

**Document Title:** Objectives of Transferring Juvenile Offenders to Adult Court

**Author(s):** Catherine Van Dijk and An Nuytiens

**Document No.:** 208015

**Date Received:** December 2004

This paper appears in *Policing in Central and Eastern Europe: Dilemmas of Contemporary Criminal Justice*, edited by Gorazd Mesko, Milan Pagon, and Bojan Dobovsek, and published by the Faculty of Criminal Justice, University of Maribor, Slovenia.

This report has not been published by the U.S. Department of Justice. To provide better customer service, NCJRS has made this final report available electronically in addition to NCJRS Library hard-copy format.

Opinions and/or reference to any specific commercial products, processes, or services by trade name, trademark, manufacturer, or otherwise do not constitute or imply endorsement, recommendation, or favoring by the U.S. Government. Translation and editing were the responsibility of the source of the reports, and not of the U.S. Department of Justice, NCJRS, or any other affiliated bodies.

C. VAN DIJK, A. NUYTIENS<sup>1</sup>

## OBJECTIVES OF TRANSFERRING JUVENILE OFFENDERS TO ADULT COURT

*In Belgium, juvenile offenders under the age of 18 are brought before the juvenile judge. By exception, however, the juvenile judge can decide to refer a young delinquent aged over 16 to the public prosecutor with the intent of prosecuting and sentencing the minor before Adult Court. This mechanism is called 'transfer', 'waiver' or 'referral'. In this paper we would like to address the question why this mechanism exists. We will attempt to hand out a few keys by comparing some European juvenile justice systems and by analysing files of transferred offenders and their subsequent punishments in Adult Court.*

*A comparative analysis (including Belgium, France, The Netherlands, Germany and England & Wales), reveals that this transfer mechanism solely exists in Belgium and England & Wales. In The Netherlands the juvenile judge can exceptionally apply penal law on minors in Youth Court, but minors can under no circumstances be sentenced before Adult Court. In France and Germany juvenile offenders are always dealt with within the juvenile justice system and under the jurisdiction of the juvenile law. Strikingly, in the two latter countries, juvenile law provides with significantly higher maximal detention periods, and an extensive Youth Court, presided by several juvenile judges and with a jury, handles the most serious cases.*

*These findings illustrate that the transfer mechanism might be used to get rid of the most difficult cases in order to preserve the existing limited youth justice system, while an elaborate system could render the option of applying penal law on juveniles redundant.*

*Analysis of the youth court files of Belgian transferred young offenders will point out whether their profile does indeed correspond with the image of the 'serious career criminal'. The personal and environmental situation of these offenders appears to be problematic in many ways. Another issue is whether or not these so-called serious offenders get the severe sentences in the criminal justice system that the juvenile justice system apparently could not provide. Results point out that only a minority of the transferred minors are sentenced to an effective imprisonment, suggesting that intended goals of incapacitation, public safety and retribution are not necessarily met with a transfer.*

### INTRODUCTION

As all European countries, Belgium provides in a specific youth justice system that deals with minor<sup>2</sup> offenders. Hence in Belgium juvenile offenders under the age of 18 usually are brought before the juvenile judge. By exception, however, the juvenile judge can decide to refer a juvenile delinquent aged 16 to or over the Public Prosecutor with the intent of prosecuting and sentencing the minor before Adult Court according to penal law. This mechanism is called 'transfer', 'waiver' or 'referral'. In Belgium the central criterion for a transfer is whether the available measures within the juvenile justice system are still adequate for the particular offender and whether the juvenile can still be rehabilitated. Within this evaluation the personality of the offender and his or hers environment play a critical part (Senaeve, 1996; Verhellen, 1996).

In this paper we would like to address the question why this mechanism exists. What are the principle reasons and objectives of transferring young offenders to Adult Court? We will attempt to hand out a few keys by comparing some European juvenile justice systems and by analysing files of transferred offenders and their subsequent punishments in Adult Court. First we will outline the possible purposes of transferring juvenile offenders.

## OBJECTIVES OF TRANSFERRING JUVENILE OFFENDERS

According to the *model of 'multiple conflicting goals'* (Denkers, 1976), three main groups of goals play a part within the justice system (in this context: the juvenile justice system and more specifically the transfer mechanism). It involves instrumental goals, intrinsic goals and organisational goals. Typical instrumental goals are retribution, special and general prevention (e.g. deterrence) and protection of society. Intrinsically, the justice system needs to protect citizens (including minors) from excessive state intervention and discretion (cf. legal safeguards). On the organisational level financial and other resources play an important role, as well as personal characteristics of the actors involved in the system and the public opinion. These (and other) goals all play part in different levels (law, policy, judicial practice) and can interact and even conflict with one another. Furthermore, the goals that are officially aimed at can in reality turn out very differently (stated versus real goals). A deep and profound analysis of the goals of referral as stated by policymakers, public prosecutors, judges and other practitioners and the real goals as accomplished in the judicial practice does not lie within the scope of this article. However, we will here discuss three principal goals that in the next sections will be illustrated with (comparative) literature analysis and empirical data.

Legally, the transfer mechanism can maintain the *legitimacy and validity* of the traditional rehabilitative juvenile justice system. While a fundamental reform of the rehabilitative juvenile justice system in Belgium remains absent, some minor adaptations have been made with the Act of 1994: besides the improvement of the legal and procedural position of young offenders, adjustments have been made to the prerequisites for transferring a minor to Adult Court. Likewise, the subsequent proposals and bills have granted the transfer mechanism a prominent role (Van Dijk & Nuytiens, 2004).

This rises the interesting question why this option to divert offenders to the Adult Court seems so appealing for many. This rather repressive choice is actually supported by those favouring the rehabilitative and protection juvenile justice model and by left wing political parties (the socialist and ecological party of the French-speaking part of the country even submitted a proposal to extend and facilitate the application of referral). A possible explanation lies within the idea that by diverting the most difficult cases that might compromise the system, criticism on the rationale of the welfare model can be shifted. In this way the system can maintain its legitimacy and value for most juveniles. "*To make the juvenile justice system viable, you have to have an escape valve*" (Bortner, 1986, p. 59). The (need for a) transfer mechanism indicates the limitations of the protection model: it signifies the difficulty to provide adequate answers to all juvenile crime and to the needs of all juvenile delinquents. Referral is justified because of the difficulty or unwillingness of the young offender to rehabilitate. In this respect, transfer is not considered as a failure of the juvenile justice system but as the individual responsibility of the minor (Bortner, 1986; Sanborn, 1994) and therefore hinders the search for new and more adequate answers to youth crime (Tulkens & Moreau, 2000).

Some might consider transfer as a useful tool to indulge public's increasing *punitive attitudes* and to ensure *public safety*. After all, an important critique on the Youth Court is that punishment is not certain, nor harsh or long enough. The latent function of transfer (the desire to punish) could be much stronger than the manifest, official rationale that the minor cannot be rehabilitated or re-educated and that the judicial interventions of the Youth Court are no longer adequate. Besides, rehabilitative measures are increasingly considered as ineffective ('nothing works') and juvenile law as risky for public safety because of its limited incapacitation possibilities (Feld, 1987; Sanborn, 1994).

Because of the prospect of (longer and more secure) incapacitation of the young offender waiver can meet the desire for repressive punishment and public safety (Braithwaite & Shore, 1981; Fagan & Deschenes, 1981; Sanborn, 1994). In this respect referral fits right into the philosophy of actuarial justice and the risk management discourse whereby crime is looked upon as a 'risk' that the justice system needs to foresee and cover. The small group of delinquents, who are at risk for chronic, serious and violent offending, needs different managing (Garland, 2001; Shichor, 1997). For these offenders – mostly deprived youth from minority groups – expensive procedures and juvenile measures are useless; and selective incapacitation is presumed to be the most efficient solution. The possibility exists that the transfer procedure is instrumentally used to tackle certain crime phenomena collectively (e.g. youth gangs).

Within the judicial practice referral often functions as a release mechanism. Partly due to the system's overload, the lack of available and adequate judicial options and institutions for certain youngsters (e.g. with psychiatric, drug addition problems, refugees, gypsies) young offenders are being transferred. Accordingly waiver also serves *organisational purposes* and increases the manageability of the system.

There are of course additional goals and other factors that have an influence on the transfer mechanism. For example individual beliefs play an important role in practice – and especially in Youth Court where discretionary power allows for input of personal conviction and involvement.<sup>3</sup> However, it is within the scope of this article not possible to discuss them all. Therefore we focus on the three mentioned purposes of transfer: maintaining the legitimacy of the system, getting though on juvenile offenders and by this preserving public safety, and managing the system. We will try to illustrate these purposes of transfer with a comparative analysis of some European juvenile justice systems (i.e. Belgium, the Netherlands, England & Wales, Germany and France) and with results of our empirical study (analysis of youth court file and criminal record of transferred youth and interviews with magistrates).

## TRANSFER TO ADULT COURT IN EUROPEAN PERSPECTIVE

The possibility of transferring youth to Adult Court in Belgium has been installed with the Act of 1965, officially to compensate for the elevation of the age of criminal responsibility from 16 to 18 (Goiset, 2002; Tulkens & Moreau, 2000). Notwithstanding in our neighbouring countries the age of criminal responsibility is also fixed at 18,<sup>4</sup> they do not all provide the option of transfer. A European perspective can shed light on the desirability or necessity of this mechanism.

### Differences

Comparative theoretical research (including Belgium, France, The Netherlands, Germany and England & Wales) shows striking differences between European countries concerning the existence and criteria of transfer to Adult Court.

**Table 1: Comparative analysis of transfer to Adult Court and application of penal law**

England and Wales, Belgium	The Netherlands	Germany, France
Minor offenders can appear in Adult Court - Mandatory (legislative waiver) - Optional (judicial waiver)	Minor offenders can under no circumstances appear in Adult Court	
Penal law can be applied in Adult Court	Penal law can be applied in Youth Court	Penal law can never be applied (-18-21 y)
Punishment: - No limits	Punishment: - No limits	
Sentenced in Police Court for petty offences and/or traffic violations (- Germany)		

Transfer to Adult Court – which implies sentencing and punishment in Adult Court according to the standards of penal law – solely exists in Belgium and in England & Wales. In most cases it is the judge who decides to refer the minor to Adult Court, based on certain criteria (judicial waiver)<sup>5</sup> In addition, Belgian and English or Welsh young offenders are under certain circumstances automatically sentenced in Adult Court for serious offences or in case of recidivism.<sup>6</sup> However, an important difference between these two countries is that the option of transfer is available in England starting from the age of 10, while the lower age limit is fixed at 16 in Belgium. Besides, legal prerequisites with regard to the seriousness of the offence are more stringent in England & Wales. In Belgium the juvenile judge principally takes the personality of the offender into account, regardless of the offence committed.

In France, Germany and in the Netherlands juvenile offenders can under no circumstances appear before Adult Court (Gazeau & Peyre, 1998; Nérac-Croisier, 1997; Weitekamp, 1998). In the Netherlands however, the juvenile judge exceptionally can apply penal law on the minor offender (Bac, 1998; Doek, 2001; Koens, 1995).

If penal law is applied on juvenile offenders in the Netherlands, Belgium and in England & Wales, no special limits concerning punishment for these juveniles are foreseen (Brems, 2001; De Jonge, 1998). We notice however that a recent Belgian Bill seeks to abolish the possibility of imposing life sentences on transferred youth (Onkelinx, 2004). For the sake of completeness we notice that the possibility – or obligation – to sentence young offenders in Adult Court (i.e. Police Court) for petty offences or traffic violations exists in all countries except Germany.<sup>7</sup>

In summary, the countries here discussed can be divided into two groups. In Germany and in France penal law by no means can be applied on young offenders, and juveniles can under no circumstances appear before Adult Court (except for petty offences before French Police Court). Juvenile offenders are always dealt with within the juvenile justice system and under the jurisdiction of the juvenile law. In the other countries penal law can be applied on young offenders – either by the juvenile judge or by the judge in Adult Court after referral.

#### **Explaining the differences?**

When taking a closer look at the countries always dealing with young offenders within juvenile law, important differences between these countries and those who provide the possibility to apply penal law on young offenders occur.

**Table 2: Comparative analysis of juvenile detention and organisation of youth jurisdiction**

England and Wales, Belgium, the Netherlands	Germany, France
Max 2 years detention	Max 10-15-20 years detention
Youth Court presided by one judge (-The Netherlands)	Youth jurisdiction on three levels + extensive Youth Court (France: jury in Cour d' Assises des mineurs)

Long-term detention within juvenile law is only possible in Germany and France. Young offenders can be incarcerated for up to 10, 15 and even 20 years (Bol, 2002; Nérac-Croisier, 1997). This is fairly high in comparison with the maximum of 2 years in the other countries.<sup>8</sup>

Another striking difference concerns the *organisation of youth jurisdiction*. In Germany and in France the Youth Court is organised on three levels. The Youth Court presided by only one judge deals with the more simple and less serious cases. A court presided by three judges handles the more serious cases. The third level consists of an extensive court presided by five judges in Germany, and of three judges and a jury in France. This court deals with the gravest cases (Cario, 1997; Dünkel, 2003; Weitekamp, 1998).

On the contrary, the Belgian, Dutch and English youth jurisdiction is organised on one level. The Dutch Youth Court however is provided with a full court that handles the more complex cases. In addition, only this full court can apply penal law on minor offenders (De Mare, 1998).

As pointed out earlier, in Belgium the central criterion in the judge's decision is whether or not the juvenile measures are still adequate. Besides the fact that this criterion is vague, it can also be interpreted in two ways. It could be possible that it is not the juvenile who is not suitable for the measures, and therefore needs to be excluded from the system, but the measures that are not adapted (anymore). In the latter case, systematically transferring minors would not solve the current impasse of the system, as would a development and renovation of the available juvenile justice interventions. In this reality of deficient and shortage of measures, judges might be more inclined to transfer the difficult offenders and thereby turn them over to an even more deficient system. The adult system suffers from alike and sometimes more severe problems of overcrowding and lack of appropriate treatment, and – even worse – is not tailored to minors.

Indeed, according to the magistrates<sup>9</sup> some legal conditions can influence the decision-making. For example when a juvenile is apprehended shortly before his or her 18th birthday while the offence was committed before the age of 17, the judge has only two options: he can reprimand the juvenile or transfer him to Adult Court. We can imagine that if it concerns a serious offence, the judge will not be likely to close the case with a reprimand. Some magistrates also believe that the lack of space in juvenile detention centres – a well-known problem in Belgium – might play a significant role. It is possible that when a judge intends to impose a detention order, but no space to execute this decision is available, that he or she will decide to transfer the juvenile to Adult Court. In this way a detention can eventually be attained.

It is clear that pressure of time and lack of intervention possibilities can exert influence on the decision-making policy of a judge. These findings suggest that the goals of managing the youth system and maintaining its legitimacy are well represented in the reality of the judicial practice in Belgium. Transfer keeps the system functional and

might avoid a fundamental rethinking of the whole system and its (outdated) protective tenor. In Germany and in France juvenile offenders are always dealt with within the juvenile law. The most serious cases can be judged in extensive youth courts that have the possibility to impose long-term detention up to 20 years. This illustrates that an elaborate juvenile justice system could render the option of applying penal law on juveniles redundant.

Anyhow, in Belgium young offenders perceived 'too hot to handle' are transferred to Adult Court. In the next section we will examine who exactly these youngsters are.

## THE PROFILE OF TRANSFERRED YOUNG OFFENDERS: 'SERIOUS' OR NOT?

Analysis of files of transferred young offenders in five Belgian districts<sup>10</sup> where transfer has been used relatively often during the period 1999-2000-2001, allows us to draw a picture of the profile of transferred youngsters.

### Personal characteristics

The population of transferred young offenders consists of almost 95% males. A wide variety of origins can be detected within our target group. It is striking however that 41,7% is of Moroccan origin.

Most of the juveniles do not perform well at school; most of them attend a professional schooling or even special education. Striking is that 10% never attended secondary school, or even never went to school at all. The latter group merely consists of gypsies. Another indication of a problematic school career is the high amount of drop-outs and juveniles that repeated one or more grades. The amount of truants and youngsters expelled from school appears to be considerably high as well.

### The 'funnel-effect'

Comparing our results to a research involving the global youth offending population on the level of the Public Prosecutor and the Youth Court (Vanneste, 2001), reveals a 'funnel-effect'. Considerably high rates of males, non-EU<sup>11</sup> natives and youth not attending general education can be retrieved in the population of young offenders on the level of the Public Prosecutor. The share of persons that meet these criteria appears however significantly higher on the level of the Youth Court. In our population we find an even higher amount. Especially the share of non-EU natives seems to have reached an alarming level.

*Table 3: The 'funnel-effect'*

	Juvenile offenders Public Prosecutor	Juvenile offenders Youth Court	Transferred juvenile offenders
Males	84%	89%	94,3%
Non-EU native	28%	44%	74,9%
No general education	76%	89%	99,1%

This signifies that being a non-EU native male not attending a general education not only increases the chance of being referred to Youth Court by the Prosecutor, but also the risk of being transferred to Adult Court by the juvenile judge.

Notwithstanding these figures, juvenile judges did not mention race as an explanatory factor in the interviews we had with them. We do not want to postulate that more Moroccan minors than Belgian juveniles are committing (serious) offences. On the

contrary, the question arises whether we can detect some selectivity in youth justice proceedings. A recent research study reveals that the ethnic origin of young offenders does play a significant role in the decision-making process of the Youth Court. This is especially true for Arabic youngsters (Vanneste, 2001). According to De Pauw, this mechanism can be explained by the negative socio-economic prognosis made by the judge for this ethnic minority group (De Pauw, 2000).

#### **Offence history and youth justice career**

The greater part of the transferred youngsters is aged 14 or 15 on the moment of first contact with the Youth Court. Before the decision of transfer, 1 on 4 young offenders has already been convicted for 1 to 5 offences. However, almost 20% has never been convicted for other offences. The amount of 'multi-recidivists' defined as young offenders convicted for 20 or more offences, amounts to only 7,7%.

More than 75% of the offences committed before transfer consider property offences. The offences regarding the transfer decision also consists of 75% property offences. We notice however that a lot of these property offences have violence as aggravating circumstances or are of a violent order as such (e.g. extortion). Crimes against life occur very rarely. At the moment of transfer the bulk of offenders has already reached majority.

In the United States an evolution of same nature – a heightened attention for waiver as a preferential solution for difficult youth and legal adaptations to extend its use – has taken place a few decades earlier, and has led to an abundant amount of research on the topic. Therefore we think it is interesting to compare our first (preliminary) results with some findings of this enormous research tradition. We note that the American and Belgian society in general and their juvenile justice systems in particular are quite different and comparison therefore falls short and must be looked upon with caution.

American research studies have demonstrated that the intended transfer population does not necessarily correspond with the population in reality. The option of waiver has been brought into being in order to deal with two groups of problematic juvenile offenders: the ones who are beyond rehabilitation and those who commit the more serious and violent offences (Mears, 2003). Research is ambiguously with regard to the offences that are being waived: some find that it are merely violent acts that are being dealt with in Adult Court, others come to the conclusion that more property offences are being referred (Fritsch, Caeti & Hemmens, 1996). According to Mears (2003) the use of transfer is more or less equally divided over property and violent offenders. Furthermore, even juveniles that cannot be considered as unable to rehabilitate and whom did not received earlier Youth Court interventions can end up in Adult Court (Bortner, 1986).

Although more research is needed our results point in the same direction: more property offenders, with the note that these offences are often accompanied with violence, and still 20% of the juveniles with no prior conviction record are transferred. As in the US (Fagan & Deschenes, 1981; Mears, 2003; Redding, 2003) there are great geographical differences: jurisdictions seem to employ their own transfer policy. This increases the risk for arbitrary and discriminating decisions (cf. the influencing factors as school career and race).

The goal of identifying the serious offenders that compromise the juvenile justice system and who are a danger to society is apparently difficult to achieve.

## PUNISHMENT IN ADULT COURT

As mentioned earlier we notice that juvenile offenders can be incarcerated within juvenile law for maximum two years. On the other hand, when transferred to Adult Court, the judge can impose any punishment foreseen in penal law, without any restriction.<sup>12</sup>

Taking the foregoing into consideration we may expect that transferred youngsters will be severely punished, and will generally be sentenced to imprisonment for more than two years. The results as shown in the following table however refute this hypothesis.

*Table 4: Punishment in Adult Court after transfer*

Punishment Adult Court	Number	%
Non-effective (probation, delayed)	160	57,3%
Effective imprisonment	47	16,9%
Unknown	35	12,5%
Acquittal	27	9,7%
Community service	7	2,5%
Internment	3	1,1%
<b>Total</b>	<b>279</b>	<b>100 %</b>

Only 16,9% of all youngsters is punished with effective imprisonment. On the majority of transferred offenders a non-effective punishment is inflicted. Community service and internment seem to occur very rarely. Almost 10% of the transferred offenders is being acquitted. The remaining 12,5% concerns minors where it was not possible to trace the punishment.

When we take a closer look at the terms of effective imprisonment, we can conclude that merely short-term detention is inflicted. Only one third of the inflicted effective imprisonment exceeds the period of three years.

*Table 5: Effective imprisonment in Adult Court after transfer*

Effective imprisonment	Number	%
0 – 1 y	18	38,3%
> 1 – 3 y	12	25,5%
> 3 – 5 y	10	21,3%
> 5 y	7	14,9%
<b>Total</b>	<b>47</b>	<b>100 %</b>

As the results on the profile of the transferred youth, the American results regarding the sentences in Adult Court are somewhat conflicting (Myers, 2003). On the one hand there are studies that show that referred youngsters tend to get less lengthy sentences (Feld, 1987; Champion, 1989). Other studies do demonstrate a harsher punishment for violent offenders but a more lenient or equal approach as in Youth Court towards property offenders (Fagan, Forst & Vivona, 1987; Fagan, 1990). One of the principal goals of transfer is the possibility of harsher punishment in Adult Court that exceeds the one in Youth Court. The question remains whether this goal is being attained when taking these results into consideration (Fritsch, Caeti & Hemmens, 1996). The reason why these transferred offenders are treated more leniently might be their young age and the fact that they are perceived as first offenders in the Adult Court (Feld, 1987; Champion, 1989). If referral does not result in lengthier and harsher

sentences, it might be a purely cosmetic operation and the 'get though' approach might be more rhetoric than reality (Fritsch, Caeti & Hemmens, 1996). In their study Fritsch et al (1996) found that the referred juveniles had in fact committed more often a violent act and that they received longer punishments than they would have received in Youth Court. However, their real-time incarceration was limited to 27% of the imposed sentence. So, while the inflicted punishment amounted to an average of 12,8 years, averagely only 3,5 years of this sentence was served.

While exact figures and terms are hardly comparable,<sup>13</sup> it appears that our findings correspond quite well with these American outcomes. Effective imprisonment – the harshest sentence and the only one that is not available within the Youth Court<sup>14</sup> – represents less than 17% of the sentences in Adult Court. Moreover, the greater part of these sentences to effective imprisonment concerns short-term punishments (less than three years). As in the US, it seems that the goals of retribution and public safety are hardly met with these rather lenient punishments in Adult Court.

## CONCLUSION

The fact that juvenile justice systems without a transfer mechanism, provide with more and longer sentencing possibilities and extended youth courts, suggests that a well balanced and build out juvenile justice system renders referral redundant. In this respect other systems might need transfer to manage their system and to preserve its legitimacy. This more punitive mechanism can derive the attention of the deficiencies of the whole system – and especially the outdated protection philosophy – by getting rid of the troublemakers. Transferring some offenders is admitting that the system is not viable for all; hence a priori an 'outside' group is created.

Our research revealed that this group consist of mostly male, Moroccan offenders with a lower education that have committed a property offence, frequently accompanied with violence. Their profile seems to be more determined by their disadvantaged socio-economic situation than their offence record. These youngsters are often (nearly) major as a result of which the Belgian juvenile justice system cannot provide adequate answers.

The question remains whether the adult system does know how to deal with these transferred offenders. From the idea that transfer represents a getting though approach and intents to increase public safety, long-term incapacitation is to be expected. Analysis of the punishments imposed in Adult Court demonstrates that for the time being this objective is not achieved, since effective imprisonment occurs relatively rare and mostly on a short-term basis.

On the basis of our limited research it cannot be determined yet which goals play a principal part on the different levels (politics, policy, academic discourse, judicial practice). We suppose that in politics getting though on youth crime and preserving the existent system for the sake of convenience gain the upper hand. While this latter goal for the time being<sup>15</sup> appears to be achieved, the objective of punishing and incarcerating youth in order to protect society is hardly being obtained. In this respect referral is merely a *symbolic* decision. The fact that these transferred juveniles are first offenders in penal law can explain this. Legal gaps, lack of intervention options and organisational problems are probably dominating the judicial *practice* of referral.

We are of the opinion that the current juvenile justice system is outdated and does not meet the needs of the juvenile offenders and society nowadays. As demonstrated by our neighbouring countries France and Germany an integrated and well build out

system is capable of handling all juvenile offenders, even the serious ones who might demand a long-term incarceration.<sup>16</sup> Such a fully fledged system can also restrict the current legal disparities whereby certain offender groups (e.g. non-EU origin, low socio-economic status) are target for referral. It appears as waiver is also applied as treat or signal towards certain offenders, which has also a symbolic dimension.

Anyhow it seems that a coherent rationale for the transfer mechanism is missing. Its application and interpretation are very diverse. More research is needed, also with regard to the system-level responses to waiver: the effect of referral on the whole system is very complicated and research might reveal more unintended effects of waiver legislation.

## ABOUT THE AUTHORS

**Catherine Van Dijk**, Assistant / PhD. Student, VUB, Vrije Universiteit Brussel, (Free University of Brussels), Faculty of Law, Dept. of Criminology, Pleinlaan 2, 1050 Brussels, Belgium, e-mail: catherine.van.dijk@vub.ac.be.

**An Nuytiens**, Researcher, VUB, Vrije Universiteit Brussel (Free University of Brussels), Faculty of Law, Dept. of Criminology, Pleinlaan 2, 1050 Brussel, Belgium, e-mail: an.nuytiens@vub.ac.be.

## ENDNOTES

- 1 With thanks to Prof. dr. C. Eliaerts for peer-reviewing our contribution.
- 2 In this context a 'minor offender' refers to an under aged offender (in Belgium, under eighteen) and not to a so-called petty offender.
- 3 The philosophy (e.g. rehabilitation, just desert/retribution, restoration) the judge adheres to and his/hers attitude towards transfer are crucial in the waiver decision. The influence of personal beliefs is enabled by the vagueness of the legal criteria.
- 4 In Germany the upper age limit is also fixed at 18. However, under certain conditions young offenders until the age of 21 can be sentenced within juvenile law (Dünkel, 2002).
- 5 A judicial waiver signifies a decision by the juvenile judge. In Belgium judicial waiver is standard; for England & Wales the judge can decide to refer the youngster in case of 'grave crime' (sentenced with minimal 14 years of imprisonment) when he/she estimates that the juvenile sanctions are inadequate (Gibson, 2000).
- 6 A legislative or automatic waiver stands for transfer prescribed by law. For example, in Belgium a new procedure of transfer is not necessary when a minor has already been convicted before Adult Court and the judgement can no longer be appealed. When committing any other offence, the youngster is automatically being prosecuted within the penal system (Smets, 1996). In England & Wales, waiver to Crown Court is mandatory for manslaughter and murder (Gibson, 2000).
- 7 In Belgium for example, a minor of 16 years or older who commits a violation of traffic regulations, is automatically prosecuted before the Police Court. However, the police-magistrate still has the possibility to refer the youngster to the juvenile judge when he or she assumes a juvenile measure to be more adequate than the adult (penal) procedure (this is a reverse waiver). The legislator installed this collective automatic (legislative) waiver for practical reasons (Senaeve, 1996), namely to prevent an overstocking of the juvenile justice system with traffic violations which might impede its core-activity of protection and re-education (Smets, 1996).
- 8 In Belgium the juvenile judge can incarcerate the juvenile for 3 months in a closed section of a juvenile detention facility; this period is once extendible with another 3 months and later on a monthly basis (Verhellen, 1996). In practice, a stay in these detention centres is rather short (3 to 6 months), partly due to the problem of overcrowding.
- 9 Our research study also entailed interview with juvenile judges.
- 10 Antwerp, Bergen (Mons), Brussels, Charleroi and Mechelen.

- 11 In order to compare our results with other researches, we will not count in the new member states of the European Union (e.g. Poland)
- 12 As pointed out, a recent Belgian bill seeks to abolish the possibility of imposing life sentences on transferred young offenders.
- 13 Sentencing terms in both Youth and Adult Court are longer in the USA than they are in Belgium.
- 14 The conditions and circumstances of confinement to a juvenile facility are hardly comparable to adult prisons.
- 15 Several attempts to reform the juvenile justice system thoroughly have failed. The Bill of the current Minister of Justice Onkelinx retains the original rehabilitative philosophy while expanding and facilitating waiver.
- 16 Although our findings of the punishment in Adult Court demonstrate that this may not be as crucial as alleged

## REFERENCES

- Bac, J. R. (1998). *Kinderrechter in strafzaken*. Arnhem: Gouda Quint.
- Bol, M. W. (2002). *Jeugdcriminaliteit over de grens*. ( Vol. 2002/4). Den Haag: WODC.
- Bortner, M. A. (1986). Traditional Rhetoric, Organizational Realities: Remand of Juveniles to Adult Court. *Crime and Delinquency*, 32, 53-73.
- Braithwaite, L. & Shore, A. (1981). Treatment Rhetoric versus Waiver Decisions. *Journal of Criminal Law and Criminology*, 72, 1867-1891.
- Brems, E. (2001). Een eerlijk strafproces voor kinderen: de Bulger-zaak in Straatsburg. *Panopticon*, (6), 571-587.
- Cario, R. (1997). Entre virtualité de l'éducatif et réalité du répressif. In R. Nérac-Croisier (Ed.), *Le mineur et le droit pénal* (pp. 149-200). Parijs: L'Harmattan.
- Champion, D. J. (1989). Teenage Felons and Waiver Hearings: Some Recent Trends 1980-1988. *Crime and Delinquency*, 35, 577-585.
- De Jonge, G. (1998). Het Nederlandse jeugdstraf(proces)recht en het IVRK: 't kan nog beter. *FJR*, (1), 11-14.
- De Mare, E. J. M. (1998). *Basisboek jeugdstrafrecht en jeugdbeschermingsrecht in de praktijk*. Utrecht: Uitgeverij SWP.
- De Pauw, W. (2000). *Migranten in de balans*. Brussel: VUBPress.
- Denkers, F. A. C. M. (1976). *Criminologie en beleid. De invloed van penologische research op het strafrechtelijke beleid*. Nijmegen: Dekker & van den Vegt.
- Doek, J. (2001). De jeugdige delinquent, de toepassing van het strafrecht voor volwassenen en het IVRK. *FJR*, (5), 144-149.
- Düinkel, F. (2002). Le droit pénal des mineurs en Allemagne: entre un système de protection et de justice. *Déviance et société*, (3), 297-313.
- Düinkel, F. (2003). Youth violence and juvenile justice in Germany. In F. Düinkel & K. Drenkhahn (Eds.), *Youth violence: new patterns and local responses - Experiences in East and West*. Godesberg: Mönchengladbach.
- Fagan, J. & Deschenes, E. P. (1981). Determinants of Judicial Waiver Decisions for Violent Juvenile Offenders. *Journal of Criminal Law and Criminology*, 81, 314-347.
- Fagan, J., M. F. & Vivona (1987). Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court. *Crime and Delinquency*, 33, 259-286.
- Fagan, J. (1990). Social and Legal Policy Dimensions of Violent Juvenile Crime. *Criminal Justice and Behavior*, 93-133.
- Feld, B. C. (1983). Delinquent Careers and Criminal Policy: Just Deserts and the Waiver Decision. *Criminology*, 21, 195-212.
- Fritsch, E. J., Caeti, T. J. & Hemmens, C. (1996). Spare the Needle but not the Punishment: The Incarceration of Waived Youth in Texas. *Crime and Delinquency*, 593-609.

- Garland, D. (2001). *The culture of control. Crime and social order in contemporary society*. Oxford: University Press.
- Gazeau, J. F. & Peyre, V. (1998). France. In J. Mehlbye & L. Walgrave (Eds.), *Confronting Youth in Europe. Juvenile Crime and Juvenile Justice* (pp. 217-49). Copenhagen: AFK.
- Gibson, B. (Ed.). (2000). *Introduction to Youth Justice*. Winchester: Waterside Press.
- Goiset, D. (2000). Dessaisissement. Une mesure exceptionnelle? *Journal du Droits des Jeunes*, 14-23.
- Koens, M. J. C. (1995). Het nieuwe jeugdstraf(proces)recht. *FJR*, (1), 3-7.
- Mears, D. P. (2003). A critique of waiver research. Critical next steps in assessing the impacts of laws for transferring juveniles to the criminal justice system. *Youth Violence and Juvenile Justice*, 1 (2), 156-172.
- Myers, D. L. (2003). The recidivism of violent youths in juvenile and adult court. A consideration of selection bias. *Youth Violence and Juvenile Justice*, 1 (1), 79-101.
- Nérac-Croisier, R. (Ed.). (1997). *Le mineur et le droit pénal*. Parijs: L'Harmattan.
- Onkelinkx, L. (2004). Voorontwerp van wet tot wijziging van de wetgeving betreffende de jeugdbescherming en het ten laste nemen van minderjarigen die een als misdrijf omschreven feit hebben gepleegd, 31 maart 2004.
- Redding, R. E. (2003). The effects of adjudicating and sentencing juveniles as adults. *Research and Policy Implications. Youth Violence and Juvenile Justice*, 1 (2), 128-155.
- Sanborn, J. B. j. (1994). Certification to Criminal Court: The Important Policy Questions of How, When and Why. *Crime and Delinquency*, 40, 262-281.
- Senaeve, P. (1996). *Inleiding tot het jeugdbeschermingsrecht*. Leuven: Acco.
- Shichor, D. (1997). Three Strikes as a Public Policy: The Convergence of the New Penology and the McDonaldization of Punishment. *Crime and Delinquency*, 470-492.
- Smets, J. (1996). *Jeugdbeschermingsrecht*. Deurne: Kluwer.
- Tulkens, F. & Moreau, T. (2000). *Droit de la jeunesse. Aide, assistance, protection*. Brussel: Larcier.
- Van Dijk, C. & Nuytiens, A. (2004). The referral of juvenile offenders in Belgium: theory and practice. *The Howard Journal*, in press.
- Vanneste, C. (2001). Une recherche sur les décisions prises par les magistrats du parquet et les juges de la jeunesse. *Journal du Droits des Jeunes*, 5-12.
- Verhellen, E. (1996). *Jeugdbeschermingsrecht*. Gent: Mys & Breesch.
- Weitekamp, E. G. M. (1998). Germany. In J. Mehlbye & L. Walgrave (Eds.), *Confronting Youth in Europe. Juvenile Crime and Juvenile Justice* (pp. 251-304). Copenhagen: AFK.