Chapter 7
Transfer of Minors to the Criminal Court in Europe: Belgium and the Netherlands

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The transfer of youths from the juvenile to the criminal court was common in large parts of the world throughout the past century. Right from the start, judicial waiver mechanisms to remove very serious cases from the juvenile court formed part of the juvenile justice system in many countries. It was and is still viewed by many as a 'safety valve' for the juvenile courts, and for the juvenile justice system as a whole. The idea was that by offering this safety valve for extremely serious cases that happen only rarely, the special treatment of the mass of young offenders could be saved. There has been little if any research into these mechanisms until recently, when, alarmed by reports from the United States, some researchers in Western Europe started to investigate this phenomenon.

There is, of course, a wide variety of factors that can be taken as indicators of the state of affairs in juvenile justice. The transfer of minors to adult criminal court can be taken as one such relevant indicator, a standard, and so a comparison between the United States and Western Continental Europe may be interesting. This chapter will present the findings of two recent studies, carried out independently from each other in Belgium and in the Netherlands. It will start by explaining the two different answers that were developed in Western continental Europe for the problem of the extremely serious cases: the 'strict' systems and 'flexible' systems. Second, it will present the findings of two 'flexible' systems, the Belgian and the Dutch systems, and compare these. As was made clear in chapter 4, in the United States the primary and explicit focus of reform efforts was to increase the number of youths tried as adults. In these two European countries the opposite can be found. In so far as the response to serious crime by minors can be taken as a relevant indicator of the state of affairs in juvenile justice, this study suggests that there is a wide gap between what has happened in the last few decades in the United States and on the European continent. Finally, the chapter will present some conclusions and recommendations for the future.

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Europe

In Western continental Europe the upper limit of penal liability within the juvenile justice system is 18 years of age. In some countries this upper limit is absolute, which means that minors can never be brought before an adult court. In others, this limit is flexible, which implies that it can be lowered in certain cases and that minors can get adult sentences and (in some countries) even be sentenced by an adult criminal court.

This has resulted in two strategies in Europe for responding to the problem of very serious crimes committed by minors. First, there is the *strict* model, in which a fixed upper age limit is operated for juvenile justice; this means that trial under the ordinary criminal law is ruled out. In this model, therefore, the problem of the criminal-law response to very serious crimes committed by minors is dealt with within the juvenile justice system itself, through high maximum sentences for certain offences. Substantive, procedural and correctional aspects all remain within the juvenile justice system.

Germany is a striking example of this model. In Germany, juveniles only come under the youth justice system from the age of 14. The German *Jugendgerichtsgesetz* (JGG) distinguishes educational measures, disciplinary measures and punishments. The punishments vary from a minimum of 6 months up to a maximum of 5 years' youth detention, unless the juvenile has committed a crime punishable in the adult criminal law with a prison sentence of more than 10 years, in which case the maximum term of youth detention is 10 years (par. 18 JGG).[1]

Austria also operates the strict model, also with 14 years as the lower age limit for juvenile justice. For the majority of offences committed by juveniles, there is no minimum term of detention; the maximum punishment under juvenile criminal law is half of the maximum for the same offence under adult criminal law. For very serious offences, however, which under general criminal law carry a life sentence or 20 years as maximum sentence, detention of between 1 and 10 years can be imposed under the juvenile justice system for 14- to 16-year-olds and between 1 and 15 years for 16- to 18-year-olds (par. 5 No. 2 öJGG).[2]

Switzerland is another country that operates this model. Switzerland used to be known for the very young age at which criminal responsibility started, namely, 7 years, but that has now been raised to 10 years. However, while this means that *educational* measures can be taken from the age of 10, criminal penalties can only be imposed from the age of 15 years. The maximum custodial sentence for minors is 1 year, but there is a maximum of 4 years for young people aged 16 and over who have committed very serious crimes (Art. 24 JStG). Despite appearances to the contrary, due to the low minimum age limit, Switzerland therefore has an exceptionally

[1] Albrecht 2004; Dünkel 1990.

[2] For young adults (18 to 20 years) the penalties available in that case vary from 5 to 20 years' detention, see Jesionek 2001.

lenient juvenile justice system, certainly as far as the maximum penalties are concerned.[3]

The second model in operation in Europe is one in which a flexible upper limit is coupled with relatively low maximum penalties in the juvenile justice system. While in this *flexible* model the majority of juveniles who appear in court are guaranteed a relatively low maximum penalty, exceptions are made for very serious cases. In principle, if the court considers it to be necessary and fair, sentences from adult criminal law can be imposed.

This model operates in the Netherlands. The general rule in Dutch criminal law is that all young people aged between 12 and 18 years are dealt with under the juvenile justice system. Departures from this general rule are possible, however. Article 77b of the Penal Code allows courts to try suspects who were 16 or 17 years old at the time of the offence under ordinary adult criminal law, if they find grounds to do so in 'the seriousness of the crime, the personality of the offender or the circumstances in which the crime was committed'. In addition, Article 495b paragraph 2 of the Penal Code allows a court to depart from the principle of trying minors behind closed doors, if in its opinion 'the importance of hearing the case in open court must outweigh the importance of protecting the privacy of the suspect, his co-accused, parents or guardian.'

Belgium operates this model too. The Belgian Youth Protection Act (WJB) offers a broad range of measures that can be imposed for a diverse range of problematic or troublesome behaviour. What is remarkable about Belgium is that, as a rule, these measures can also be imposed in response to criminal offences. However, the Belgian Youth Protection Act also provides for another drastic intervention in response to very serious crimes, that is the transfer (Art. 38 WJB) for 16- and 17-year-olds. This means that the juvenile is transferred to the ordinary adult criminal justice system.[4]

This model is also found in France. The foundations of French juvenile criminal law were laid down in 1945 in the *Ordonnance relative à l'enfance délinquante*. The minimum age is 13. The youngest offenders and those who have committed the least serious offences can be dealt with by the *juge des enfants* (Art. 8 Ord.). Thirteen- to sixteen-year-olds who are accused of more serious offences have to appear before the *Tribunal pour enfants* (Art. 3 Ord.), while 16- to 18-year-olds are tried by the *Court d'assises des mineurs* (Art. 20 Ord.). All these courts hear cases behind closed doors and work with a rather informal approach geared to the young person (Art. 8, Art. 14 and Art. 20 Ord.). As far as the very serious crimes are concerned, both the *Tribunal pour enfants* and the *Court d'assises des mineurs* can impose heavy sentences on minors, namely, half of the maximum sentence for the offence under general criminal law up to a maximum of 20 years. Where this maximum is already very high, the *Court d'assises des mineurs* can furthermore impose

[3] Rehberg 2001; Zermatten 2004.

[4] Nuytiens et al. 2005.

a sentence from general criminal law upon offenders aged between 16 and 18, if the circumstances and personality of the offender call for this (Art. 20-2 Ord.).[5] Apart from that, the sentence should (in the first instance) be served in a separate young offenders-institution or -section. There have been various proposals in France in recent years to make it easier to try minors under the ordinary criminal law, most recently by Minister for Justice Clément following months of pressure from his colleague Minister Sarkozy for Home Affairs. President Sarkozy has announced new initiatives.

An extreme version of the flexible model can be seen in England and Wales, where juvenile delinquents can be tried by a variety of courts. In addition to the usual Youth Court, in some cases, for example if a minor has committed a criminal offence with one or more adults, the case will be heard in the Magistrates' Court. Where very serious crimes are concerned – murder, manslaughter – then the trial will be held on indictment in the Crown Court. A Crown Court trial is a very formal and public hearing which amounts in fact to normal criminal proceedings (Art. 53 Children and Young Persons Act).[6] This was for that matter the essence of the European Court's criticism of the trial of the two very young offenders in the Bulger case, which was judged to be in breach of Article 6.1. (right to a fair trial) of the European Convention on Human Rights. From a substantive perspective also, this amounted to a trial under the ordinary criminal law. While the maximum sentence in the current English juvenile criminal law is 2 years, in the case of grave crimes – crimes carrying a maximum sentence of 14 years in general criminal law – the court can go much further. For grave crimes in England and Wales, very long prison sentences are possible for children from the age of 10 years, which appear to match the maxima in the ordinary criminal law.[7] Minors who are convicted of murder can be given an indeterminate sentence, which in practice may eventually amount to life.

Following this brief review, we can anyway conclude for the time being that the situation in Europe is completely different from that in the United States. In the strict model, transfer to the adult criminal justice system is completely impossible. In the flexible system, it is possible but it is the court that decides on the penalty to be imposed on the juvenile, and not the prosecutor. We have to note also, however, that both models show a great variety of forms and a large range from severe to lenient in the responses to serious offending by juveniles. Furthermore, there are still more variants in Europe. There are countries that have no separate juvenile justice system at all, especially in Scandinavia, where however separate maximum penalties are laid down for juvenile offenders, such as 7 years in Denmark and 10 years in Sweden.[8] Finally, Scotland stands out as having a completely different approach: here children are tried under the general criminal law from their 16th birthday (see chapter 4 and 13.

[5] Renucci 1998, p. 106.

[6] Bottoms and Dignan 2004.

[7] Stump 2003, p. 191.

[8] Fourteen years if an offence is committed with an adult offender.

The following sections will examine in more detail how the Netherlands and Belgium respond to very grave offences committed by minors. What is the policy on this issue and how is it implemented in practice?

The Netherlands

The Netherlands has been shaken in the past few years not only by a political killing (Fortuyn 2002) and a murder which smacked of terrorism (van Gogh 2004), but also by a number of appalling crimes of violence involving juvenile offenders, some with fatal outcomes, which have forced themselves into Dutch public consciousness. Several really shocking cases dominated the news for weeks in short succession around the end of 2003 and early 2004. In October 2003, a 43-year-old female drug addict was kicked to death by a group of young men on a square in Amsterdam. A month later the public was again shaken by the cold-blooded murder of a 16-year-old girl in Bemmel whose body was then set on fire. Two months after that, the attack on the deputy head of a school in The Hague, who was shot through the head by a pupil in broad daylight in the school canteen, which was full at the time, caused further public outrage. Minors were involved in all these cases and each one of them was tried under the general criminal law.

The option to make such an exception to juvenile criminal law has existed since the introduction of the separate juvenile justice system in 1901. On a parliamentary initiative an amendment was adopted which created the opportunity to impose an adult penalty from the age of 16 years in some cases at the discretion of the court. The decision and reasons for the decision were, in other words, left entirely to the court. This judicial discretion remained untouched for over half a century. It was only in 1965 that conditions were attached to it. The criteria were worded in very general terms as ‘the seriousness of the offence’ and ‘the personality of the offender’. They were applied cumulatively: so there had to be both a serious offence and something in the offender’s personality which justified making an exception to the limits of the juvenile criminal law.

The lowering of the age of majority in civil law from 21 to 18 years provided the occasion for a review of all the rules based on this age limit. An advisory committee proposed raising the upper age limit of juvenile criminal law, arguing for a single system of juvenile justice which would apply from the age of 12 to 24 years.[9] It would, of course, have to be possible to make exceptions to this, because in the committee’s opinion there could be circumstances in which it would be desirable to apply the general criminal law to young people aged between 16 and 24 who had committed a serious crime. In the view of the advisory committee, the personality of the offender should be the deciding factor. The committee also proposed to

[9] Anneveldt Committee 1982, p. 16.

increase the maximum term of youth detention for 16- to 18-year-olds from 6 to 12 months. The extension of the system to include 18- to 24-year-olds would be accompanied by a new maximum sentence of 18 months for this age group. Under the age of 16 the maximum should be kept at 6 months.

The government, however, put aside this sound proposal for a juvenile justice system up to the age of 24 years which had been so long in the preparation. Even the grounds for the exceptions to applying juvenile criminal law to 16- and 17-year-olds were interpreted differently from what the committee had proposed: there was certainly no decisive role for the personality of the offender, the criteria became alternatives rather than accumulative, and a third, separate criterion, 'the circumstances in which the offence was committed', was added. Finally, the committee's proposal on maximum sentences was disregarded. Contrary to the committee's recommendations, sentences were made more severe across the whole range. For 12- to 16-year-olds, the maximum was increased from 6 months to a year; for 16- and 17-year-olds it went up to 2 years. Since 1995, therefore, Dutch juvenile courts have been able to impose much heavier sentences within the framework of the juvenile justice system. How far has there also been a need on top of that for more flexible arrangements for transfer to the adult criminal justice system since then?

In Practice

Following the shocking events in late 2003, early 2004, and especially the prolonged and lurid attention given to them in the media, it was suggested from many quarters, including professional experts, that more and more minors were being tried under the general criminal law in the Netherlands. This was the reason for investigating the practice on this point in the Netherlands. If we look at the available figures for the past 10 years, however, we see that, contrary to expectations, there has actually been a considerable *decrease* in the trial of minors under general criminal law. While in 1995 there were 16% of all cases dealt with by the juvenile courts, in 2004 it was only 1.2%. Even when we look at absolute figures for recent years, there is a clear decrease to be seen (Table 7.1).

Table 7.1 Guilty verdicts in courts of first instance in criminal cases against 12- to 17-year-olds

Year	All cases (12–17)	General criminal law (16–17)	%
1998	7,798	206	2.7
1999	8,291	198	2.4
2000	8,930	170	1.9
2001	8,489	205	2.4
2002	9,531	204	2.1
2003	10,462	174	1.7
2004	11,584	143	1.2

Source: OMDATA

We are forced to conclude that the amendment to the law in 1995 brought about a spectacular turnaround. The percentage of all minors who appeared in court who were tried under general criminal law has been reduced more than tenfold in 10 years and it seems likely that this downward trend is set to continue. A conclusion that can be drawn from this is that one component of the package of amendments in 1995 – the heavier maximum sentences – has given courts so much scope that they have much less need to use the option to apply general criminal law. Evidently, the other part of the package of amendments – making trial under general criminal law easier by allowing alternative rather than accumulative grounds and the addition of a third separate ground 'circumstances in which …' – has not prompted courts to make extra use of Article 77b of the Penal Code.

The general trend, therefore, is for decreasing use of general criminal law, but is that the case all over? If we break this information down by the different district courts, major local differences emerge. This is clearly illustrated by a comparison of data from the district courts for two periods: 2000–2001 and 2003–2004 (Table 7.2).

Over the whole country the falling trend is obviously confirmed: from 417 cases in the first period there has been a decrease to 355 in the second period. However, while for example in Den Bosch there was a dramatic decrease over the 4 years from 60 to 15, in Zutphen over the same period the trend is in completely the opposite direction: an increase from 5 to 35 cases! These are the two extremes but the rest of the picture is also far from unequivocal.

Table 7.2 Comparison of court decisions on the application of general criminal law to minors in the periods 2000–2001 and 2003–2004

Court	2000–2001	2003–2004
Amsterdam	62	60
Den Bosch	61	15
The Hague	52	26
Rotterdam	34	19
Utrecht	27	29
Assen	27	10
Breda	26	23
Arnhem	24	27
Zwolle	20	26
Dordrecht	12	23
Almelo	11	13
Maastricht	11	13
Groningen	9	8
Haarlem	8	11
Roermond	8	4
Alkmaar	7	1
Leeuwarden	7	5
Middelburg	6	6
Zutphen	5	35
Total	417	355

Source: WODC

If we analyse the data from the same source by type of offence, a new and intriguing fact comes to light. We assumed that the main reason for applying adult criminal law to minors would be that they had committed serious crimes, especially crimes of violence. However, that turned out to be the case in only a minority of these cases. Less than 30% of these cases concerned crimes of violence, over 40% concerned property crimes, just under 15% were for vandalism and public order offences and almost 10% were offences against the Opium Act. While we would expect that the decrease in these cases since 1995 would be coupled with a strong concentration of cases involving serious violence, based on these court data this turned out not to be the case. That raises the question again as to whether the other part of the package of amendments in 1995 – the relaxation of the option to apply general criminal law – does not perhaps offer too much scope for it to be used too readily.

Another surprising outcome of our research into Dutch practice emerged from the analysis of 5 years of court judgements, which was that in total sentences of 2 years or more were only imposed 83 times on juvenile offenders; that comes down to an average of 16 or 17 cases a year. This means that over the past 5 years, with 65,085 court cases against juvenile suspects, in less than 0.13% of cases was a sentence imposed which exceeded the maximum sentence that can be imposed under juvenile criminal law. That is remarkable, because the reason for having the option of transfer is that it provides a safety valve for very serious crimes which would call for a heavier sentence than is customary and possible under juvenile criminal law.

The Case Files[10]

To make a proper assessment of the issue of minors who are tried under the general criminal law, more information was needed than could be obtained from the figures of CBS/WODC and the court statistics. Not only do these figures give no information about what sanctions were imposed, they also leave us in the dark about the role of experts and the grounds of the courts' decisions. This information can only be obtained by studying case files. It was with great difficulty, due to the poor administration systems at the courts, that we eventually managed to gather together 62 useable files from 13 courts spread over the whole country for the period 1999–2005. That averages out at only eight case files per year. Clearly this gives us a biased picture of practice with regard to the application of Article 77b of the Penal Code, because the cases we examined are almost certainly the most serious 5% to 10%.[11]

These 62 case files correspond in one respect with the overall picture of when the general criminal law was applied. Here too the ratio between crimes of violence and property crimes turns out to be opposite to what we expected. In this collection

[10] For further details, see Weijers 2006.

[11] The overwhelming majority of the accused were 17 years old (55 cases), while nine offenders were probably 16 at the time of the offence.

Table 7.3 Most important offences

Art. 310 Penal Code	Theft	23 x (Art. 310 + 6 cases Art. 311)
Art. 312 Penal Code	Robbery	17 x
Art. 289 Penal Code	Murder	11 x
Art. 287 Penal Code	Manslaughter	9 x (of which 2 x Art. 288)
Art. 317 Penal Code	Extortion	9 x
Art. 242 Penal Code	Rape	7 x
Art. 140 Penal Code	Criminal organisation	5 x
Art. 250 Penal Code	Forcing someone into prostitution	4 x

of files, the greatest number concerned theft – 23 cases (Art. 310 Penal Code and in six cases Art. 311 Penal Code) and 17 cases of robbery (Art. 312 Penal Code), whether or not combined. Only after that came homicide: 11 cases of murder (Art. 289 Penal Code) and 9 cases of manslaughter (Art. 287 Penal Code, plus in two cases Art. 288 Penal Code) (Table 7.3).

One of the questions that our case file study aimed to throw light on was the role of experts' reports: did the courts follow the reports or in applying Article 77b of the Penal Code did they regularly take decisions against the advice of the behavioural experts? First of all we needed to ascertain how often there was an expert report. It turned out that there had been expert's reports in three-quarters of these cases. In a quarter of the cases there were two or more different reports and in some cases there were three or even more. Despite the fact that in the main there was no lack of reports, in only half of the cases were we able to find out what the courts had done with the advice in the experts' reports. Where we were able to establish this, it turned out that the courts followed the advice in three-quarters of cases, and in the other quarter they did not. These findings seem to justify the conclusion that in cases where an expert opinion is produced, the court follows the advice in most cases.

The next question concerned the grounds for the courts' decisions. As we have already stated, Article 77b of the Penal Code offers three grounds for this article to be applied: the seriousness of the offence, the personality of the offender and the circumstances in which the offence was committed. The first rather remarkable discovery here was that there was no explanation to be found in the documents in the case files in a quarter of the cases. The next striking discovery was that in all the documents where the court did provide an explanation, the prime ground given was *always* the seriousness of the offence. Finally, in almost half of these cases, all three grounds were given. In all these cases, this was confined to an obligatory mention, without any further explanation or supporting reasons. This was also true of those cases where two or more grounds were given: there was usually a complete absence of any detailed explanation.

Finally, we wanted to know what penalties the courts actually imposed in this selection of serious Article 77b Penal Code cases. We found that detention in a youth custody centre was imposed in eight cases (13%) (usually in combination with a prison sentence). The average sentence was over 4 years. The maximum was 12 years, followed by seven cases of 8 years [and two cases of 8 years' detention followed by detention under a hospital order (*TBS*)]. The minimum was 6 months.

We are therefore able to conclude that the range of sanctions imposed by the application of Article 77b of the Penal Code was very broad. Furthermore, it was found that even within this selection punishments were imposed which in fact lie within the scope of juvenile criminal law, certainly when the reduction in the sentence that is customary in general criminal law in the Netherlands but not in juvenile criminal law is taken into account. In this sample of serious cases, the courts found it necessary to try the suspects under general criminal law but in almost half of the cases they then imposed a penalty which, in terms of its length or severity, could also have been imposed under the juvenile justice system.[12] That raises questions about the ratio and justification for these decisions. When viewed in that light especially, the poor or complete absence of explanations by the courts in the majority of cases is a serious omission.

As far as the strategy of the courts was concerned, three tracks can be distinguished. First, there were the cases where the safety argument was decisive in the decision to apply the general criminal law. That was the case, for example, in the case of a 17-year-old girl who was convicted of murdering her ex-partner. The expert witnesses warned that she had a seriously disturbed personality structure and psychopathic character structure as well as an extremely limited moral sense. She was given 8 years' detention followed by detention under a hospital order. Precisely the same sanction was imposed on the murderer of Maja Bradaric, who was killed and burned in November 2003 in Bemmel near Nijmegen. These were cases involving very serious crimes, where the court concluded based on the expert reports that in view of the personality of the offender account had to be taken of the risk of repetition of the offence which, despite treatment, could remain a serious risk for a very long time. In short, these offenders needed to be securely locked up and above all *given treatment* for a sufficient period of time.

Second, there were cases where the court judged that the offence was so serious as to justify the application of the general criminal law, even though the risk of repetition was not considered to be very high. In these cases the court decided to impose lengthy prison sentences, sometimes against the advice of the expert witnesses. One such case became known as the 'Veghelse honour killing': the oldest son of a Turkish family was put under severe pressure by his father to avenge his sister's elopement. The boy, who had no criminal record and was not known for any problems, was given a loaded pistol by his father and then he went to his school, a regional training centre where the boy who had eloped with his sister turned up, and fired wildly in all directions, fortunately without killing anyone. The Den Bosch District Court probably wanted to set an example. It felt that the seriousness of the offence justified trying the boy under adult criminal law, and he was sentenced to 5 years' imprisonment for attempted murder and attempted manslaughter.

Third, there were a number of cases where the offences were relatively minor and consequently relatively lenient sentences were imposed. A typical case concerned

[12] In the case files we only found nine cases where the Public Prosecutor had demanded a different sentence. In seven of these cases the prosecutor had demanded a heavier sentence and in two cases a lighter one.

a minor who had broken into 15 houses within a space of a few months and had also taken part in circulating forged money. This boy had previously been sentenced to 8 months' suspended youth detention and in that framework had taken part in an intensive social rehabilitation program. However, he soon got involved in another spate of burglaries and the Zwolle District Court stated 'that this conduct on the part of the accused gives us reason to be very gravely concerned about the future'. As was often the case in this third category, there was no expert report and therefore no personality investigation. Nevertheless, the court concluded that the seriousness of the offence, the circumstances *and* the personality of the accused provided grounds for applying adult criminal law. The young man was sentenced to 18 months in custody, of which 6 months was suspended, and to pay ¤ 2,000 Euros in compensation.

This is an example of a penalty that could easily have been imposed within the juvenile criminal justice system. That would also have seemed the logical course of action given the relative seriousness of the offences: no violence or threat of violence was used in the burglaries and the offender did not use, or indeed have in his possession, any weapons. The circumstances also did not seem to directly justify the transfer decision, and finally the assessment of the offender's personality was questionable.

Two conclusions, one positive and one negative, can be drawn from this research. The positive conclusion is that the number of transfers of minors to the general criminal law has fallen sharply in the Netherlands and will probably decrease even further. On the other hand, it is a cause for concern that a large proportion of the remaining transfers take place without being supported by adequate statements of reasons for the decision.

Belgium

The age of criminal responsibility in penal law was raised in Belgium from 16 to 18 by a recent amendment to the 1965 Youth Protection Act (YPA). Since then, delinquents under the age of 18 have been sentenced in the Youth Court. However, there is one exception to this rule. Since 1965, the Youth Court has been able to transfer a juvenile offender, aged 16 or over, to the Public Prosecutor with the intention of having the young offender sentenced in the Adult Court.[13] In this case, the young offender ends up in the general criminal justice system and is treated as an adult. Penalties from penal law can be imposed, except the death penalty.[14] Hence, the most severe punishment that can be imposed on transferred offenders is life imprisonment. Because transferred offenders are treated as adults, they serve their detention in prison (Nuytiens et al. 2005).

[13] Theoretically, the Public Prosecutor can still dismiss the case or propose mediation. In practice, this only happens occasionally. This is not surprising, because in most cases it is the Public Prosecutor who demanded transfer.

[14] Since the death penalty was abolished in 1996, this restriction has lost its relevance.

The 1965 YPA considers transfer to be an exceptional decision. This is why (1) the Youth Court is obliged to explain a transfer decision in detail; and (2) two inquiries are compulsory before the Youth Court can decide to transfer a young offender to Adult Court. First, for the purpose of obtaining relevant information on the personality of the young offender, the Youth Court is obliged to order a medical-psychological examination. This inquiry is carried out by a psychiatrist, a psychologist or a multidisciplinary team of experts. Second, a social inquiry must be accomplished in order to gain sufficient information on the home background of the youngster (e.g. school career, family). This inquiry is carried out by social workers of the Youth Court's social service.[15]

According to the YPA, the main motivation for transfer is whether or not the intervention options at the disposal of the Youth Court (the youth protection measures) are still adequate, that is, whether the youngster is still likely to benefit from these interventions. In line with the protective and rehabilitative philosophy of YPA, the personality of the minor is crucial in this judgement.[16] However, transfer criteria are not explicitly listed in the YPA. Hence, neither the seriousness of the offence nor juvenile justice antecedents are criteria for transfer according to the YPA. Nevertheless, the Youth Court can take into account the nature or gravity of the offences, as well as the juvenile justice history of the youngster, if it provides information concerning the personality of the young offender.[17]

The 1965 YPA was modified profoundly in 2006, and the legal framework for transfer to Adult Court was altered substantially as part of a thorough reform of the juvenile justice system.[18] The most important changes are illustrated in Table 7.4.

While the lower age limit has not been altered, significant changes concerning the grounds and criteria for transfer, the authorised court dealing with transferred offenders, as well as the limits and the execution of punishments, have been implemented.

Table 7.4 Legal framework for transfer decisions

	1965	2006
Age	≥16 years	≥16 years
Grounds	Personality	Personality, maturity and environment
Criteria	None	Serious offence(s) *OR* At least 1 Youth Court measure
Court	Adult Court	Adult Court *OR* Extended Youth Court
Punishment	No death penalty Prison	No life sentences Youth Detention Centre or prison

[15] Van Dijk et al. 2005.

[16] Nuytiens et al. 2005.

[17] Goiset 2000.

[18] The 2006 Act will be put into operation gradually. The entire Act has to be fully operational in 2009.

Whereas the 1965 YPA did not define criteria for transfer, the 2006 Act explicitly defined two non-cumulative criteria. First, an offence-based criterion was introduced; transfer is now restricted to young offenders who have committed serious offences. More specifically, these are rape, sexual assault involving violence or menaces, assault or battery causing death or severe injuries, violent theft, murder and attempted murder, manslaughter and attempted manslaughter. Second, a criterion concerning the juvenile's criminal record was introduced. The 2006 Act postulates that young offenders can only be transferred if the Youth Court has already imposed at least one youth measure in the past. The grounds for the transfer decision still have to be reasoned in terms of the personality of the youngster. However, two cumulative variables are added: the young offender's degree of maturity and his environment.

Another important change has occurred, concerning the court that deals with transferred offenders. Before the law was amended, transferred offenders were sentenced in the Adult Court. More specifically, they were tried in the Correctional Court or in the *Court d'assises*,[19] depending on the gravity of the offence(s). The 2006 Act created a new jurisdiction, the 'Extended Youth Court', within the Youth Court. In contrast to the Youth Court, presided over by only one professional juvenile judge, the Extended Youth Court is presided over by two juvenile judges and one judge of the Correctional Court. While the most serious crimes will still be sentenced in the *Court d'assises*, other offences will be handled by the Extended Youth Court.

In both cases, however, the youngster will be tried according to the rules of penal law, and prison sentences can be imposed, though the 2006 Act restricts prison sentences to a maximum of 30 years; life sentences can no longer be imposed. Another innovation is the fact that transferred offenders serve their sentences in specific youth detention centres for transferred offenders. However, this 'prerogative' is only guaranteed for transferred offenders who are still minors at the time of sentencing. For youngsters who have already turned 18, detention in a youth centre is only guaranteed if there is sufficient space. On top of that, youngsters who disturb the peace in the youth centre can still be transferred to prison. While this legal amendment is promising, there are reasons, though, tobe sceptical. First, the youth detention centres still have to be built, and budgets are tight. Second, the option of detention in youth facilities is not obligatory but depends on the availability of places.

The Practice

According to the 1965 YPA, transfer of young offenders to Adult Court has to be considered to be an exceptional decision. Recent statistics show that the use of transfer is indeed limited in practice. Research shows that only 1% of the Youth

[19] This court, where professional judges are assisted by 12 laymen, deals with the most serious offences.

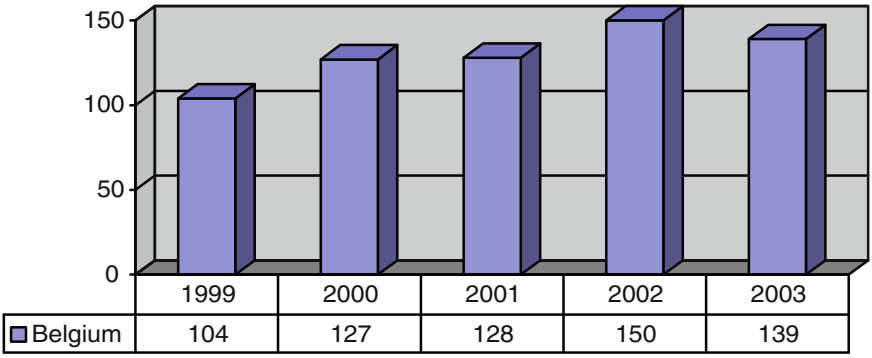


Fig. 7.1 Absolute number of transfers in Belgium: 1999–2003

Court's decisions concern transfer to Adult Court. It is more accurate to say that transfer decisions amount to 3% of all judgements.[20] As the graph above illustrates, the absolute number of transfer decisions made by the Youth Court has fluctuated between 104 and 150 in recent years. The figures do not show a huge (Vanneste 2001) increase but rather suggest stagnation.[21] Of course, it remains to be seen whether the recent amendment to the law will affect the application of transfer in the future (Fig. 7.1).

It is remarkable that the application of transfer shows significant geographical variation. First, transfer is used far more often in the French-speaking part of Belgium. Second, it seems that in 1999, 2000 and 2001, 86% of all transfer decisions were pronounced in only 7 of 27 court districts. On top of this, the figures show that the Brussels Youth Court was responsible for 47.1% of all transfer decisions! Of course, we have to take the huge case load of this district into account. Figures are only significant if we put them in context, in this case, if we relate them to the total number of decisions taken by the Youth Court.[22]

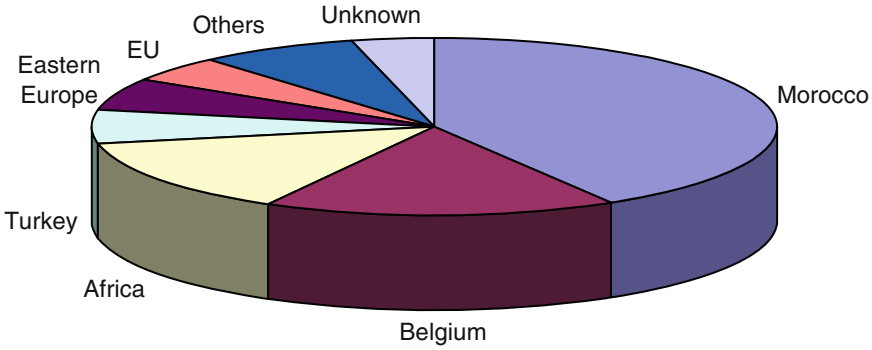
The Files

Between 2003 and 2005 (before the recent amendment to the law), we carried out some fieldwork on the practice of transfer. An analysis of files in the Youth Court and in the Adult Court was conducted in order to paint a picture of the profile of transferred offenders and their criminal careers. In addition to this, interviews with

[20] Vanneste 2001. The Youth Court can take preliminary decisions as well as final decisions. The transfer decision can only be imposed as a judgement.

[21] Nuytiens 2006.

[22] Ibidem.



Morocco	Belgium	Africa	Turkey	Eastern-Europe	EU	Others	Unknown
87	35	29	13	12	10	16	8

Fig. 7.2 Ethnic origin of transferred juveniles

juvenile judges were conducted in order to gain more insight into the decision-making process concerning transfer.[23]

From an analysis of the files of 210 transferred[24] offenders in 5 Belgian Youth Courts,[25] where transfer has been used relatively often between 1999 and 2001, we can paint a picture of the personal and socio-economic profile of these offenders. A large majority (94.3%) of the population consisted of males. As far as their ethnic origin is concerned, it is striking that almost three-quarters of them did not originate from an EU[26] country. More specifically, we found that youngsters originating from Morocco were highly overrepresented (41.4%). Young gypsies and asylum-seekers were also overrepresented: of the 157 non-EU youngsters, 35 (22.3%) were gypsies or asylum-seekers (Fig. 7.2).

The greater share of the juveniles were not performing well at school; most of them were attending vocational schools (64.7%) or special education (7.1%). It is striking that 10% had never attended secondary school, and some had never even been to school at all. The latter group was entirely made up of gypsies. Another indication of problematic school careers was the high number of drop-outs (at least[27] 30.8%) and juveniles who had repeated one or more grades (at least 29.9%). The number of

[23] Nuytiens et al. 2005; Nuytiens et al. 2006.

[24] Transferred between 1999 and 2001.

[25] Antwerp, Brussels, Charleroi, Mechelen and Mons.

[26] We noted that (1) the categories were constructed before some new member states joined the EU; and (2) the category 'Africa' did not include the North African countries (Morocco, Algeria, Tunisia and Mauritania).

[27] We noted that problems can exist without being reported in the files. This goes for the other variables as well.

truants (at least 44.1%) and youngsters expelled from school (at least 44.8%) appeared to be very high as well. Despite the fact that juvenile judges have to base their decision on the personal and contextual situation of the young offender, for 11% of the transferred offenders information concerning their school situation was lacking.

The analysis of files showed that transferred offenders often lived in large families and that a lot of youngsters were living in problematic familial environments. The problems reported were of a financial as well as of a social nature.[28] Moreover, it seems that at least 34.1% of the population had one or more siblings with judicial antecedents.[29] Finally, at least 14.2% of the youngsters' fathers had come into contact with the judicial authorities.

The young offenders were also having to cope with personal problems. According to the medical-psychological reports, half of the transferred youths denied, minimised or justified their deviant behaviour, and lacked empathy with their victim(s). Other frequently mentioned descriptions were: immature, dangerous, aggressive, mistrustful, spoiled and so on. A large proportion of the transferred population were suffering from psychiatric disorders. Most frequently mentioned were: neurotic personality (15.7%), antisocial personality disorder (14.6%), depression (13.1%) and behavioural disorder (7.8%). In addition, experts often estimated the chances of these young people developing some kind of personality disorder as high. Based on the medical-psychological inquiries, we could conclude that a large proportion of the transferred population suffered from psychological and/or psychiatric problems.

Exploring the time span between the first contact with the Youth Court and transfer, it appeared that young offenders with a long history in juvenile justice were not overrepresented. On the contrary, most of them had been transferred rather quickly: the time span between the first contact with the Youth Court and transfer was 1 year or less for 19% of the youngsters; 21.5% came into the category of 1 to 2 years; and another 19% had spent 2 to 3 years in the youth justice system before transfer. The longer the history, the fewer youngsters were situated in the categories. Maybe this is not surprising: transfer can affect only young offenders aged 16 or over. Transferred offenders come into contact with the Youth Court at a rather advanced age. The greater share of the transferred youngsters were either aged between 14 and 15 (40%) or aged between 16 and 17 (26.2%) at the first contact with the Youth Court. Only 9.5% were younger than 12 when this happened.

Before transfer to the Adult Court, one in four young offenders had already been convicted of one to five offences by the Youth Court. Remarkably, 20% of all transferred offenders had never been convicted of other offences prior to transfer. In contrast, 'multi-recidivists', defined as young offenders convicted of 20 or more

[28] For 18% of the families, a financial problem was reported (e.g. debts, living on benefits). For 24.8% of the families, intra-familial aggression was reported (e.g. incest, physical or mental abuse). For 17.1% of the families, drug abuse of the parent(s) was reported. For 26.1% of the families, a health care problem was reported (physical or mental problems of the parents). It was striking that many of the parents were living on social security due to health problems.

[29] The sibling had come into contact with the Youth Court (welfare reasons and/or offending-related reasons) and/or with the Criminal Court.

offences before transfer, accounted for only 8%. However, we do have to take into account the large number of missing values (18.1%).

Finally, we looked at the nature of the offences committed. The analysis of the files revealed that more than 75% of the offences committed before transfer were property offences. Moreover, 75% of the offences resulting in the transfer decision were also property offences. However, an in-depth analysis of the Youth Court files showed that a lot of these property offences involved aggravating circumstances, that is, physical or psychological violence (e.g. threatening the victim), or were of a violent nature (e.g. extortion, vandalism). This population was not committing white-collar crime. The majority of the offences concerned were so-called 'street crimes', offences that are very visible and alarming for citizens.

As the next table illustrates, the most serious offences, punishable with long-term imprisonment under the Belgian Penal Code, were relatively rare. For example, manslaughter and murder accounted for less than 1%. Of all the serious offences, the greater part concerned property offences with aggravating circumstances (burglary, theft involving threats/violence). Remarkably, however, there were more serious offences committed by transferred youngsters in the 'offences for which transferred' category than in the 'offences judged before transfer' category. This indicates that their criminal careers had developed over time and their offences had become more serious (Table 7.5).

Decision Mechanisms

The analysis of files revealed some remarkable findings. These findings can be better understood by analysing the decision-making process concerning transfer. Through interviews with juvenile judges[30] we found that several factors influenced the transfer decision. According to the judges, the most decisive factor was the attitude of the young offender. Transfer was more likely for youngsters who adopted a negative attitude (e.g. no regrets) and who were responsible for the failure of previously imposed youth measures. These elements are obviously related to the

Table 7.5 Offences committed before and after transfer

	Offences judged before transfer	Offences for which transferred
Burglary	28.8%	35.9%
Theft with aggravating circumstances	16.3%	21.9%
Rape/sexual harassment	0.8%	1.9%
Manslaughter/murder	0.15%	0.7%
Hostage	0.15%	0.7%
Arson	0.3%	0.4%
Other offences	53.5%	38.5%

[30] We interviewed 11 juvenile judges of the Youth Court and 6 juvenile judges of the Court of Appeal.

young offender's personality. The interviews revealed that objective elements also played a role in the decision-making process. The seriousness of the offence(s) and the protection of society were considered especially important factors. For juvenile judges, violence against persons, especially repeated crimes of violence, were considered to be very serious.

It seemed that judges were deciding whether or not to transfer a young offender on the basis of personality- and offence-related aspects. In these cases, it was the young offender and his actions that brought the Youth Court to a transfer decision. However, there seemed to be a group of young offenders who were transferred to Adult Court more readily as a result of a lack of options within the juvenile justice system. Several judges indicated that the lack of available and enforceable youth measures was a decisive factor, or at least a catalyst. The lack of space in youth institutions, in particular, put a lot of pressure on the judges. One judge stated that 'You have to give a youngster every chance until he turns 18, but since the number of beds in the institutions has been reduced (…) these youngsters do not get the chances they deserve. They are forced into recidivism, and the only thing left to do is to conclude that the youth measures are no longer useful.'[31]

Furthermore, certain groups are practically systematically expelled from the juvenile justice system. Several judges indicated that, for example, young offenders dealing with psychiatric problems are sometimes transferred because of the lack of suitably adapted measures within the juvenile justice system. One judge declared that 'Within the juvenile justice system there is no possibility of detention. Sometimes a youngster is transferred to Adult Court in order to obtain detention in penal law. In that case, we reason as follows: the youth measures are not useful because the young offender is mentally ill.'[32] Juvenile judges indicated that gypsies and asylum-seekers were also transferred more often, due to the lack of effective youth measures for these groups; it is very difficult to work with these youngsters because, in general, they speak neither French nor Dutch.

It is clear that these structural deficits influenced the decision-making process. Judges were not making decisions exclusively on the grounds of what was best for the young offender, but they were taking account of the availability of youth measures as well.

Penal Career

In order to paint a picture of what happens to the young offender once he is transferred to Adult Court, the Criminal Court files of the exact same offenders were analysed. Leaving out the missing values (13%), it appears that transfer did not lead to penal consequences in 11.6% of all cases. This is due to the fact that the

[31] Nuytiens et al. 2005, p. 196.

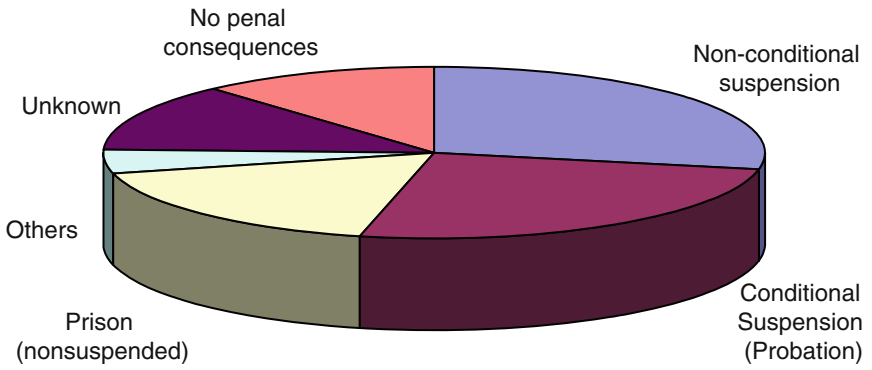
[32] Ibidem, p. 215

transfer decision was annulled by the Court of Appeal or due to the dismissal of the case (Public Prosecutor) or acquittal by the penal authorities.[33] Eventually, the Criminal Court passed judgement in at least 75% of all transferred cases.

The analysis of the Criminal Court files showed that transfer decisions that did lead to a penal conviction often resulted in non-conditional suspended prison sentences (28%) or conditional suspended prison sentences (=probation) (25.6%). Actual (nonsuspended) prison sentences were less often imposed (17.4%). More specifically, it seems that long-term imprisonment (>5 years) occurred very rarely: detention of 6 years was imposed five times, and detention of 8 years was imposed only once. Finally, one young offender was sent to prison for 28 years.

As the figure below shows, other sentences were rare (Fig. 7.3).

At first sight, nonsuspended prison sentences were relatively rare. However, on taking a closer look, it appeared that most of the suspended prison sentences (75%) and probation sentences (54.6%) were only partially suspended. This means that part of the prison sentence was suspended while the remaining part had to be served. Taking this information into account, it turns out that more than half of the transfer decisions led to a sentence involving a period in custody! However, we do have to note that in Belgium, due to overcrowded prisons, short-term prison sentences are not always enforced. Our research showed that more than a quarter of the imposed custodial sentences on transferred offenders were not enforced.



Non-conditional suspension	Conditional Suspension (Probation)	Prison (nonsuspended)	Others	Unknown	No penal consequences
82	75	51	13	38	34

Fig. 7.3 Sentences imposed on transferred Juveniles

[33] Another reason is that the Adult Court was of the opinion that the offences had already been punished by means of a former judgement.

Follow-up research revealed that the transfer decision (and in a lot of cases the subsequent prison sentence) did not deter the youngsters. Within a period of 4 to 6 years, at least 51.1% were convicted again in Adult Court for offences committed as adults. This means that more than half of the transferred youngsters relapsed into crime within a relatively short time span.

Three conclusions can be drawn from our research. First, the application of transfer in practice has always remained limited, and recent figures suggest stagnation. Second, the profile of the transferred population is surprising. Transfer is not only used for the young offenders for whom transfer was conceived, namely, the 'serious offenders'. Interviews with juvenile judges revealed that the option of transfer is very often used to compensate for the shortcomings of the youth justice system. Third, long-term prison sentences are rarely imposed on transferred offenders. However, we have to note that, notwithstanding this observation, our research found that at least 73.4% of all transferred offenders ended up in prison at least once within 4 to 6 years following transfer. This was as a result of (1) preventive custody; (2) convictions for offences committed as juveniles and/or (3) convictions for offences committed as adults. A large number of transferred offenders relapsed into crime within short time span.

Conclusions and Recommendations

Despite differences in the legal frameworks, the transfer practices in Belgium and in the Netherlands show remarkable similarities. Notwithstanding significant geographical variation inside both countries, the overall use of transfer is very moderate. Whereas in Belgium the numbers are rising slowly but not alarmingly, in the Netherlands the numbers are clearly falling. The most important conclusion is that the use of transfer is at a very low level in both countries.

Another, rather worrisome conclusion though is that transferred offenders end up in adult prison in both countries. More possibilities within the juvenile justice system are needed, so that the serving of punishments in prison can be avoided. In Belgium, the recent amendment to the law partly fulfils this need, but in the Netherlands alternatives are not yet available.

Finally, another, both more surprising and more worrisome conclusion is that in both countries many of the transferred offenders do not appear to belong to the category of 'serious offenders'. This is partly due to vague or absent legal criteria. For that reason, stricter legal criteria on transfer are needed. In Belgium, the recent amendment to the law seems to partly fulfil this need, but again, this is not the case in the Netherlands.