

Juvenile delinquency and juvenile justice in Belgium

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Introduction

Belgium is a small (with a surface of 32.545 km²), but well-situated country in the northwest of Europe. It consists of over ten million citizens of whom almost six million live in the Northern part, Flanders. As in other European countries, families in Belgium are becoming smaller and smaller. The fertility rate is 1.56 children per woman. So Belgium is faced with an ageing **population**, 15% of whom are older than 65.¹ The portion of juveniles (0-19 years) has diminished (from 24,6% in 1990 to 22,4% in 2003) and the prognosis is a further decrease to 20,2% in 2021 (VRIND, 2003).

Due to a federalization process (1970-1988) Belgium has been transformed into a Federal State consisting of **three Communities** (a French, a Dutch and a German Community) (De Vroede & Gorus, 1997). This metamorphosis resulted in the reorganization of the competencies concerning juvenile delinquency. The judicial reaction on youth delinquency remained a federal matter, while the execution of the educational measures ordered by the youth court has become a community matter.

This means that each Community has its own regulation concerning the execution of measures ordered by the youth court. The judicial response on criminal offences committed by minors however is still based upon the federal **Youth Protection Act of 1965** and therefore remains equal for all Communities (Eliaerts, 1999). Despite fierce criticism on the rehabilitative orientation of this Act and ongoing theoretical debate between adherents of different paradigms, the legal situation remains – aside from a few minor changes – unchanged until today.

1 Global overview of delinquency trends

An accurate quantitative picture of the actual practice with regard to youth crime in Belgium appears difficult to obtain. The lack of reliable figures concerning the different aspects of juvenile justice is a major bottleneck.

1.1 Availability and reliability of Belgian figures on juvenile crime

The systematic gathering of data on crime and crime control has been a problem in Belgium for decades. This situation – despite increasing computerisation – is dramatic, especially regarding juvenile delinquency. Figures, if available, are scattered over several federal, regional and local agencies and hence neither reliable nor comparable. Official criminal statistics are in brief *“little accessible, pretty unreliable and very incomplete”* (Goedseels, 2002, p. 30)

We will, however, attempt to draw a picture of juvenile delinquency in Belgium on the basis of results of self-report studies and official statistics², e.g. figures of the public prosecution and the youth court (see 1.4) and data on sentence implementation (juvenile facilities (see 6.5) and alternative measures (see 6.3)).

¹ See <http://www.Belgium.be> (dd. 28/05/2004).

² We would like to emphasise that official data do not necessarily reflect the criminal reality (the offences actually committed by minors). These figures also express the efforts of victims (willingness to report crime), police (willingness to register), magistrates (willingness to prosecute and sentence) and priorities set in policies.

1.2 Self-report data

During the physically and emotionally turbulent adolescence, committing (petty) offences can be considered as part of typical juvenile experimenting behaviour. In this respect juvenile delinquency can be looked upon as '**statistically normal**', standard behaviour that comes with the process of growing up. International self-report studies confirm this thesis (Junger-Tas, Terlouw & Klein, 1994). An extensive research project of the KULeuven (the Catholic University of Leuven) on Flemish youth included an inquiry into the offending behaviour of 12 to 18 year old students (Goedseels, Vettenburg & Walgrave, 2000). Despite the known distortions of self-report data³, they reveal interesting information on undetected, unreported, unresolved crime (the so-called 'dark number').

Students were asked after **eight types of offences or problem behaviour**, committed during the past year. Fare dodging was reported the most (25,5%), followed by theft (23,4%), vandalism (20,7%), use of drugs (17,4%), carrying weapons (12,7%), assault and battery (12,6%), running away from home (6,5%), and drug dealing (5,7%). With regard to the use and dealing of drugs, in 90% of the cases it involved only soft drugs.

Ample half of the respondents (52%) committed at least one of the offences. One fifth committed only one of the offences, a same proportion two to three acts, 10% claimed for more crimes. The latter group can be considered as **career delinquents**: they not only committed more types of offences, but also more frequently and their acts were detected more often by the police. These career delinquents suffered more from depression, suicidal thoughts, experienced less parental support and control and their school careers tended to be problematic.

These figures correspond well with another Belgian study of French-speaking juveniles (14 to 21 years old): the total prevalence of delinquent behaviour during the last year aggregates 56,1%, the total prevalence in the total course of their young lives amounts to 82,5%. Only the drug-related offences are remarkably less prominent among the Walloon youths (8,8% drug use and 1,6% drug selling during the past year) (Born & Gavray, 1994).

Most offences are committed only once (especially 'assault and battery' and 'running away') or occasionally. Carrying weapons, drug use and dealing are committed more recurrently (Goedseels, et al., 2000). Criminal acts classified as serious have a rather low frequency (Born & Gavray, 1994). Confirm with other research, girls are less delinquent, although the differences are less striking for running away, drug use and fare dodging. Regarding age, the same curve as in international studies occurred: a peak on the age of 15-16 and a decline from age 17 (apart from the use of drugs). Vandalism and especially drug use typically take place in group, while running away, assault and battery and drug dealing are committed alone (Goedseels, et al., 2000).

The variance between Belgian and non-Belgian juveniles is small, only for fare dodging, assault and battery and carrying weapons the latter group presents slightly higher percentages. Students with a higher educational level commit significantly less offences. Most crimes (70-90%) are never discovered; vandalism and assault and battery are the most detected by the police. Noteworthy is that the group of offenders was also more victimised (Goedseels, et al., 2000).

Generally – as far as a comparison with other research studies⁴ is allowed – Belgian youths nowadays do not seem to be more criminal as their peers in the past or their peers abroad. Quite the contrary, international research postulates 70% or more of all 13-18 year old juveniles committing yearly at least one offence. Remarkably, the figures vary little over time.

³ Bias e.g. provoked by social desirable answering, by memory distortion and by the drop out of truants.

⁴ See: J. Junger-Tas, G-J. Terlouw en M.W. Klein (Eds.) (1994). *Delinquent behavior among young people in the western world. First results of the international self-report delinquency study*. Amsterdam/New York: Kugler Publications..

So the idea that juvenile delinquency is increasing could be inaccurate. Yet, these statistics do not reveal anything on the seriousness of the offences.

1.3 Police statistics

Because age is not a variable in Belgian police statistics, there are no specific youth statistics available at this level. Only regional and diffuse figures exist, for example regarding local phenomena as street gangs.

1.4 Statistics of the Public Prosecutor and youth court

For some insights in Belgian judicial statistics we refer to a research study that analysed all decisions of the prosecutor and the juvenile judges regarding juvenile delinquents in eight Belgian judicial districts⁵ during three months (Vanneste, 2001).

On the **level of the prosecution**, almost three quarters (71%) of the determinative decisions encompassed a dismissal of the case. One fifth implied a referral to the youth court. Alternative sanctions occur relatively rarely (4,2%), although the use of alternatives can vary significantly over districts (in some districts this percentage can double). Finally, 4,5% of the decisions leads to a referral to Special Youth Services.

The mentioned research study also managed to gather some more specific long-term (1980-1997) data concerning the largest (and hence most important) judicial district, **Brussels**. These data do not support the hypothesis that juvenile delinquency is rising, on the contrary. The figures show that the amount of juvenile delinquency communicated to the Public Prosecutor by the police diminished between 1994 and 1997. The supposition that delinquent minors are becoming younger, cannot be supported either. We can however conclude that the nature of committed offences is changing; while the amount of property offences is diminishing, personal offences are on a rise. Besides, these findings need to be put against the background of a diminished portion of juveniles in the total population (see introduction).

Regarding the 20% referred cases to the **youth court**; the juvenile judge can pass provisional decisions (in the preliminary phase) as well as judgements in the final trial-stage. For all decisions the proportion preliminary decisions versus judgements is 60 - 40%, and the proportion residential (with placement of the juvenile) versus ambulatory (with preservation of the minor in his own environment) measures is more or less equally dispersed. **Residential** confinement (49,7%) usually involves custody in a (half-)open or closed institution of the Flemish or French-speaking Community (26%), but also in private institutions (18%), and before 2002 confinement in a detention centre for adults for maximal 15 days took place in 4% of the cases (Art. 53 of the 1965 Act was abrogated January 1, 2002). Other residential options such as placement in charge of a reliable person (0,7%) or a psychiatric institution (1%) are less frequently used, although the need for more facilities in juvenile psychiatry is pressing. **Ambulatory** measures (48%) involve putting the minor under supervision of Special Youth Services (18%), imposing community service or an educational training (16%), or giving the minor a reprimand (14%). **Transferring** juveniles to adult court (Art. 38) remains an exceptional decision (3% of all judgements).

By means of analysis of files on the level of the prosecution and the youth court a **profile** of the juveniles could be made, which of course cannot be equated with the profile of the delinquent in general. The profile covers offence characteristics as well as socio-demographic features.

With respect to the **offence characteristics**, it is striking, but not surprising, that the profiles on the level of the youth court are far more serious than those on the level of the prosecution. The juveniles brought before the judge committed more offences, often in

⁵ Belgium consists of 27 judicial districts.

group, using more violence and weapons and had a longer criminal record than those whose case was being handled by the Public Prosecutor.

Juveniles who enter the juvenile justice system can be profiled as being socially and economically vulnerable. They often experience familial problems (e.g. judicial interventions in the family, harmful familial atmosphere) and their school career evolves adversely and involves problem behaviour, bad grades and truancy. Profiles also show an overrepresentation of boys, especially of minority groups. These **socio-demographic features** are even more significant in case of the juveniles brought before the youth court.

Whether these profiles give rise to more delinquent behaviour, facilitate a referral to judicial instances, or else a combination of both, can not be determined.

2 Prevention of delinquent behaviour

The Belgian prevention landscape can be labelled as highly chaotic: there is no consensus of used concepts, no united theoretical perspective, and there remain gaps and overlaps (Burssens, Goris & Vettenburg, 2004). The complex allocation of competences between the Federal State and the Communities is partially responsible for this chaos. National prevention programs directly aimed at preventing juvenile delinquency are rare. Most often they are part of a larger and more general societal oriented project. The Federal State usually plays the role of financier (except in case of projects organised by the police, see below, 3). With federal or regional subsidies local communities and agencies can for example organise programs for youth at risk in cities (e.g. in Antwerp).

Since the emergence of crime and feelings of insecurity have become political priorities, local, regional and national authorities have launched several preventive measures. We will briefly point at some of these initiatives. For example, the Belgian Ministry of Social Integration has created 'integration contracts' for youngster up to 25 without an income. In cooperation with the welfare sector the Ministry of Education has set up projects for schools with problems, such as discipline, motivation of students and violence. With regard to the prevention of drugs and alcohol, several initiatives are taken by the health sector. Especially worth mentioning are the prevention initiatives of the Ministry of Internal Affairs (1989). These integrated projects – a collaboration between as many local instances as possible such as the police and the administrative, political, social and educational agencies – were directed at so-called petty street crimes and the feelings of insecurity. From the beginning of 1993 municipalities can make Prevention and Security Contracts with the Ministry of Internal Affairs to obtain more resources for the necessary extra security measures. The content of these measures can be very diverse: specialised policemen training, drug treatment centres, social prevention programs for football-hooligans, job training for societal vulnerable youngsters, etc. Globally, prevention has shifted from early detection and treatment of individual cases, to global action at social, economic and cultural level (Walgrave, Berx, Poels & Vettenburg, 1998)⁶.

⁶ See also C. Strebelle (2002). *Les contrats de sécurité. Evaluation des politiques de prevention en Belgique*. Bruxelles: Bruylant; Ph. Mary (Ed.) (2003). *Dix ans de contrats de sécurité: évaluation et actualité*. Bruxelles: Bruyant.

3 Police intervention

According to the Youth Protection Act of 1965, children aren't criminal responsible below the age of eighteen⁷. The youth court imposes no punishments like in adult courts, but 'educational measures' (see below, 5). Besides criminal cases, the youth court is also competent to try cases of children in need of care, and deviant behaviour (i.e. truancy). The law demands that the decisions of the Public Prosecutor and the youth court should be taken in the best interest of the child, considering his personality and family situation. This legal framework influences, or should at least do so, the tasks and the functioning of the police forces in youth cases.

According to the law, the police act **under the authority of the Public Prosecutor**, to whom they have to report all crimes. In theory, they cannot decide to drop the charges. In practice, the police often give unofficial warnings (cautions) or provisionally register the facts. Depending on additional information or new offences, they still can decide to make an official report and to send it to the Public Prosecutor. In principle diversion programs cannot be set up without intervention of the Public Prosecutor (see below, 4). In practice, it occurs that the police demand juveniles to participate in educational training such as traffic courses or to restore small damages. If the deviant behaviour of a young person reveals a "problematic educational situation", they can refer him (and his parents) to social support agencies (yet without conditions).

There exist **no specific legal rules** for arrest and police custody of minors. Recently the *Cour de Cassation* decided that, like in adult cases, deprivation of liberty of a minor should be confirmed within 24 hours by a (juvenile) judge⁸. The minor should then be transferred to a youth institution⁹. The individual rights of juveniles during police custody aren't clearly regulated. Assistance of a lawyer is only provided by law if the minor is brought before the youth court. It appears that the parents are not always (immediately) warned. Research revealed that juveniles (especially ethnic minority groups) sometimes complain about their treatment during police custody (Vanderhaegen & Eliaerts, 2002). They maintain that arrest and police custody (especially spending a night at the police office) is abused to obtain confessions or testimonies or even to 'punish' some offenders¹⁰. The circumstances of detention are sometimes reported to be bad (no food i.e.). To control the actions of the police in juvenile cases no specific independent complaint bodies exist.¹¹ In the Flemish and the French Community there is an 'ombudsman' for children who (only) can ask questions and report to political authorities.¹²

The law does not demand a **special youth section** within a police force. However, since the reform of the Belgian police law in 1998, the function of "specialized chief-inspector" was created in the local police (formerly called 'police assistant') (De Naeyere & Gossé, 2004). This function requires an additional diploma in the humanities, i.e. criminology. The

⁷ See below, 5.1., for a few exceptions

⁸ According to the law on pre-trial detention (20/6/1990). *Cour de Cassation*, 15/5/2002.

⁹ Since 1/1/2002, a minor can no longer be locked-up in a prison (abrogation of art. 53 of the 1965 Act), unless he has been sentenced by an adult court. Due to regular overcrowding in the institutions of the Communities, a federal detention centre was set up in March 2002 (the Federal Centre Everberg), where juvenile delinquents can be sent to (under certain conditions) as a provisional measure (for a max. period of 2 months and 5 days).

¹⁰ Some police officers are of the opinion that prosecutors or juvenile judges are too "soft" with juvenile delinquents, especially recidivists, and that they are sent back home too easily (sometimes because of overcrowding in youth institutions).

¹¹ Control of the police is exercised by the "General Inspection" of the police (Police Law of 1998) and by an independent committee (Comité permanent de contrôle des services de police, law of 18/7/1991) that reports directly to the "Chambre des représentants du peuple" of the Belgian Parliament.

¹² The "Kinderrechtencommissaris" in the Flemish Community and the "Délégué general aux droits de l'enfant et à l'aide à la jeunesse" in the French Community.

specialized chief-inspector works mostly for the youth (and family) section of the office of the Public Prosecutor and performs inquiries related to the Youth Protection Act. The juvenile judge can also give him instructions, such as controlling the execution of his decisions.

In the larger police forces, however, there often is a special youth section. They also have detectives and sometimes even social workers. Special equipment facilities are often available, like separate rooms for interrogation of juveniles (also victims of crime) and anonymous cars. The assignment of a youth section is rather large. They undertake preventive actions, make inquiries in 'problematic educational situations', and they deal with cases where children are victims of crime, like child abuse. Besides that, they offer special support in tackling specific youth crimes (street crimes, car-jacking, drugs...): profiling, crime-analysis, co-ordination of special actions (on hot spots). Concerning their preventive tasks, school visits can be mentioned (information about drugs, traffic regulations...). They can also participate in networks of social support and victim aid agencies. Much depends on the initiatives taken by local authorities or the police management.

4 Interventions of the Public Prosecutor

4.1 *Legal framework*

Every judicial district has a specialised Youth Division, competent for all cases involving minors. When confronted with an offence committed by a minor, the Public Prosecutor has only three legal **options** at his disposal:

1. He can dismiss the case;
2. He can consider the offence as a symptom of underlying personal, social or familial problems and consequently send the minor and/or his family to Special Youth Services;
3. Finally, if the Public Prosecutor considers a judicial measure necessary, he can refer the case to the juvenile judge.

In practice however, Public Prosecutors also employ alternative options. Because these new practices take place in absence of any legal basis, they create several problems for the legal rights of minors (see below, 4.3).

4.2 *Diversion experiments*

4.2.1 **Developments over the last 20 years**

Since the beginning of the eighties Public Prosecutors of several judicial districts **experimented** with measures to divert young offenders from the formal juvenile justice system. The reasoning behind these experiments was the observation that a great deal of the offences was not prosecuted at all, because of its minor importance. Nevertheless, the dismissal of these cases had several negative side effects such as a sense of impunity with the offender, risk of recidivism, and frustrations with the victim and society in general. By giving the Public Prosecutor additional modalities to react to juvenile crime, a more immediate response that can prevent the further development of a criminal career became possible (Devroede 1997; Defraene 2001). The introduction of community-based agencies that organise and supervise the execution of alternatives increased the use of community service on the level of the Public Prosecutor (Spiesschaert, Vanthuyne, Van Dijk & Van Grunderbeeck, 2001).

From a more general and theoretical perspective, these new practices can be considered as a result of the **dissatisfaction with the Youth Protection Act of 1965**, its **rehabilitative** philosophy and its implementation. The past twenty years and especially during the nineties we see a revival of a punitive discourse on youth delinquency. The

criminal responsibility of juveniles, the presumed increase in youth delinquency and a renewed belief in a just desert instead of a rehabilitative approach, are central issues in the recent public debate on the reform of the Belgian juvenile justice system. While in some countries this movement has led to a new legislation, in Belgium, this retributive or repressive tendency remains rather a matter of the political discourse¹³ (Eliaerts, 2001). Instead, community service increasingly became a means to sanction young offenders within the legal framework of the rehabilitation paradigm (Eliaerts, 2001). However, from a theoretical point of view, these new practices are associated with the sanction or **justice model**.

During the nineties, a third way of thinking about justice emerged in Belgium. A lot of researchers felt dissatisfied with both the protection/treatment and the sanction/penal model. Following an international movement, they advocated a new model: the so-called **restorative justice paradigm**. Within the restorative justice literature, community service and victim-offender-mediation are presented as two prototypes of this new philosophy. One of the key principles of restorative justice that distinguishes it from the traditional rehabilitative and retributive paradigms is the focus on the harm caused by the offender. Therefore, the main goal of the judicial response is to restore this harm. Retributive and re-educational goals are subsidiary and not intentionally strived for. As a consequence, the content, aims and philosophy of community service are evolving in a restorative direction (Walgrave, 2000), or at least in theory.

Influenced by the restorative justice movement and a supportive policy towards restorative justice practices, several Belgian judicial districts introduced victim-offender-mediations in the mid and late nineties. As voluntariness is considered an essential characteristic of victim-offender-mediation, many claim that it should be proposed on the level of the Public Prosecutor, before initiating any judicial procedure.

Because a clear legal framework is lacking, the **practice is very fragmented and diverse**. According to district, the Public Prosecutor, the juvenile judge or both have the competence to impose community service and/or victim-offender-mediation. Moreover, judicial districts diverge highly in the application of alternatives and in the way they employ selection criteria.¹⁴

4.2.2 Implementation of diversion: rehabilitative, retributive and restorative features

a Community service

Some studies suggest that judicial actors often use alternatives as a means to **sanction** juvenile offenders in a constructive way, or even to reinforce the punitive features of the intervention (Vanderhaegen, 1999). With this punitive intention, Public Prosecutors in some judicial districts impose community service in addition to victim-offender-mediation, in case the minor has a prior record or has committed a rather serious offence.

Research also reveals that alternative measures have a **net-widening effect**. First, community services are not only used as an alternative for prosecution or traditional welfare measures, but often as an alternative for dismissal (Eliaerts, Dumortier & Vanderhaegen, 1998; Geudens & Walgrave 1996; Geudens 1996). However, not all judicial actors experience this net-widening effect as negative. From the victim's point of view, more victims can have their damages repaired. From a pedagogical point of view, moreover, it may be better to react (in a restorative way) to a minor's first offence, than not to react at all. Community service can make young offenders and their parents more responsible and it gives the minor the opportunity to symbolically **restore** the damages caused to society. On the level of the prosecution, community service can avoid stigmatising and coercive judicial

¹³ With the Acts of 1994 and 2002, however, some adjustments have been made (see below section 6.4.2 and 6.6.1).

¹⁴ For related issues to the legal rights of minors, see below 4.3

interventions. This might prevent further, more persistent delinquency and, accordingly more severe judicial interventions (Devroede 1997, Vanderhaegen 1999).

Secondly, this net-widening effect may result in a bifurcation policy: minor offences will be handled alternatively, while serious crimes will still be pursued within the traditional system. Besides the restorative goals of community services, a great part of magistrates values especially their **punitive** objectives. Influenced by some mediatised incidents concerning young delinquents, **public safety** as well, is becoming a more legitimised goal of judicial interventions (Eliaerts, 2001). Community services, imposed for minor offences, when unsuccessful, can result in even more severe interventions than an initial traditional juvenile justice measure. After all, when juveniles do not complete their community service, judges feel the need to react strongly in order not to lose their credibility (Dumortier 2000).

However, not only restorative or punitive philosophies are at stake: community services are also still influenced by the **rehabilitative** paradigm. Different studies show disproportion between the seriousness of the offence and the length of community service. Besides offence characteristics, more subjective factors and personal circumstances of the young offender (e.g. age, family and school situation and attitude of the minor), influence the decision making process of Public Prosecutors and judges (Eliaerts, et al., 1998; Geudens & Walgrave 1996; Geudens 1996). Therefore, in order to re-educate and rehabilitate them, some juvenile offenders are dealt with more harshly than their fellow offenders with less personal problems. Because of the lack of legal rules and the discretionary power of judicial actors, unequal practices are very common in the Belgian juvenile justice system. According to the individual prosecutor or judge, the restorative, the retributive or else the pedagogical objectives gain the upper hand (Van Paesschen 2000; Puccio 2001; Eliaerts, et al., 1998).

b Victim-offender-mediation

Although with a different impact, the same general comments can be made regarding victim-offender-mediation. There is empirical evidence that victim offender mediation is used in addition to other measures in order to broaden social control processes (Eliaerts, et al., 1998). The problem of **net-widening** is also reflected in situations where victim-offender-mediation is applied even in case of mischief (Puccio, 2001). In some judicial districts it is the explicit policy to select only cases of minor importance with clear, minor and easy identifiable damage, with the principle objective to restore the financial damage of the victim. Some empirical data show that mediation can be employed in a **punitive** way, or at least result in punitive practices. For example, after mediation young offenders can be confronted with high damage claims and therefore experience an even more severe reaction than they would have experienced within the traditional procedure. Moreover, fear of being sentenced and pressure of victims, parents or others can push offenders to restore more than they think is fair. Furthermore, the introduction of the victim in the judicial process, can lead to double punishment: on the one hand the youngster is obliged to restore the harm caused to the society, on the other hand he has the duty to repair the damages of the victim. Moreover, in some judicial districts community service is imposed together with victim-offender-mediation to obtain a more punitive judicial reaction (Dumortier 2000, Dumortier & Eliaerts, 2002).

Despite these punitive side effects or retributive practices, victim-offender-mediation is also characterised by **rehabilitative and restorative** elements. In line with the rehabilitation model, the personal characteristics and needs of the offender and his or her environment play a major role in the decision to propose a victim-offender-mediation. For example, the diversion from a stigmatising judicial procedure, the opportunity for the offender to gain insight in the victim's moral and financial needs and to empathise with the victim can be important considerations. From a pedagogical point of view, a quick and adequate reaction, even to minor offences, is preferable (Puccio, 2001).

4.2.3 Profile of diverted offenders

A large survey in several Belgian judicial districts in 1999 that a.o. questioned the decision making process of the Public Prosecutor, gives us an indication of the characteristics of minors engaged in a **community service and/or a victim-offender-mediation** (Vanneste, 2001, see above 1.4). Neither offence history, nor prior conviction, ethnic origin nor additional problem behaviour stand in the way of diversionary strategies (e.g. community service victim-offender-mediation). On the other hand, school- and family problems decrease the use of alternative measures. In fact, alternatives are especially employed in cases that formerly would have been dismissed by the Public Prosecutor (Vanneste, 2001).

The profile of young offenders selected for **community service** by the Public Prosecutor can be described as follows (Geudens 1996, Geudens & Walgrave, 1996). In comparison with offenders sentenced by a juvenile judge to community service (see 6.3.1), minors are younger (age 14 or 15, with an average of 15,1 years), they study on a higher educational level (1/3 attend general secondary education), but strikingly they are more often living in a broken home. Both however, are mostly male and belong to lower social classes. As in the study of Vanneste (2001), ethnic origin is well represented (nearly half of the cases). As opposed to the level of the juvenile judge, most minors committed only one offence and have no prior record. Nearly half of these offences concerned acts of vandalism, another 40% consisted of property offences. Almost invariably, community service on the level of the prosecution amounts to 20 hours (which is substantially less than the average community service imposed by the juvenile judge, see 6.3.1). In over 85% of the cases, the juvenile completed his community service successfully. Of the remaining 15%, the Public Prosecutor dismisses half; the other half is referred to the juvenile judge.

4.2.4 Figures

While community services are preferably imposed by the judge¹⁵, relatively more mediations take place on the level of the prosecution. In this paragraph we will therefore present only the figures regarding victim-offender-mediation; for quantitative information on community services we refer to paragraph 6.3.1. In 2002, the judicial authorities in Flanders referred **935 files** to the twelve mediation centres, an increase of 42% compared to 2001 (659 files). 84,7% of these files were referred by the Public Prosecutor, 14,7% by the juvenile judge. Altogether, 1437 victims and 1604 juvenile offenders were involved (Ondersteuningsstructuur Bijzondere Jeugdzorg (OSBJ), 2003; Geudens, 2003). The committed offences are mostly property offences (62%), followed by acts of violence (25%). The figures suggest much willingness of offenders and victims to engage in mediation processes (61%), when they are given this opportunity. In 86% of the cases, the victim-offender-mediation resulted in a full or partial settlement between the parties. This agreement involved in nearly half the cases apologies of the youngster, in over 60% a financial settlement, and sometimes (15%) the minor makes some promises (e.g. to attend school on a regular basis). The active participation of the parties leads to an overall high degree of satisfaction of both victims and juvenile offenders (Geudens, 2003).

4.3 Legal rights of minors on the level of the Public Prosecutor

We would like to stress the fact that legal rules are lacking and consequently, the discretionary power of judicial actors is large. The resulting unequal practices are often object of critiques.

More specifically regarding **community service** one might question whether this 'measure' does not belong solely to the juvenile judge. Although community service might incorporate some restorative characteristics (like repairing in a symbolic way the harm caused to society), the repressive characteristics obviously remain present. After all, community service implies a limitation of freedom. Especially when no legal framework is

¹⁵ See the discussion on the legal rights of minors in paragraph 4.3 and 6.4.

present, it seems that only a judge should impose this 'restorative' sanction/punishment. The same thing can be said on **educational trainings**¹⁶. Although pedagogical aims obviously are present, it still implies a forced limitation of freedom. Nevertheless, following some discourse (more precisely the previous Minister of Justice, Verwilghen) community service should always take place on the level of the juvenile judge (taken into account the clearly repressive aims), but educational training (seen as less repressing and more educating) should also be possible on the level of the Public Prosecutor. Following the latest project of the new Minister of Justice Onkelinx (2004), however, nor community service, nor educational trainings would be possible on the level of the Public Prosecutor.

As contrasted with community service and educational training, **victim-offender-mediation** is seen as a clear representation of the restorative model. The offender and the victim are considered as primary parties in a decision making process involving the voluntary restoration of the material and immaterial harm caused by the offence. As a consequence it is quite commonly accepted that it can (following some restorative justice-advocates should) take place on the level of the Public Prosecution. In this way diversion (one of the aims of the restorative justice movement) becomes possible. In practice we notice that much mediation takes place on the level of the Public Prosecutor. A lack of (legal) rules however leads to serious bottlenecks (cf. supra) also with regard to some fundamental legal safeguards for minors.

First of all, it is unclear *for what kind of crimes* mediation can and/or should be used. Also the *influence of a successful or unsuccessful mediation* on the judicial procedure is not clarified. Within certain judicial districts a successful mediation (in practice this terminology seems to cover the execution by the minor of an agreed repair-arrangement) leads to all charges being dropped. In other judicial districts, however, the Public Prosecutor can still prosecute (for example when the Public Prosecutor also wants the damage of the society being repaired). In Belgian practice, these issues tend to be settled in referring to local co-operation agreements between the Mediation Centre and the Public Prosecutor. This lack of legal rules obviously creates (*judicial*) *uncertainty* and an *inequality* between minors, depending on the district they live in.

The *right to legal assistance* for minors who (want to) enter mediation seems to pose problems as well. In the beginning lawyers did not seem to be very welcome within mediation. Nevertheless, serious criticism seems to have altered this situation. Nowadays the right to legal assistance of a lawyer is quite accepted in Belgium – at least according to discourse – and some mediation centres have already concluded local co-operation agreements with the Bar, Public Prosecutors and the youth courts. However during the mediation process itself the presence of a lawyer appears to remain problematic in some districts. It is feared they will take over the mediation process. Much seems to be dependent of initiatives of the local Bar.

The 'restorative' principle of '*voluntary acceptance*', profiled by different mediation-services, is also criticised. After all, it is hard to pretend that, in practice, a minor has a free choice and is in no way obliged to participate, when his unwillingness to co-operate can be sanctioned by prosecution before the youth court and/or a harsher punishment from the juvenile judge (Trépanier 1993). Therefore, we wonder if the terminology '*informed consent*' (as used in some Belgian Districts) instead of 'voluntary' is not more desirable. Indeed, before giving their consent to participate in a restorative justice-process, the young offender as well as the victim '*should be fully informed of their rights, the nature of the process and the possible consequences of their decision*' (European Recommendation, no. 10; see also a UN Draft Declaration, no. 12, b).

The *presumption of innocence*, although almost always claimed, does seem problematic in practice. After all, in Belgian practices a minor has to acknowledge the facts before he can enter a mediation-process. But, is it actually possible to acknowledge criminal facts, without admitting guilt? Are juvenile judges not going to interpret earlier participation in

¹⁶ For more detailed information on this intervention modality, we refer to section 6.3.2.

mediation as an admission of guilt? Hence the question arises whether it would not be more clear to state that minors who want to participate in a mediation process waive their right to be presumed innocent (of course only for the facts they acknowledge). This waiver could be formalised by signing a document that, at the same time, explicitly refers to all rights, duties and consequences of entering a mediation process.

Also the *principle of confidentiality* is not as easy to realise in practice as discourse might suggest. After all, within some judicial districts Public Prosecutors are interested in the attitude of the involved minors, while in other districts they are only interested in whether the damage has been restored. Hence within different districts, different ways of reporting from the mediation centre to the Public Prosecutor can be noticed.

Finally, the *principle of proportionality* remains a difficult burden within restorative justice practices. After all, the proposed 'restorative proportionality' based on the seriousness of the harm caused to the victim and society (Declaration of Leuven, 1999), might imply severe restorative actions from the minor. For example a minor who writes his signature on a wall (graffiti), might cause more material damage than another young offender who intentionally breaks someone else's nose. When the restorative actions are only taken in function of the degree of material damage, less serious offences with considerable material damage would become more difficult to restore than serious offences with little material damage. Moreover, coercion, pressure and fear of being pursued or punished severely, might encourage young offenders to restore more than they think is fair. Besides, especially in the event of substantial damage, the use of restorative proportionality easily results in more severe measures. For, as you know, minors are often not in the position to repay the damage without some financial help of their family. Hence, when their family refuses to help or when the victim demands the minor to retribute, often, the minor has got no other choice than to work to pay back his debts. In Belgium, mediation centres have created Restitution Funds in order to pay a certain amount of money to the victim for each hour the minor labours in favour of the community. Such a situation, however, obliges some minors to work for many hours in favour of the community in order to repair the damage and finish the mediation successfully. Sometimes, a '*restorative measure*' that is in proportion to the seriousness of the harm can turn out quite harsh for a young offender, even more severe than an *alternative sanction* (like community service) taken by the traditional juvenile justice system.

Therefore, we wonder whether there should not be guidance available that would leave freedom to negotiate, but that would also avoid unwarranted disparity (Van Ness, 1999, p. 274-5). A legally based, but not strictly retributive proportionality, might also prevent mediation from leading to more severe reactions on young people's offences than is the case in the traditional juvenile justice system.

In summary, we can conclude by stating that, following the latest project of the Minister of Justice in Belgium, it seems that only victim-offender-mediation will be tolerated on the level of the Public Prosecutor. From a legal rights approach, it can only be supported that *only a judge* can impose *sanctions*. Nevertheless, a clear legal framework organising and guiding the restorative justice practice on the level of the Public Prosecutor is still lacking and does not seem to be foreseen by the new Minister of Justice.

5 Sentencing: basic principles

From the beginning of the 20th century with the *Children's Act of 1912*, the underlying premise of the Belgian juvenile justice system – as in most countries of the European Union – has been the concept that children need not be punished but rather **protected and (re)educated**. Purpose of the intervention is the protection of society and the protection of the child. Central criterion of the intervention is ‘the best interest of the child’; emphasis is laid on reintegration and rehabilitation of the child (Eliaerts, 2001).

A first important feature of the protection model is that minors are not criminally responsible. Besides, their actions are not considered as criminal offences as such, but rather as symptom of an underlying problematic (personal, social, family) situation. Interventions are therefore feasible not only in the case of delinquent behaviour, but also in the case of a wide variety of troublesome behaviour (e.g. truancy, mischief, running away from home) and situations (broken homes, child abuse). In this respect the principle of legality is being deserted (Verhellen, 1996; Put & Senaeve, 2003).

Secondly, the judicial reaction towards the juvenile is no longer based upon the committed acts, but on the personality and environment of the minor (Walgrave, 1998). The classic principle of proportionality is being replaced by far-reaching judicial discretion of the juvenile judge to intervene in the best interest of the child. Moreover, the judge can revise his decision at any given time. In order to assess the personality and situation of the minor and possible evolutions, there is only one judge throughout all the stages of the procedure (Christiaens & Dumortier, 2004).

These and other specific characteristics of the rehabilitation model have resulted in fierce criticism regarding the legal rights of minors (see sections 4.3, 6.4, 6.6).

The rehabilitation-tradition was re-affirmed in the *Youth Protection Act of 1965*: until their 18th anniversary juveniles are presumed to lack penal responsibility and are dealt with separately from adults.¹⁷ We point out that the juvenile justice system – along with the federalisation process – has been divided in two sections. One section deals with children in need of care on a voluntary basis, the other – judicial – section (youth court) deals with delinquent juveniles, civil matters and cases where the voluntary assistance has failed and the situation demands a judicial intervention to preserve the integrity of the child (Verhellen, 1996).

While most delinquent minors appear before youth court, the juvenile judge can however, exceptionally decide to refer a juvenile offender aged over 16 to the Public Prosecutor with the intent of prosecuting and sentencing the minor in adult court (**‘transfer to adult court’**). Besides this form of transfer, decided by the juvenile judge (judicial waiver), there also exists the modality of automatic waiver, that is to say referral prescribed by law (legislative waiver). When a minor, 16 years or older, commits a violation of traffic regulations or related violations, he or she is automatically prosecuted before the police court (this is the lowest level of penal jurisdiction). Nevertheless, 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 (**‘reverse waiver’**) (Tulkens & Moreau, 2000).

Despite some adjustments made by the Acts of 1994 and 2002, the current juvenile justice system in Belgium is still merely based upon the 1965 Act and therefore one of the last European countries with such a far-reaching protection model.

¹⁷ We notice that there is no lower age limit.

6 Sanctions

The Youth Protection Act (1965) does not offer the possibility to inflict punishments or sanctions on juvenile delinquents. The juvenile judge can only impose '**educational measures**'. In practice however, we notice that the answers to juvenile delinquency in our neighbouring countries are named differently ('sanctions', 'punishments', and 'sentences') but in reality are very similar to the Belgian interventions.

We notice that – while the age of penal majority is eighteen – under certain conditions, the measures can be **prolonged** until the age of 20.

6.1 Provisional measures

The objective of the preliminary phase is to gather information on the committed offence(s), as well as on the personality and the environment of the minor. During this phase of the procedure, the judge can command social investigations (executed by the social service of the youth court) and / or a medico-psychological research (performed by a psychiatrist). The youth court can also impose provisional measures during this phase.

The juvenile judge can impose the following provisional measures:¹⁸

1. A supervision order
2. A conditional supervision order
 - a. Specific conditions (e.g. attend school / a guidance centre)
 - b. Community service / educational training
 - c. Mediation¹⁹
3. Placement
 - a. In a private institution or confinement to a private individual
 - b. In a youth institution of the Community
 - i. (Half-)open
 - ii. Closed
 - c. In the Federal Centre (closed)

The preliminary phase can last *six months*; afterwards the Public Prosecutor has *two months* to summon the minor. Whether or not the provisional measures are applicable until the session of the court remains unclear.

The judge has to specify whether the youngster needs to be confined to an (half-)open or closed institution of the Community. The minor can only be placed in a closed section in case of consistent misbehaviour, dangerous behaviour or when required by the judicial inquiry. Confinement of the juvenile to a closed institution of the Community is possible for *three months*, once extendible for another *three months*. After six months, detention in such an institution can only be extended on a *monthly* basis and at the latest until the juvenile turns twenty (art. 52 quarter, altered by the Act of 1994). These decisions however, have to be motivated by the judge and be indispensable when taking in consideration the public safety and the personality of the minor. Incarceration in the closed Federal Centre is

¹⁸ We notice that the possibility to send a minor to prison for maximum 15 days (art. 53 of the 1965 Act) has been abolished since 2002, but has been replaced by the Act of March 2002 (see paragraph 6.6.1).

¹⁹ Mediation (victim-offender-mediation or family group conferences) is not as such enlisted in the Youth Protection Act of 1965.

regulated more strictly by the Act of 2002 (see further paragraph 6.6 where the legal rights of minors during detention are discussed).

All provisional measures are open to appeal.

6.2 Judgements

The second phase includes the public trial. Here the judge analyses the file of the minor once again. The Public Prosecutor demonstrates proof of the facts and can claim a certain measure, the lawyer of the minor assures his or her defence and the parents can be present as liable party.

By judicial decision the juvenile judge can nullify or re-enforce the provisional measures taken earlier, or he/she can take another appropriate measure. In this decision the judge takes not only the facts and circumstances at the time of the offence into consideration, but also the evolution the youngster and/or the family have gone through (possibly as a result of the provisional measures). This explains why in many cases the provisional measures are more far-reaching than those in the trial-phase.

The juvenile judge can pronounce the following judgements:

1. A reprimand
2. A supervision order
3. A conditional supervision order
 - a. Specific conditions (e.g. attend school / a guidance centre)
 - b. Community service / educational training
 - c. Mediation
4. Placement
 - a. In a private institution or confinement to a private individual
 - b. In a youth institution of the Community
 - i. (Half-)open
 - ii. Closed
 - c. In a psychiatric institution
5. Transfer to adult court (exceptional)

The law sets no maximal time limit for (conditional) supervisions. However, for alternative measures specific arrangements concerning the duration and nature of the measure are usually made (see 6.3). The judgements mentioned under 4a and 4b can be imposed for a maximum of one year. After this period, but possibly earlier, the measure needs to be reconsidered by the judge. Confinement to a psychiatric institution is problematic. There are no psychiatric institutions specifically for delinquent minors; the existent institutions are not obliged to hospitalise the juvenile offender if they believe that the minor does not fit into the profile of the institution. In that case the minor will probably be referred to a public institution²⁰ – even if these do not have the expertise to treat juveniles with psychiatric disorders. As in the preliminary phase, all judgements are open to appeal.

We can conclude by saying that juvenile offenders – theoretically – cannot be ‘punished’ or ‘sanctioned’ within juvenile law. The only way a ‘real’ punishment can be obtained, is by transferring the minor to adult court. The minimal legal requirements to transfer a youngster to adult court are that he or she committed an offence, while at the time being 16 years or older. The central criterion the law prescribes judges to consider in their decision is whether or not the available measures within the juvenile justice system are still adequate for the particular offender. By ‘adequate’ the legislator meant that the principle

²⁰ Public institutions are obligated to admit all youngsters referred by the juvenile judge.

objective of these interventions – re-education – would still be attainable for the offender. Within this evaluation the personality of the offender and his or hers environment play a critical role. Therefore the legislator prescribes that social and medical-psychological inquiries have to be carried out in order to guide the judge in this evaluation (Tulkens & Moreau, 2000).

With the Act of 1994 the transfer procedure has been slightly facilitated, as 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 (automatic waiver). When committing any other offence, the youngster is automatically being prosecuted within the penal system (Smets & Cappelaere, 1995).

In case of referral, the juvenile can be sentenced with all penalties of the Penal Code. However, a recent governmental proposal seeks to abolish the infliction of life sentences on transferred youngsters (Onkelinx, 2004).

6.3 Alternatives

As mentioned earlier (section 1.4) alternative sanctions occur relatively rarely on the level of the Public Prosecutor (4,2%); decisions of the juvenile judge include 16% alternatives (Vanneste, 2001). We need to stress the fact that there are substantial differences between districts and that it concerns a rapidly evolving field. For theoretical insights we refer to paragraph 4.2 where the emergence and implementation of alternatives on the level of the prosecution are discussed. Sections 4.3 and 6.4 deal with the legal rights of minors engaged in these alternatives.

We will here present some figures of the implementation of alternative measures (community service, educational training and mediation) in Flanders in 2002, but only from those agencies that are for the greater part subsidised by the Flemish Government. The presented statistics are accordingly an underestimation of the real figures (Ondersteuningsstructuur Bijzondere Jeugdzorg (OSBJ), 2003; Geudens, 2003). Agencies, subsidised by the federal Government organise alternatives as well; however, their target group consist mainly of adult offenders. Additionally we will illustrate these statistics with some qualitative results of studies on community service and educational training.

We will also briefly discuss a new experiment in family group conference (January 2001 – October 2003).

6.3.1 Community service

In 2002, ten agencies, mostly subsidized by the Flemish Government, guided **658 youthful delinquents** in the execution of a community service (OSBJ, 2003). The minors can carry out their community service in a variety of non-profit organisations, like homes for the elderly, the street cleaning or technical services of the municipality, hospitals, animal homes, etc. (Depoortere, 2002). The duration of the services can amount from 20 to over 200 hours. In the judicial district of Brussels the average duration of a community service was 52 hours in 1998, 69 hours in 1999 and 47 in 2000. Compared to other districts this is a relatively low number, e.g. the average community service in Antwerp takes up to 80 hours. Most juveniles are aged 16 to 18, male, Belgian, with a lower educational level and living in a relatively stable home situation. Most frequently qualified for a community service are drug related offences or thefts; proportionality between the severity of the offence and the length of the sanction can be considered satisfactory (Vanderhaegen & Eliaerts, 2002).

6.3.2 Educational training

In 2002, twelve services, mostly subsidized by the Flemish Government, rendered assistance to **780 juvenile offenders** who were referred by the Public Prosecutor or the juvenile judge for an educational training (OSBJ, 2003).

There is a **great variety** in programs. Some projects are short-termed (10 to 50 hours), others can take up to several months or a year. There are programs which focus solely on the minor, others also include his or her environment (friends, family, neighbourhood), or even the victim. Some projects are only organised on an individual basis, others take place mainly or exclusively in groups. Whether or not the project takes place in a group or rather on an individual basis, depends on pragmatic considerations (preference and experience of the counsellor, long waiting lists) or merely theoretic arguments (characteristics of the minor and of the program). Within the individual approach it is easier to meet the specific needs of the juvenile. On the other hand the group-dynamic that arises from the group-sessions offers the minors an opportunity to confront each other with their different opinions, values and moral standards. They can learn from each other and this can increase the insights in their behaviours (Van Dijk, 2004).

With regard to the **content** the programs can aim to inform or sensitise (e.g. about drugs, alcohol, vandalism, sexual harassment, gambling), to teach how to cope with aggression (or other problems), or to train social, practical, school or labour skills. Other projects intend to provide the young offender a deeper understanding of the causes and consequences of his or her delinquent behaviour, or offer insights in the position of the victim and aim for empathy with the victim's suffering (Van Dijk, 2004).

We will now look in depth at some projects for minors organised by the **Flemish Community**. In view of the diversity we will only discuss the most important and frequently imposed projects (Van Dijk, 2004).

- **Social skills training:** This program focuses on social vulnerable juveniles who lack certain skills to be self-reliant and assertive individuals. They cannot for example resist peer pressure. An individual training aims at increasing their social competence, since a lack of social skills is often causally related to the offences committed. The program teaches the minors to gain insight in their shortcomings and creates the opportunity for them to acquire new skills.
- **The program 'Coping with drugs':** This project is designed for minors who have committed a drugs related offence. It does not concern occasional drug-takers, neither heavily addicted youth. However, they have to meet some criteria of problematic drug use, sometimes in combination with drug dealing (when it solely concerns dealing, usually an other program is imposed, because of the different, more profit-oriented moral intention). The education informs the juveniles about the possible advantages and disadvantages of their drug-(ab)use with regard to their personality and environment, and it gives them the opportunity to reflect upon it in a group.
- **The program 'Coping with aggression':** This training addresses minors who have committed violent crimes and experience problems with physical and psychic aggression. The causes and consequences of frustration-aggression are being examined and alternative behaviours explored.
- **The program 'Victim in – sight':** Young offenders who poorly empathise with the victim and/or have little insight in the damages and the consequences of their actions can engage in this project. Its intention is not only to increase their knowledge about the material damages and physical and emotional injuries of the victim, but also to alter their attitudes towards the victim and the harm they have caused. Ultimately the program wants to encourage the minor to take responsibility and to restore the damage inflicted by his actions.
- **The context-project:** This is a long-term project (six months to a year) meant for young offenders who have lost their link (relation) with their environment and society at large (cf. de-linquere). Its intention is to restore some of these links: the relation with oneself, with the family, with the community and the society (focussing on school, work, social assistance) and with nature and the transcendent. Its starting-point is not just the minor or even only the family but the entire context surrounding the juvenile.

6.3.3 Victim-offender-mediation

To ensure authenticity and voluntariness, most victim-offender-mediations (84,7%; OSBJ, 2003; Geudens, 2003) take place on the level of the Public Prosecutor, before initiating any judicial procedure (see 4.2.1). More detailed figures are therefore presented in paragraph 4.2.4.

6.3.4 Family Group Conference (FGC)

Within the framework of restorative justice the *KULeuven* (the Catholic University of Leuven) conducted an experiment with family group conferences in Flanders (Vanfraechem, 2002). The juvenile judge can hereby propose a FGC in case of youngsters who have committed a serious offence or a series of minor offences. The juvenile and his/hers parents have to engage freely in the program; the victim(s) can actively or passively participate. Both parties can also bring their own support system (e.g. a friend, a confidant); other participants are a police officer who symbolises societal involvement, the juveniles' lawyer who vouches for his/hers rights. A neutral mediator guides the communication process between the participants towards a 'declaration of intent' settled by all parties. The juvenile judge validates this declaration and evaluates the execution of the settlement afterwards.

From January 2001 to October 2003 **98 juveniles** were referred for a FGC. For 58 of them **53 conferences** were organised (four of them included two offenders). For 33 youths the FGC could eventually not take place, mostly because the juvenile offenders denied or minimised the offence(s) or else, social assistance prevailed. Victims participated in half of the cases, in an additional fifth of the FGC's they were represented by relatives. The 'declarations of intent' can entail restoration towards the victim, reparation towards society and prevention of future offending. Most commonly the offender makes amends, apologies and other compensations towards the victim, but performing a community service or following a treatment can also be part of the settlement. Most 'declarations of intent' are executed properly although some youngsters need to be urged to carry on with their restorative actions (Vanfraechem, 2002).

6.4 Legal rights of minors on the level of the juvenile judge

6.4.1 The Act of 1965 (8th of April 1965)

As mentioned earlier, the judicial reaction towards delinquent minors in Belgium is still largely falling within the Youth Protection Act, dating from 1965. Since the seventies-eighties this model was increasingly criticised within Belgium, in particular in academic circles and in the Flemish part. Especially the **lack of legal rights and informality** posed some serious problems. By wanting to meet the *needs* of each individual child, traditional concepts of criminal justice were overturned (Christiaens, 1999; Eliaerts, 1999). To make an easy participation of the juvenile possible, the open court was abandoned during the preliminary stages. Instead an informal procedure was implemented with a specialised juvenile judge. In this preliminary stage there was²¹ no right to legal assistance for this was supposed to hamper a 'good', informal contact between the judge and the juvenile. The adversarial roots of a legal formal procedure, whereby each party has the right to prove or refute elements *à charge* and *à décharge*, was deserted as well. After all, the personality and the environment of the minor and especially its prognosis for the future were the main concern and not so much the committed acts in the past. With the same kind of rhetoric reasoning, victims too were pushed to take a back seat 'in the best interests of the child'. Also the lack of proportionality helped contribute to the criticism on the 1965 Act. For as you know, a protective measure aims at assuring youths' *future welfare*, rather than it intends to punish

²¹ Adapted with the 1994 Act, see below.

them for their *past offences*. Finally, even the principle of legality faded away, for juveniles can be in need of help even when they have not committed a crime. Hence, large possibilities to intervene have been created by the 1965 Act (see above, section 5, basic principles).

6.4.2 The Act of 1994 (2nd of February 1994)

The absence of basic penal principles of due process (legality, equality before the law, legal assistance, proportionality or the relation between the offence and the penal punishment), was and is a source of fundamental criticism. At the centre of this criticism stands the observation that stating in books that minors must not be punished anymore but protected, does not mean, in practice, that no more minor will be (or will feel) punished. Indeed, through the evolution of the juvenile justice system, we see the application of different models (paradigms), leading to conflicting goals and interpretations of the protective measures in practice (see also Eliaerts & Dumortier, 2002; Christiaens, 1999). These goals can change during the different stages of the procedure. Moreover, the actors who participate in the procedure can defend different (possibly conflicting) views on the goals and the characteristics of the measures. As a consequence of the lack of legal rights, juvenile judges have great discretionary power to determine the finality of the measure which of course leads to disparity. Thanks to a '**justice movement**' on the international (see UN Convention on Children's Rights), the European (Belgium was condemned for its lack of legal rights by the European Court of Human Rights: Bouamar-arrest) and on the national level (the installation of a working-group on youth sanction law²²), an act was voted in 1994, which offers more due process guarantees to juveniles (most importantly the right to legal assistance during the preliminary stages). At the same time however, the 1994 Act seems to have been the starting point of a **re-penalisation** of juvenile offences (facilitating for example transferring 16 to 18 year olds towards the adult courts) (see also above, section 5).

6.4.3 Community service and educational training

Following this 'justice movement', 'alternative sanctions', like community service and educational training became, at least in certain districts, a more common means of sanctioning young offenders. As contrasted with traditional 'measures', these new 'sanctions' were seen as offering **more legal guarantees** to youngsters. After all, there is a clear limitation in time (number of hours) for the involved youngster. Besides, the juvenile judge should only impose it after a fair trial. Finally, once the 'alternative sanction' has come to an end, the youngster can get on with his life. The legal basis for these new 'sanctions' was found in the 1965 Act and its possible 'conditional supervision order' (a supervision accompanied with certain 'educational or philanthropic tasks' for the minor). In 1997 the *Cour de Cassation* confirmed that these sanctions or 'educational or philanthropic tasks' could only be imposed after a trial in order not to violate the presumption of innocence (art. 6 ECHR). However in several districts, juvenile judges kept on imposing these 'tasks' during the preliminary stages of the proceedings in order to react to juvenile delinquency in an effective and fast way. It is clear that this way of imposing 'alternative sanctions', was contrasted to the views of the highest Court and soon became heavily criticised by those who defend children's *due process rights*. In 2003 the *Cour de Cassation* was again asked to rule. A juvenile judge had suspended a boy from pre-trial detention during the preliminary stage under the condition of fulfilling a community service. This time, the *Cour de Cassation* overruled its previous arrest. Following the recent arrest of the *Cour de Cassation* the aim of the imposed 'task' becomes crucial. When the 'educational or philanthropic task' is imposed in order to sanction the minor or to restore the damage caused to society, the 'task' should

²² This workgroup, composed by academics and practitioners, stresses especially the respect for the minor's legal rights. See Decock & Vansteenkiste (1995).

be imposed after a fair trial. On the contrary, when the task is 'imposed'²³ in order to unfold the child's personality and/or home situation, it is not a *sanction* but a *measure of protection and research* in the interest of the child. Hence it can be imposed during the preliminary stages.

It is clear that this new arrest does not bring a lot of judicial security for the minors involved. By claiming that community service or educational training is 'imposed' in order to unfold the minor's personality, the juvenile judge is always in the position to 'impose' it before any fair trial has been organised (Christiaens & Dumortier, 2004). Within the recent project of the Minister of Justice no clear position is taken either, thus confirming this judicial uncertainty. Besides, other criticism can be noticed concerning the imposition of 'alternative measures'. Since a clear legal framework is lacking, there is no maximum foreseen in the number of hours an alternative measure might imply. The way of reporting from the private counselling services to the juvenile judge is not regulated either. What information on the execution should the judge receive? The extent to which the minor is allowed to take part in the decision making process concerning the content of the measure is also obscure. Besides, many other questions remain unanswered. How many chances should a minor get before his community service or educational training must be seen as a failure? What are the legal consequences of a failure or on the contrary a successful 'alternative sanction'?

6.4.4 Victim-offender-mediation

Although victim-offender-mediation originally only took place on the level of the Public Prosecutor, since the ending of the nineties we notice this procedure also on the level of the juvenile judge. It seemed that on the level of the Public Prosecutor only less serious cases were sent to mediation centres. In order to be able to work with more serious cases, mediation centres created local co-operation agreements with juvenile judges. Moreover the legal rights of minors are better guaranteed on the level of the juvenile judge, since the right to legal assistance is always foreseen and the interference of a judge can be seen as a judicial safeguard for the minors involved. Nevertheless, the aim of diversion (diverting the case away from the 'penal' judge) becomes hard to meet by this way of working.

Because there exists **no legal framework** for victim-offender-mediation, judges try to fit this new way of reacting within the old 1965 Act. Hence it is imposed, as is the case with the already mentioned 'alternative sanctions', as a measure of research (during the preliminary stages) or as a sanctioning measure to restore the victim's damage (during trial). In some districts mediation is imposed during the preliminary stages but the outcome of the mediation (for example working during some hours for the victim) must be confirmed during a trial and hence before its execution actually takes place. This can be seen as a judicial control on the content of the mediation, and more specifically on the mediation's outcome.

As is the case on the level of the Public Prosecutor a lack of legal rules governing mediation leads to different bottlenecks and uncertainties as regards the legal rights of minors (see above, 4.3).

6.5 Juveniles in institutions

In the past decade, the number of **Flemish juveniles** who are within the province of the Special Youth Services has increased from 6346 in 1989 to 7194 in 1999 (Florizoone & Roose, 2000). This number encompasses the private institutions (residential and ambulatory, such as social assistance at home, daycentres, support for adolescents in independent living), foster care and the (half-)open or closed public institutions of the Flemish government. The population of these institutions and facilities includes delinquent youths as

²³ We need to make a distinction for the term 'imposed' in this context: in principle the judge can only propose a task and the youngster needs to accept it voluntarily.

well as minors in (familial, educational, social) trouble and their family (the so-called 'problematic educational situation').

Even confinement to the *(half-)open or closed youth institutions* of the Flemish government²⁴, considered to be the harshest measure the judge can take, is possible for both groups, although juvenile delinquents constitute the greater part (ratio 3 to 1). In 2002 a new federal closed juvenile correctional facility (the Federal Centre Everberg) was established specifically for delinquent boys aged 14 to 18. In 2002 all (half-)open and closed public institutions in Flanders held a *capacity* of 246 (by comparison: in 1999 this capacity entailed 208) (Vlaamse Overheid, 2003). Over thousand minors are confined annually to one of these facilities. This stands for a slight, but consistent rise since 1995 (from 930 confinements in 1995 to 1.097 in 2002). The mean detention period amounts to two to three months. This short term enables a quick referral to other facilities with diminished security and a more lenient regime, but at the same time it complicates treatment (Florizoone & Roose, 2000).

The juveniles confined to these public institutions are for the greater part of Belgian nationality (although the proportion of *non-natives* is relatively higher). However, a closer look on the individual institutions reveals a geographic disparity, as in one facility (i.e. 'De Markt') over 40% is of non-EU (mostly Moroccan) citizenship (Florizoone & Roose, 2000).

In the **French-speaking part of the country**, there are five youth institutions of the French government with open and/or closed sections ('Institution publique de protection de la jeunesse').²⁵ Unlike the Flemish institutions they are accessible for delinquent youth from the age of 12 on (younger ones only in very exceptional situations), and not for the juveniles who find themselves in 'problematic educational situations'. Altogether there is a capacity of 39 places for girls, of which 34 open and 5 closed. For Walloon boys there are 150 places: 110 open and 40 closed.

The *length* of the placement depends on the institution or section in which the juvenile resides. For example, a stay in the orientation and observation institution can last maximally 40 days in the open section and three months at most in the closed section. Residence in an education-oriented institution is in principle undetermined for the open section. For the closed sections this stay takes 75 days, once extendible with three months, and then extendible every month. Transfers between sections are of course possible and can extend the total stay.²⁶

A study revealed that confinement to a public institution did not seem to enable social reintegration: the lack of personnel and the institutional rigidity hinder personal treatment. Stigmatisation and the risk of social and scholar rejection are additional barriers for successful reintegration. Public security is well guaranteed: youths do perceive this security, especially when residing in the closed sections. For most juveniles a stay in a public institution is a negative **experience**, but it provides a means to wipe the slate clean. Some youth do benefit from a placement: especially for those in a 'problematic educational situation' the period in the institution enables restoration of family bonds; others realise that this might be their last chance and use the opportunity to reflect upon their future. However, the positive aspects of a placement seem to be merely exterior to the institution (family, grow to maturity) and are not inherent to the pedagogical program (Delens-Ravier & Thibaut, 2002).

²⁴ 'De Kempen' ('De Markt', (half-)open institution for boys; and 'De Hutten', closed institution for boys) and 'De Zande' ('Beernem', closed institution for girls; and 'Ruislede', closed and (half-)open institution for boys).

²⁵ There are four institutions for boys: Braine-le-Château (closed section), Fraipont (open and closed sections), Wauthier-Braine (open section) and Jumet (open section). One is reserved for girls, i.e. Saint-Servais (open and closed sections).

²⁶ <http://www.cfwb.be/aide-jeunesse/IPPJ/index.htm> (dd. 22/03/2004)

6.6 Control of juveniles' rights during detention

The same kind of criticism surrounding the 'alternatives' (see above paragraph 4.3 and 6.4.3-4) exists with regard to detention during the preliminary stages. A large majority of youngsters placed in Belgian institutions never had any fair trial. Often they are released before the trial takes place. During the trial they are reprimanded or placed under supervision (with or without the imposition of an 'educational or philanthropic task').

6.6.1 The Act of 2002 (1st of March 2002)

When confined to an institution during the **preliminary stages** the legal rights position of the minor depends on the institution he or she is placed in. Since the first of January 2002, minors can no more be placed in adult prisons during the preliminary stages. As a consequence however, certain juvenile judges claimed they had to liberate several 'dangerous young criminals'. Hence the Belgian Federal Government rapidly created in less than two months time a new juvenile 'Centre' (in fact a youth prison in order to replace the old adult prison) in order to protect society. Nowadays there exist two kinds of institutions in Belgium: the regional institutions of the Community (with the primary aim to protect youngsters) and the new Federal Centre Everberg (with the primary aim to protect society). In practice it is not very clear what the differences between these two kinds of institutions exactly are, despite the obvious procedural differences as a consequence of the differences in pursued goals. Within the regional institutions (objective of protecting minors) juveniles can be held for three months (see 6.1). Then the juvenile judge has to revise their case and motivate whether the placement should be prolonged for another three months. Following these three months the case has to be revised again and from that moment on the minor can only be placed on a monthly basis and under specific conditions (and at the very most until the youngster is aged 20). Within the Federal Centre (objective of protecting society) the juvenile judge has to revise the minor's case after five days and then on a monthly base. The minor can only be held for a maximum of two months and five days in the Centre. Afterwards he has to be placed in an institution of the Communities. Hence, the judicial control on minor's placements is better insured within the Federal Centre than within the regional institutions. It has to be mentioned that only boys can be placed within the Federal Centre. As a consequence girls are always placed within regional institutions governed by the "three monthly revision" rule.

When the judge wants to impose a placement **during trial**, only confinement to a regional institution is possible (see 6.2). Following the 1965 Act the juvenile judge can always soften a measure and set a minor free. Moreover, the minor's case has to be revised on a yearly basis. The juvenile judge has to visit the minor on a regularly basis in order to evaluate whether the minor's legal rights are respected during the execution of the detention. The minor can also always write to the juvenile judge. Besides, the French and Flemish Community both have their 'Children's Rights Commissary'. These commissaries are allowed to visit the institutions. Within the Flemish Community mention can be made of the 'Minorijs Project' (which tries to indicate some minimum rights for minors involved within the Flemish Protection System) and the 'Jo-Lijn' (where all minors and parents confronted with the Flemish Protection System can call for information and complaints). These projects however do not foresee in 'hard rights' for placed minors. In fact, in Belgium, when placed in an institution as a minor, no specific regulation exists concerning the *right to complaint*.

If a minor is **transferred** to the **adult courts** and penalties, he is considered as an adult and his legal position will differ in no way from that of an adult. Unfortunately, he will also be treated as an adult and no special institutions, regulations or reduced punishments are foreseen for these minors. Within the recent proposal of the Minister of Justice, Onkelinx (2004) a certain improvement can be noticed (for example no life sentences, special institution for some of the transferred youngsters). However, at the same time it seems that

the possibility of transferring youngsters towards the adult system will be facilitated. Again we notice the trend of improving the legal position of minors while, at the same time, re-penalising their delinquent behaviour (see the 1994 and 2002 Act).

6.7 Evaluation of judicial interventions

6.7.1 Results and recidivism

Research on the effectiveness of juvenile sanctions and interventions is scarce in Belgium. Only limited studies exist on recidivism and on the experience and satisfaction of the sentence by offender and/or victims. Usually they constitute just a little segment of a larger research project. For example, an extensive study on the use and impact of community service involved an investigation of **recidivism** after a community service in comparison with recidivism after traditional measures (Geudens, 1999). The study revealed that juvenile offenders who carried out a community service significantly re-offended less frequently than the offenders of the matched control group who received a traditional measure²⁷, i.e. 50,5% versus 74,5%. Recidivism encompasses a registered offence by the Public Prosecutor within the eighteen months following the intervention. Regarding the traditional interventions recidivism was especially problematic for confined youth (84% of the placements in private institutions and 79% of the placements in public institutions). The reprimanded youths did not differ significantly from the community service group (52%), explicable by the higher share of petty offenders in the reprimanded group. Recidivism aggravates as the juvenile has a longer offence history, however the positive effect of community service on recidivism does apply for the 'career delinquents' as well as for first offenders. A logistic regression analysis pointed out that ethnic minority origin, a broken home situation, a low educational level, traditional sentencing and a serious offence profile are significant **predictors** for recidivism (Geudens, 1999).

Within the research experiment on family group conferences (see 6.3.4; Vanfraechem, 2002), an **evaluation** with a control group was not made: the researcher only compared recidivism of the juveniles who successfully completed the FGC with recidivism of those who didn't. This comparison revealed that more than half of the latter group re-offended as opposed to less than a quarter of those who completed the FGC positively. Juvenile offenders and their parents estimate the risks of re-offending as low, but victims are less optimistic. Considering the realization of the high involvement and communication of the different parties, an inquiry into the experience of the participants in the FGC was an indispensable part of the research. Globally the **satisfaction** of the participants with the procedure of the FGC was high. They all felt well informed; juveniles appreciated the fact that they could take responsibility and avoid incarceration in a youth institution, parents assessed the procedure and outcome as just and fair, and victims especially valued the opportunity for communication, participation and the processing of emotions. However, for many participants the process is considered to be (too) intensive and time-consuming and not all victims are completely satisfied with the settlement (Vanfraechem, 2003).

The evaluation of alternative sanctioning in Brussels revealed that these options are often used as 'passe-partout' and create a net-widening **effect**. Judicial actors and practitioners do not experience this necessarily as a negative effect: from a pedagogical point of view it is better to respond actively to the misbehaviour of juveniles than to do nothing or to just reprimand them, since they need to take responsibility (see also above, 4.2.2). The greater part of the community services is **completed** successfully. However the only criterion used is that the juvenile performed the total amount of hours; the quality of the work or problems during the execution are not included in this evaluation. Although the motivation of many young offenders is limited and they often experience difficulties complying with engagements, the decision to interrupt the execution of the sanction and to

²⁷ These traditional measures encompass reprimands (11,5%), supervision orders (25%), placements in private (24,5%) or public institutions (39%).

send the juvenile back to the judge is not lightly taken. With regard to the drug program, the evaluation is not clear-cut: its goal is merely to inform and sensitise, not necessarily to bring juveniles to stop using drugs. This attitude often conflicts with the objectives of judicial authorities. In respect of these conflicting goals, measuring recidivism is not desirable (Vanderhaegen & Eliaerts, 2002).

6.7.2 Experiences of juveniles

The Brussels research study (see above, 6.7.1) also entailed interviews with offenders²⁸ on their experiences. The contacts with police officers are for many offenders an unpleasant and highly emotional experience: they often feel intimidated and manipulated. A lack of information and participation characterises the hearing and trial in front of the juvenile judge: the juveniles feel like they're not involved and/or taken seriously. The imposed sanction is usually experienced as just, proportional and fair, except if a co-offender is sentenced more lenient or if the offence involves the use of soft drugs. The juveniles consider an educational training as the most useful and beneficial measure: the link with the offence is clear and they feel they have learned something, as opposed to community service where the link with the offence is not as clear-cut. In the latter case they agree to perform the service in order to avoid detention, and not so much because they are convinced of its benefits. First offenders are more prone to believe that they won't re-offend; career delinquents are less optimistic about their ability to change. The most beneficial factors to keep offenders to 'the straight and narrow path' are a steady relationship and a good job (Vanderhaegen & Eliaerts, 2002).

A Walloon research study (Delens-Ravier & Thibaut, 2002) focused as well on the perspectives of the youngsters themselves. Interviews revealed that most youths have a negative image of the *police* system, mostly caused by the methods police officers employ (e.g. interrogation style, display of power). The role of the *Public Prosecutor* is highly vague and not well understood by the young offenders. In accordance with the Act of 1965, for young offenders the *juvenile judge* occupies the central position in the whole system and is perceived as the key-figure that follows them closely during their track in the juvenile justice system. Juveniles feel themselves captured in a system where they have absolutely no power or say in. In order to get out of the system as quickly as possible, they try to behave in a conformist way.

Conclusion

Because of the lack of reliable figures, gathered on a regular basis, it is difficult to uncover **trends in juvenile crime**. Self-report studies do not suggest that Belgian juveniles commit more offences than their foreign peers. While there is no evidence that juvenile delinquency is rising, nor that offenders are becoming younger, the nature of committed offences does seem to have changed. The amount of property offences is diminishing and personal offences (i.e. violent street crimes) are on a rise. In particular, a small portion of merely older juveniles (+16), often from ethnic minority groups, seems to be responsible for a disproportional amount of the more serious and violent delinquency in the big cities. Problematic as well is the out-dated legal framework and the lack of adequate institutions and (treatment)programs for these so-called difficult offenders or career delinquents.

With regard to the number of youngsters that end up in Special Youth Services, we can perceive a slight rise. More specifically, the capacity of the (half-)open and closed public youth institutions in Flanders expanded from 208 'beds' in 1999 to 246 in 2002. Over thousand minors are confined to these facilities on an annual basis. Whether the expansion

²⁸ Because the juveniles whose sanctions evolved more problematic did not want to co-operate, we can only offer a highly distorted picture.

of detention in closed institutions can only be attributed to a rise or hardening of youth delinquency, cannot be determined. The more repressive climate and diminished tolerance towards certain groups of juvenile offenders may also be important factors. Besides, the lack of appropriate intervention modalities (confinement, care, and treatment) for troubled youngsters (who suffer from substance abuse, psychiatric disorders, behavioural problems...) 'forces' judges to confine these juveniles to other (public) institutions that are not adapted to their specific needs.

Whereas the Belgian **juvenile justice system** nowadays is still founded upon the Youth Protection Act of 1965, experiments and legislative adaptations have moved the system away from its initial protective and rehabilitative mission. Strikingly, this movement evolves in two opposite directions.

On the one hand, diversion experiments and measures, such as community service, mediation and educational training, have offered an alternative for formal judicial reactions or residential interventions. While punitive and rehabilitative features are still present, these alternatives also promote restorative goals. These measures are, however, for the greater part (though not uniquely) applied in cases of petty offences. A clear-cut trend is hard to uncover considering the substantial differences between the policies of judicial districts, the personal beliefs of magistrates and hence the disparity in practice.

On the other hand, the Acts of 1994 and 2002 have introduced some characteristics of the justice model (better legal safeguards and due process rights for juveniles), but at the same time these Acts contain more punitive features and may give rise to a re-penalisation of the juvenile justice system (cf. facilitation of the waiver procedure). Furthermore public safety becomes a more legitimate goal of juvenile justice.

Nevertheless, the current Minister of Justice in her Bill (Onkelinx, 2004) desires to preserve the protection model from 1965 for the greater part of the juvenile offenders. If this Bill becomes a law, Belgium will still have a *sui generis* justice system for delinquent youth until age 18, apart from some exceptions (judicial and legislative waiver). The traditional features of the rehabilitative paradigm will be preserved, i.e. judicial discretion, the decisions and judgements in function of the personality and environment of the minor. Yet, little is known about the practical outcomes of the present policies concerning the effective reduction of delinquency. Belgian authorities do not have a coherent (research) policy in order to develop 'evidence based programs' and to make prevention and intervention more effective and individual rights better respected. This is partially due to the complex division of competencies in the matter of juvenile justice between the Federal State and the Communities.

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