the opening of the main proceedings (see p. 89). Even during trial, the possibilities of diversion were very slight because of the generally nonpetty nature of the charges (see p. 92). The same applied to the prevention of incarceration measures (one of the alternatives of the Hamburg diversion program). In this field, however, Hansen-Siedler estimated that the defense attorneys "lacked information" (p. 100, translated) on diversion alternatives. He concluded that, because formal defense begins only with the commencement of main proceedings, by which the underlying crime could not be classified as petty, and because the attorneys lacked information on the diversion program, diversion and juvenile defense were mutually exclusive (see p. 93).

5 Conclusions

The theoretical discussion and its confirmation in an inspection of the legal situation seem to provide a clear answer to the question whether defense attorneys are "diversion agents" or "upholders" of diversion: Upholders of diversion are public prosecutors and judges, and maybe further persons and institutions (e.g., police and youth welfare) but not and never defense attorneys. In view of the sovereign nature of decriminalization through diversion, defense attorneys as private individuals cannot be upholders of diversion. Defense attorneys are also anything but "diversion agents par excellence".¹⁵ This is already countered by the

fact that practical formal defense only occurs when criminal charges are brought or serves a clientele who do not fit into diversion programs.

The contacts between defense and diversion are thus relatively narrow in practice. The points where defense activities touch diversion programs are restricted to exceptional cases. This does not mean that defense does not have any roles to perform together with diversion, but that these are also exceptions.

The tendency toward incompatibility between diversion and defense reveals that the tasks of defense in the context of diversion can in no way be defined just by stating that defense attorneys should uncritically support a diversion program at every opportunity. There are many indications that diversion, understood as an "all-purpose weapon" for defense to deal with petty crime, does not facilitate the substantive defense of the accused. A defense attorney who simultaneously feels committed to promoting diversion would, in my opinion, be a "double agent".¹⁶ He or she would therefore serve the state's interest in sanctioning. Insofar, the situation is comparable with one in which defense seeks its salvation by striving far too uncritically for a so-called court settlement.¹⁷

It is more the case that the tasks of the defense could be to test the position of the case and legal situation with a view to entering a clear diversion procedure and providing the client with intensive counseling in this regard. In this context, its task may be to scale down the definition of the charge so that it first becomes possible to enter into diversion. There is also a need to investigate whether the readiness in judges and public prosecutors to scale down a charge can be increased or weakened when refusal might lead to a particularly critical defense. If the client desires to seek decriminalization through diversion, it would seem to be contrary to the system for the defense attorney to strive for this goal only with the means of confrontational defense. His or her activities must consist far more in seeking the consensus and in exchanging the arguments to which the diversion program is geared. This should not mean a complete withdrawal of the defense attorney from the function of a sentinel over the strict observation of procedural law. However, the more the defense stresses formal guarantees, the more difficult it will become for the process of decriminalization through diversion.

Hence, diversion and defense have far less in common than anticipated. They prove to be two such different forms of decriminalization that one can even talk about contrasting decriminalization models. They refer to a different clientele (adolescents - adults), concern different charges (petty crime - intermediate and serious crime), and use completely different means and methods. Defense as the classical 19th century liberal-constitutional concept of decriminalization has little in common with the "sovereignly" initiated and supported diversion programs of the preventive state.

In view of the different catchment areas of decriminalization through diversion or defense, there is also no need to make a choice between the two in an "either/or" sense. Not only can they easily exist and function side by side but also

tailoring decriminalization into the alternatives of defense or diversion should not be viewed too narrowly. However, it should not be forgotten that defense and diversion are only two forms of decriminalization among many. Neither mean true decriminalization, that is, the unsubstituted, unconditional withdrawal from crime and punishment (Naucke, 1984: 201). Insofar, it is always worth testing whether the desired solution is not to perform a true decriminalization by removing various sections from the penal code (that primarily concern petty crime), so that diversion could then take a secondary role in the remaining core of penal law. In such a "small area of true, unequivocal penal law", defense would then be indispensable for a constitutional criminal procedure.¹⁸

Notes

- * Translated from German by Jonathan Harrow at University of Bielefeld.
- 1 Most norms for defense originate in the second half of the 19th century; diversion is a concept formulated in the second half of the 20th century with American origins (see Kaiser, 1985: 72).
- 2 Defense is a concept from legal and everyday language; diversion a criminological terminus technicus.
- 3 This has been criticized in various ways on constitutional grounds and does not need to be dealt with in any depth here (see Naucke, 1984; Alternativ-Kommentar StGB 1990, Hassemer, preceding Section 1 marginal number 487 et seq.).
- 4 "From its very beginnings, diversion seems to have served as an attempt to fight the economic crisis of penal law" (Kaiser, 1985: 73, translated).
- 5 However, not an inhibition of justice, as could possibly be concluded by extending the previous citation from Kaiser. Justice, to which defense also belongs, is not inhibited by conflicts, complication, or delay in adjudication but may even flower because of it. Only the activities of the authorities of formal social control are possibly inhibited.
- 6 This includes the right to inspect and read prosecution files, to counsel clients, and even to write a plea for the defense. It is precisely these central duties that Breymann (1987) considers to be in the way: "Not infrequently, cautionary and counseling appointments at the public prosecutor's office or the youth welfare office or the beginning of a measure are postponed because a defense attorney has become involved. First of all, the defense attorney requires at least one week to inspect the files, and then also invites the accused in order to then produce pages of script" (p. 116, translated).
- 7 Although it is always at risk of being restricted by reforms. See, for example, the proposals for a law to disburden justice (printed in part in *Strafverteidiger*, 1991: 282 et seq.) or the planned OrgKG [Organized Crime Act] (published in *CILIP* 39, No. 2, 1991: 49 et seq.).
- 8 As in the so-called Kiel model (Ostendorf, 1991, Sect. 45, marginal number 16).
- 9 This discussion on side effects or latent functions addresses whether or not typical side effects occur or are suppressed during decriminalization through defense or diversion that generalize beyond the concrete case and the penal adjudication of the process in question.

- 10 Another example is the "PKK process" (process against members of the Kurdish Workers' Party, accused of forming a "terrorist association") at Düsseldorf, in which the validity of Sections 129, 129a of the German Penal Code is being attacked.
- 11 However, in my opinion, assigning defense a quasi-social-sanitary role would overburden it.
- 12 Semistructured interviews lasting approximately one hour. These were audiotaped and later transcribed.
- 13 As specialists tend to be consulted for more severe crimes whereas all-round attorneys are consulted more often for petty crimes, this may possibly introduce a degree of bias.
- 14 A presentation and evaluation of the Hamburg diversion model can be found in Deichsel (1991).
- 15 As informal legal counselors (juvenile law counseling), lawyers can make a major contribution to assigning juvenile delinquents to diversion programs. However, in their role as informal legal counselors, such lawyers are in no way procedural counsels. Consequently, the paper published by Deichsel (1987: 169) also notes that juvenile law counselors are not active in a forensic sense.
- 16 Compare Blumberg (1988: 79) who views defense attorneys as being generally at risk of carrying out double-agent activities for the justice system and their clients. Echoes of a double-agent activity can also be seen in Breymann (1987: 114), when he assigns defense attorneys an educational function in the context of diversion programs and urges that they should pull "pedagogic strings" together with the public prosecutor.
- 17 For a detailed discussion of this issue, see Schünemann (1989: 1895 et seq.).
- 18 For a procedure "with great constitutional, liberty-protecting assurances in material law, procedural law, and court law," see Naucke (1984: 216).

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