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A comparative study of child justice systems: Any lessons for South Africa from The Netherlands?

Abstract

This submission is a theoretical overview of the adjectival process of child justice in The Netherlands. It offers insight into the criminal procedure of an almost pure inquisitorial system dealing with children in conflict with the law. Unlike the South African methodology, the Dutch approach uses welfare and education as the premise for its criminal actions against child offenders. The author posits that the South African system, especially with her incorporation of an inquisitorial preliminary inquiry in the child justice process, would benefit from the lessons offered in inquisitorial jurisdictions with regard to the implementation of the best interest standard in the process of prosecuting child offenders.

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1. Introduction

Juvenile justice¹ in the Kingdom of The Netherlands, like that in Germany, follows a primarily inquisitorial approach.² The substantive and adjective framework supporting this approach is largely reinforced by the fact that Dutch³ criminal and procedural law is codified into legislation, incorporating juvenile justice. The assimilation of juvenile criminal and procedural law into general codes is distinct from South Africa, which uses a separate codification for child justice from a procedural perspective at least.⁴ The genesis of the inquisitorial approach is found in the influence of the Napoleonic Code on Dutch law, which is dissimilar to the South African approach to criminal law and procedure.⁵ The infiltration of Dutch law on South Africa's common law is, however, trite. The inquisitorial nature of

- 1 In South Africa, the system dealing with child offenders is generally referred to as 'child justice', which is synonymous with juvenile justice, but lacks the negative connotations associated with juvenile delinquency.
- 2 Findley 2011:912.
- 3 The identifier 'Dutch' is used synonymously for the Kingdom of The Netherlands for the sake of brevity.
- 4 Albeit reliant on some provisions of the general code of criminal procedure, namely the *Criminal Procedure Act 51/1977*.
- 5 Hirsch Ballin (2012:40) states that "Dutch criminal procedural law is strongly influenced by the French system. The French *Code d'Instruction Criminelle* that entered into force in 1811 also applied by order of Napoleon, in The Netherlands. The

Dutch juvenile criminal law is tempered by a preventative and rehabilitative approach. Although South African child justice aims to protect the best interest of the child in the criminal process, the preventative aims of her policy and procedure are better reflected in the welfare basis of the *Children's Act 38 of 2005*, as opposed to the *Child Justice Act 75 of 2008*.

2. The basis of Dutch criminal law and procedure

The Netherlands is a constitutional monarchy operating within a constitutional framework that stipulates the powers of government.⁶ Sec. 16 of the Dutch *Constitution*, read with sec. 1 of the *Code of Criminal Procedure*, guarantees the implementation of legality.⁷ In line with this provision, no conduct is defined as criminal unless it is demarcated as such by law; the courts may not create a crime through interpretation of existing legislation. By virtue of the principle of legality, any new crime created by the legislature may not be implemented retroactively. The principle also implies that the courts may implement only penalties created by statutes.⁸ The Dutch criminal law system is part of the continental family of law and is codified in the *Code of Criminal Law* of 1881 and the *Code of Criminal Procedure* of 1921.⁹ The procedural and criminal law relevant to child offenders is contained within the Dutch *Code of Criminal Procedure*¹⁰ and the *Code of Criminal Law*.¹¹

The system of child justice in The Netherlands is well developed and can be traced back to 1905 under the first *Children's Act*.¹² The system provides an example of an almost pure inquisitorial system of child justice and thus offers an avenue for differential comparison with South African child justice, which can be described as moderately inquisitorial,¹³ partly because it operates within a holistic adversarial system of criminal justice. Juries and lay participation are largely absent in criminal trials, in general, and in juvenile processes, in particular.¹⁴

Netherlands adopted its own Code of Criminal Procedure in 1838, which was however basically a copy of the French ...".

6 Government of The Netherlands 2014.

7 Blankenburg 2006:49.

8 Tak 2008:39.

9 Final report of The Netherlands to the European Commission on Criminal Justice 2013:2.

10 *Wetboek van Strafvordering*.

11 *Wetboek van Strafrecht*.

12 The *Kinderwetten* of 1905 made it possible for the state to intervene when a parent neglected the educational needs of a child. The same *Act* provided mechanisms for dealing with juvenile delinquency. The 1905 approach formed the foundation for the current practice of *Jeugdstrafrecht* (juvenile criminal law). See, in this regard, European Commission (n.d.).

13 See Karels (2015:45 *et seq.*).

14 Malsch n.d.

3. Historical overview of the Dutch juvenile justice system

As mentioned earlier, the Dutch system of child justice has its genesis in the *Children's Act* of 1905.¹⁵ The *Children's Act* allowed state intervention where parents neglected their educational duties. The relinquishment of parental authority to the state is a practice of the doctrine of *parens patriae*, which is, in essence, a welfare approach to childcare.¹⁶ In addition to welfare-related concerns, the 1905 *Act* sought to control juvenile delinquency.¹⁷ The *Children's Act* laid the foundation for future child justice initiatives in The Netherlands.¹⁸ Prior to the *Children's Act*, some children, in order to support themselves, were forced to work under a system of apprenticeship,¹⁹ which led to maltreatment and exploitation.²⁰ Consequently, the state turned towards a system of *homes* to house orphaned and otherwise impoverished youth.²¹ Criminal activity was dealt with by the particular orphanage and punishments ranged from food restrictions²² to banishment to the colonies.²³ During this time, however, the courts became involved in the punishment of children and regularly imposed punishments on children between the ages of 12 and 15, although these tended to be mild in nature.²⁴ The eighteenth and nineteenth centuries saw a turn towards the concept of childhood as a process of development, eventually resulting in adulthood.²⁵ The shift in focus brought about a change in the way in which juvenile delinquency was perceived. Instead of focusing on the inherent evil or immoral character of the child, blame was shifted to the social environment in which the child was raised.²⁶ The renewed focus on the bio-psycho-social sphere led to the creation of a child protection system. The renewed focus on children as individuals eventually resulted in the implementation of a minimum age of criminal responsibility²⁷ established in the *Criminal Code* of 1809.²⁸ During the French occupation, however, the *Code Pénal* removed the minimum age criteria and instead asserted that all children below the age of 16 were considered *incapacitas doli*. As a result, each case was decided on the merits concerning capacity.²⁹ Children considered criminally incapable were sent to houses of correction until they reached the age of 20. In 1881,

15 Van Nijnatten 2000:119.

16 Rendleman 1971:205.

17 Van Kalmthout & Bahtiyar 2010:911.

18 Liefwaard 2008:359.

19 Liefwaard 2008:359.

20 Junger Tas 2004:300.

21 Junger Tas 2004:301.

22 Liefwaard 2008:366.

23 Junger Tas 2004:302.

24 Junger Tas 2004:302.

25 Doek 1991:198.

26 Junger Tas 2004:303.

27 Liefwaard 2008:359.

28 Junger Tas 2004:303.

29 Junger Tas 2004:303.

a new criminal code was adopted and child offenders below the age of 14 were placed in communal homes. Children over the age of 14 were, however, subject to prison-cell incarceration.³⁰

The *Children's Act* was principally the result of children entering the working sector. It was premised on the state's power to intervene³¹ and on a system of education as opposed to punishment in response to delinquency.³² The *Penal Children's Act* of 1901 abolished the *doli incapax* doctrine and instead handed the discretion to a judge to determine whether the child was capable.³³ With regard to procedure, a preliminary inquiry was established to investigate the child's social and family environment.³⁴ Under this *Act*, children were given the same procedural rights as adults and the previous wide discretion of the prosecutor was considerably limited.³⁵ In 1989, the system of juvenile justice underwent a major overhaul and the minimum age of criminal capacity was fixed at 12. In addition, the 1995 version gave wide discretionary powers to the police and prosecution to dismiss a case prior to its coming before a judge.

Currently, the Dutch approach to juvenile justice is strongly influenced by a welfare approach supplemented by infrequent use of detention. The Dutch do not separate their ordinary criminal law and procedure from juvenile law in terms of statute. The juvenile provisions within the *Criminal Code* are contained in secs. 77a-77gg³⁶ and secs. 482-552hh³⁷ of the *Code of Criminal Procedure* Book IV³⁸ as well as the *Youth Care Act* of 2004.

4. Categories of juvenile offenders

Dutch criminal law recognises three categories of juvenile offenders:

1. Children below the age of 12.³⁹ These children are *doli incapax* without exception. The child can, however, be referred to custody under a

30 Junger Tas 2004:304.

31 Junger Tas (2004:305) asserts that, for example, parents were not permitted to remove children from social welfare homes when they became of age to work.

32 Doek 1978:796.

33 Junger Tas 2004:306.

34 Junger Tas 2004:307.

35 Junger Tas 2004:307.

36 Tak 2008:17.

37 Tak 2008:20.

38 To some degree, the *Youth Care Act* of 2004 contains provisions relating to juvenile offenders, but these are not the primary consideration of this submission.

39 Sec. 486 of the Dutch *Code of Criminal Procedure*.

care order in terms of civil law.⁴⁰ This approach is similar to that taken in sec. 9(3)(a)⁴¹ of the South African *Child Justice Act*.⁴²

2. Children between the ages of 12 and 17.⁴³ These children are considered criminally capable and can thus be arrested, prosecuted and convicted of an offence, provided there is no other limitation to capacity such as, for example, mental disorder.⁴⁴ There is no *doli incapax* provision in the Dutch system. It is also possible to try children between the ages of 16 and 17 in the ordinary criminal court where deemed appropriate by a judge.⁴⁵ This approach is dissimilar to the South African use of the *doli incapax* provision. In addition, the South African system tries all child offenders deemed capable in a criminal court,⁴⁶ if the child is not diverted before trial. In contrast to the Dutch approach, South African child justice does not waive or transfer a child to an ordinary adult criminal process, irrespective of the nature of the offence.⁴⁷
3. Young adults between the ages of 18 and 21.⁴⁸ These offenders can be tried under the juvenile system if their personality and circumstance require this approach.⁴⁹ In South Africa, a similar approach is used in cases of persons between the ages of 18 and 21 who may be tried

40 Van Kalmthout & Bahtiyar 2010:912.

41 "After assessing a child in terms of subsection (2), the probation officer may, in the prescribed manner

(i) refer the child to the children's court on any of the grounds set out in section 50;

(ii) refer the child for counselling or therapy;

(iii) refer the child to an accredited programme designed specifically to suit the needs of children under the age of 10 years;

(iv) arrange support services for the child;

(v) arrange a meeting, which must be attended by the child, his or her parent or an appropriate adult or a guardian, and which may be attended by any other person likely to provide information for the purposes of the meeting referred to in subsection (4); or

(vi) decide to take no action."

42 Although in South Africa the provision, at least at the time of writing, applies to children below the age of 10 years being the lower limit of criminal capacity.

43 Sec 488 of the Dutch *Code of Criminal Procedure*.

44 Van Kalmthout & Bahtiyar 2010:912.

45 Tak 2008:41. The determination of whether a child is heard in a juvenile court or adult criminal court hinges on the personality of the offender, the gravity of the offences and the circumstances surrounding the case. These factors are, however, not cumulative and, in reality, the gravity of the offence is sufficient to establish criminal court jurisdiction.

46 A child justice court is constituted as any court deemed as such under the *Criminal Procedure Act 51/1977*.

47 Offences are listed in schedules 1-3 of the *Child Justice Act* and children are tried in a child justice court, irrespective of the nature of the offence.

48 Tak 2008:41.

49 Van Kalmthout & Bahtiyar 2010:913.

under the *Child Justice Act* at the discretion of the Director of Public Prosecutions after consideration of various factors.⁵⁰

The Dutch juvenile justice system is triggered on commission of a criminal act or omission as defined by Dutch criminal law.

5. Courts, presiding officers and prosecution

The court structure for juvenile hearings is similar to that applicable to an adult offender. There are, however, certain distinctions in the procedure, one of which is the nature of the judge. Distinct from adult criminal cases, a juvenile is tried by a juvenile court judge who acts as both the examining and the trial judge.⁵¹ In addition, The Netherlands provides a mechanism for 16- and 17-year-olds to be tried in an ordinary adult criminal court in the following instances:

- The seriousness of the offence warrants such action, or
- The personality of the offender warrants such action, or

50 In terms of sec. 4(2) of the *Child Justice Act*:

“(2) The Director of Public Prosecutions having jurisdiction may, in accordance with directives issued by the National Director of Public Prosecutions in terms of section 97(4)(a)(i)(aa), in the case of a person who –

- (a) is alleged to have committed an offence when he or she was under the age of 18 years; and
 - (b) is 18 years or older but under the age of 21 years, at the time referred to in subsection (1)(b),
- direct that the matter be dealt with in terms of section 5(2) to (4).”

The factors that may be considered by the Director of Public Prosecutions are listed in the Directives issued in terms of sec. 97, include:

- (a) in the event of a Schedule 1 offence;
- (b) if the co-accused is a child;
- (c) if the person was used by an adult to commit the crime;
- (d) where there is doubt regards the age of the person;
- (e) where the person appears to be intellectually or developmentally challenged; or
- (f) where other pertinent and relevant circumstances so demand, such as those listed in paragraph J.2 above.

Directive J2 lists the following circumstances:

- (a) particular youthfulness;
- (b) particularly low developmental level of a child;
- (c) presence of particular hardship, vulnerability or handicap (e.g. where the child heads a household);
- (d) victim prefers diversion to trial as he/she does not want to testify in court;
- (e) compelling mitigating circumstances such as diminished responsibility;
- (f) undue influence exerted upon the child in the commission of the offence (e.g. child used by adult to commit crime (CUBAC));
- (g) witnesses for the prosecution are fragile and/or unwilling to testify; or to proceed would be potentially damaging to a child witness/victim.

51 Van Kalmthout & Bahtiyar 2010:931.

- The circumstances, in which the offence was committed, warrant such action.⁵²

Trial in an adult criminal court entitles the judge to apply more serious sanctions than those applicable under the juvenile system; however, the child cannot, under any circumstances, be sentenced to life imprisonment.⁵³ In South Africa, child offenders undergo a preliminary inquiry before a preliminary inquiry magistrate and, if referred for trial, appear before a single presiding officer, who may be assisted by assessors, where necessary, in a child justice court. The same presiding officer who hears the preliminary inquiry may only preside over subsequent trial if he "... has [not] heard any information prejudicial to the impartial determination of the matter ..."⁵⁴ Children in conflict with the law, irrespective of the nature or seriousness of the offence, cannot be subjected to ordinary criminal procedure (in this case, meaning an absence of the protections, for instance compulsory legal representation at trial and diversion options available in the *Child Justice Act*) under any circumstances.

In general, the structure of the criminal courts in The Netherlands appears as follows:

- Misdemeanour crimes are tried before a single cantonal judge of the district court.⁵⁵
- Crimes are tried by a full bench of three judges or by a single judge in the district court.⁵⁶
- A police judge may hear cases, which the prosecutor considers not serious, and this court sits as a single judge in the district court.⁵⁷ This court may not implement a sentence of more than 12 months and has the power to refer the matter to the full criminal court where it considers it more appropriate to do so.⁵⁸
- A single judge usually hears juvenile cases.⁵⁹
- The court of appeal sits as either three or one judge.⁶⁰
- The Supreme Court consists of five judges, but can sit as three when the case will not qualify for cassation⁶¹ or when there are no legal questions being asked of the court.⁶²

52 Van Kalmthout & Bahtiyar 2010:938. This criteria is specifically aimed at group crime where the child offender is involved as part of a participatory crime.

53 Van Kalmthout & Bahtiyar 2010:938.

54 Sec. 47(10) of the *Child Justice Act*.

55 Tak 2008:32.

56 Tak 2008:32. See further Government of The Netherlands (n.d.).

57 Tak 2008:32.

58 Tak 2008:32.

59 Tak 2008:32.

60 Tak 2008:32.

61 Government of The Netherlands n.d.

62 Tak 2008:32.

- In South Africa, child offenders make a first appearance in a court of preliminary inquiry and then, depending on the schedule of the crime,⁶³ may face trial in a district, regional or High Court, sitting as a child justice court and having jurisdiction in the geographical area in which the crime was committed. Appeal cases may be heard by a full court or by the quorum of the Supreme Court of Appeal or Constitutional Court,⁶⁴ depending on the nature of the post-trial remedy sought in each particular case.

In the Dutch system, the prosecutor plays a central role in the process and is fully responsible for the prosecution policy.⁶⁵ There is regular consultation between the prosecution and the police, child welfare units and juvenile probation boards.⁶⁶ Each district has a Judicial Case Consultation, which consults on each matter to determine whether the welfare authorities should be involved in the case, or not. This consultation must take place within 7 days of the first interrogation by the police.⁶⁷ In this manner, the Public Prosecutions Department, in co-operation with welfare agencies, settles the majority of cases.⁶⁸ At the pre-trial phase, the prosecutor may order the detention of a child where it is in the interest of the investigation; however, the child can only be detained for 3 days, which period can be prolonged for a period of an additional 3 days, where necessary.⁶⁹ Dutch prosecutors are formally part of the judiciary and are referred to as magistrates. Their task is the impartial and responsible investigation of both inculpatory and exculpatory facts.⁷⁰ Dutch prosecutors possess an *opportuiniteitsbeginsel*, which is essentially the discretion to decide to prosecute, or not.

The prosecution in South Africa is *dominis litis* and thus has the authority to decide to implement prosecution or make a return of *nolle prosequi* in cases involving children in conflict with the law.⁷¹ Unlike the Dutch system, the prosecutor is not an investigating magistrate. The prosecutor receives a docket from the police who, by that point, have completed their investigation of the alleged child offender. A probation officer, appointed by the Department of Social Development, assesses the child during the investigative stage.⁷² The assessment report forms part

63 The schedule is connected to the sentencing or penal jurisdiction, which generally dictates whether a matter is heard in a district, regional or High Court in South Africa.

64 As dictated by the Constitution and practice directives concerning the number of judges that hear a particular matter.

65 Van Kalmthout & Bahtiyar 2010:930. See further Blom & Smit 2006:238.

66 Van Kalmthout & Bahtiyar 2010:930.

67 Van Kalmthout & Bahtiyar 2010:930.

68 Van Kalmthout & Bahtiyar 2010:930.

69 Van Kalmthout & Bahtiyar 2010:930.

70 Hirsch Ballin 2012:42.

71 Joubert *et al.* 2014:87.

72 Within 24 hours of arrest or within other specified periods in cases where a written warning or summons to appear at a preliminary inquiry has been issued by the police.

of the docket received by the prosecution for presentation to the court of preliminary inquiry. In certain instances, a prosecutor can release the child on bail pending the preliminary inquiry.⁷³ In addition, the prosecutor has a discretion to divert the matter before it goes to the preliminary inquiry.⁷⁴ These instances are, however, limited by the schedule of the crime and must be confirmed by a magistrate in chambers.⁷⁵ The discretion is thus not unfettered. The prosecutor cannot order detention, but can advise the police whether the child offender should be arrested before preliminary inquiry or secured to attend using non-custodial methods.

6. Criminal trial process

The Dutch criminal process is divided into three main stages, *viz.* pre-trial (*voorbereidend onderzoek*), during which time the criminal investigation (*opsporingsonderzoek*) occurs; the trial stage (*eindonderzoek*) following the investigation, and finally the execution stage. The pre-trial stage has become increasingly important in the Dutch process, because the hearing of witnesses at trial is more of an exception than a rule.⁷⁶

Once a suspect is caught in *flagrante delicto*, or where the incident is reported to the police, the police investigation phase begins. At this stage, the police will question the suspect, although there is a general right to remain silent in the face of police questioning.⁷⁷ The police investigation is reduced to writing under oath and this stage incorporates the use of arrest, and search and seizure, where necessary.⁷⁸ The police are not the only agents of investigation in The Netherlands and the examining judge has a role in the investigative phase of the trial. Once the investigative judge and the police conclude the investigation, the file is forwarded to the prosecution for a decision. It is, however, possible, in the initial stages of the juvenile justice process, that the police or prosecution dismiss the case before it proceeds further.

By contrast, the South African child justice process is divided into the pre-trial phase (incorporating the initial arrest, search seizure, evidentiary investigative steps, taking of statements, and preliminary inquiry, and so on), the trial phase (trial and sentencing), and the post-trial phase (appeal, review, mercy, indemnity and pardon). The preliminary inquiry judge has no role in the initial investigation, although it is not uncommon for the prosecutor to direct the police in certain instances.⁷⁹

73 See sec. 21(2)(b) of the *Child Justice Act*.

74 See sec. 41 of the *Child Justice Act*.

75 See sec. 42 of the *Child Justice Act*.

76 Hirsch Ballin 2012:41.

77 Tak 2008:49.

78 Tak 2008:49.

79 In South Africa, the police and prosecution form part of different arms of government and are thus independent from one another. Despite this, there is a degree of co-operation in the criminal justice process.

I shall now survey the Dutch phases of the criminal process as they relate to child offenders and compare them to the analogous procedures in South Africa.

6.1 Investigation phase

In Dutch juvenile law, crimes are divided into misdemeanours and crimes. *Crimes* are the more serious of the two categories.⁸⁰ The distinction is important at the investigation phase, because the less serious of the two allows for the implementation of extrajudicial sanctions without the involvement of the judiciary. Extrajudicial sanctions are authorised by the police and/or prosecutors' office and require that the juvenile performs a specific task or pays a sum of compensation as a form of sanction.⁸¹

Police sanctions in The Netherlands include conditional police dismissal and out-of-court settlement with the police.⁸² Conditional dismissal incorporates the use of warnings, unconditional dismissals, and conditional dismissals issued by the police.⁸³ The first two require little explanation, but the last requires further interrogation. A conditional dismissal requires the juvenile offender to compensate the victim through reparation, performance of a duty or the payment of a sum of money, which places the victim in the same position s/he would have been, were it not for the commission of the offence.⁸⁴ Generally, these dismissals have no legal basis and do not form part of the Dutch *Criminal Code*.⁸⁵ The exception lies in sec. 77e of the *Criminal Code*, which states that the police may require a juvenile offender, as part of a conditional dismissal, to participate in a special programme with the permission of the public prosecutor.⁸⁶ These programmes effectively circumvent the referral of the matter for formal prosecution. They are traditionally referred to as HALT programmes.⁸⁷ HALT can be considered analogous to pre-preliminary-inquiry diversion by a prosecutor under secs. 41 and 42 of the South African *Child Justice Act*, except for the fact that the police control HALT programmes. The juvenile offender's consent is a requirement of the HALT process.⁸⁸ If the juvenile offender refuses to consent, the matter is referred to the prosecution for formal processing.

80 Van Kalmthout & Bahtiyar 2010:919.

81 Van der Vijver 2006:88.

82 Van Kalmthout & Bahtiyar 2010:921.

83 Crime and Society n.d. There is no specific legal provision that permits or regulates the use of police discretion in these cases and, to the contrary, law enforcement is obligated to report the crime to the prosecutor. The police discretion is drawn primarily from the prosecutorial discretion to prosecute and in this way appears valid, although the researcher questions the transparency and accountability of an indirect operation of discretion.

84 Blankenburg 2006:50.

85 Van Kalmthout & Bahtiyar 2010:919.

86 Van Kalmthout & Bahtiyar 2010:920.

87 Youth Policy in The Netherlands n.d.. See further <http://halt.nl/en/halt-programme/background/> (accessed on 5 November 2015).

88 The requirement of consent is analogous to the South African requirement for diversion.

Since 2001, a special form of HALT proceedings has been introduced under the name STOP disposal.⁸⁹ STOP disposals are applicable to children below the age of 12 who would have been liable for prosecution had they been of the age of criminal responsibility.⁹⁰ These programmes require the consent of the child and his/her parents or guardian and are voluntary.⁹¹ Another option is out-of-court settlement with the police, which effectively applies only to misdemeanours and implies that the child buys off the prosecution⁹² for a maximum amount of €350.

If the offence committed by the juvenile offender does not qualify for any of the options for dismissal available to the police, the matter is referred to the Public Prosecutions Department. At this stage, there are also options to preclude formal trial. The prosecutor in these matters may order a conditional dismissal or a transaction.⁹³ The dismissal option can be conditional or unconditional, with the conditional dismissal usually involving the performance of a service, or compensation of the victim for his/her loss. A transaction can be applied where the child has committed an offence that would carry a maximum penalty of 6 years if committed by an adult.⁹⁴ In these cases, the prosecutor can enter a deal with the child that involves the payment of a fine up to a maximum of €3750 and/or other conditions such as the performance of a service for the victim, or the attendance of a programme.⁹⁵

In the South African system, there is no official distinction between misdemeanours and crimes. The *Child Justice Act*, however, contains 3 schedules of offences where schedule 1 represents the least serious offences and schedule 3 the most heinous ones.⁹⁶ The police have no power to dismiss a matter or to grant an extrajudicial sanction. The prosecution may, however, grant diversion for schedule 1 offences, but this must be confirmed by a magistrate in chambers.⁹⁷ Diversion includes various options such as compensation to the victim or the making of an apology, and so on.⁹⁸ In South African criminal procedure, summons with an admission of guilt fine is commonly used for less serious offences – this is analogous to the Dutch practice of paying a sum of money to avoid prosecution. This option is, however, only available to adult offenders and

89 Weijers & Duff 2002:34.

90 Van der Laan 2008:146.

91 Van Kalmthout & Bahtiyar 2010:920.

92 This is analogous to acknowledgement of guilt fines under sec. 57 of the *Criminal Procedure Act* 51/1977. Conversely, however, a child offender in South Africa may not be given an acknowledgment of guilt option under sec. 57 of the Act.

93 Van Kalmthout & Bahtiyar 2010:920.

94 Van Kalmthout & Bahtiyar 2010:920.

95 Van Kalmthout & Bahtiyar 2010:920.

96 See sec. 6 of the *Child Justice Act*.

97 See secs. 41 and 42 of the *Child Justice Act*.

98 See sec. 53 of the *Child Justice Act*.

no summons with an option to pay an admission of guilt fine may be issued to a child offender.⁹⁹

6.2 Examination phase

The examining magistrate decides on the issue of pre-trial detention. There are, however, several options open to avoid sending the juvenile offender to a detention centre pending trial. There are three types of pre-trial detention, namely remand in custody, remand detention, and detention pending trial.¹⁰⁰ Pre-trial detention is only applicable where there is an indication that the juvenile committed the offence, and is only applicable to offences listed in sec. 67-67(a) of the *Code of Criminal Procedure*.¹⁰¹ The duration of pre-trial detention may not exceed the total final punishment that the juvenile would receive if convicted of the offence in question.¹⁰² When the prosecutor wants to issue pre-trial remand, he does so by issuing a claim for remand to the examining judge. If approved, the remand cannot extend past 14 days, although it can be extended, on application, to a maximum of 90 days.¹⁰³ Remand detention is usually served in a remand home, but it is possible for the juvenile to be remanded to police custody.¹⁰⁴ The final option is pre-trial detention, which usually takes the form of house arrest with electronic monitoring. This has been largely supplemented by night detention, which allows the juvenile to attend school during the day, but at night and over weekends, s/he is detained in a remand home.¹⁰⁵

In the South African system, pre-preliminary-hearing detention or placement is determined largely by the age of the child and the schedule of offence s/he is alleged to have committed. Release on bail by the authority of the police is not permitted, although the child can still qualify for prosecutorial bail in certain circumstances.¹⁰⁶ Where a child offender is detained after arrest, s/he must appear before a court of preliminary inquiry within 48 hours.¹⁰⁷ The court of preliminary inquiry then determines, after hearing the prosecutor and considering the assessment report, whether the child offender should be detained, placed in a child and youth care centre, released on bail, or released on own recognisance.¹⁰⁸ The discretion to detain at the police investigation phase is severely restricted by the 48-hour

99 See sec. 19 of the *Child Justice Act*.

100 Van Kalmthout & Bahtiyar 2010:941.

101 Section 67[1.] A pre-trial detention order may be issued on the basis of suspicion of:

a. a serious offence which carries a statutory term of imprisonment of at least four years.

102 Van Kalmthout & Bahtiyar 2010:941.

103 Van Kalmthout & Bahtiyar 2010:941.

104 Van Kalmthout & Bahtiyar 2010:941.

105 Van Kalmthout & Bahtiyar 2010:930.

106 See sec. 24 of the *Child Justice Act*.

107 See sec. 20 of the *Child Justice Act*, read with sec. 50(d) of the *Criminal Procedure Act* 51/1977.

108 See secs. 32 and 33 of the *Child Justice Act*.

rule read with sec. 50 of the *Criminal Procedure Act* 51 of 1977. The liberty of the child offender is jealously protected by sec. 35 of the *Constitution of the Republic of South Africa* and thus pre-preliminary-hearing detention discretion is intensely restricted and monitored.

In the Dutch system, investigations by the police and examining judge, in the absence of dismissal actions as discussed *supra*, are followed by a prosecutorial decision. The prosecution will decide either to drop the case, settle by transaction, or issue a writ of summons on the offender.¹⁰⁹

6.3 Trial phase

The trial commences with the reading of the charge by the prosecution to the juvenile.¹¹⁰ After the charge is read, the judge examines the juvenile and any witnesses for the state and any experts, where necessary. The prosecution and the defence may then question the witnesses. The juvenile retains the right to remain silent and cannot be questioned under oath in line with this right if s/he elects not to testify.¹¹¹ In reality, witnesses are seldom called, as the court relies on the statements in the dossier. After the examination of the docket, the prosecution makes a closing statement followed by the defence and thereafter the juvenile is given the opportunity to make a statement.¹¹² The court then closes the case and retires to consider its judgement. If the court convicts the juvenile, the process moves to the sanctioning stage.

A convicted juvenile faces several possibilities as sanction for his/her offence. The judge can implement any one of the following sentences:

- Judicial pardon – effectively a guilty finding without a punishment attached.¹¹³
- Juvenile detention – detention cannot exceed 1 year for a juvenile between the ages of 12 and 15, or 2 years for a juvenile between the ages of 16 and 17 (when tried in the juvenile courts).¹¹⁴
- Fine – fines generally range from €3 to €3350, which can be paid in instalments.¹¹⁵ Where the juvenile does not pay the full amount and such cannot be recovered from his/her property, the court may order his/her detention for a maximum of 3 months.¹¹⁶
- Confiscation – the confiscation of objects obtained through the commission of the offence.¹¹⁷

109 Tak 2008:51.

110 Tak 2008:60.

111 Tak 2008:61.

112 Tak 2008:61.

113 Van Kalmthout & Bahtiyar 2010:923.

114 Van Kalmthout & Bahtiyar 2010:930.

115 Van Kalmthout & Bahtiyar 2010:924.

116 Van Kalmthout & Bahtiyar 2010:924.

117 Van Kalmthout & Bahtiyar 2010:924.

- Disqualification from driving a motorbike or car, depending on the age of the juvenile.¹¹⁸
- Compensation – the order can be combined with other sanctions and effectively orders the juvenile to compensate the victim for his/her loss. This sanction cannot be imposed on a juvenile under the age of 14, which is the age at which a child is civilly liable for his actions.¹¹⁹
- Alternative sanctions – usually involve community service or the attendance of an educational project. If granted by a judge, as opposed to a prosecutor as part of a transaction, the maximum time limit is 240 hours, which must be performed within 6 months.¹²⁰ These sanctions can only be implemented with the consent of the juvenile and are usually implemented only after receipt of advice from the Child Care and Protection Board.¹²¹
- Conditional sanctions – a conditional sentence is attached to a traditional sentence with the *caveat* that the traditional sentence will not come into play if the juvenile refrains from committing further offences and/or fulfils the requirement of conditions set by the judge. A conditional sentence may also relate to conditional release from a detention centre after serving two thirds of a sentence.¹²²

The South African trial process in a child justice court does not rely on documentary evidence to the same degree as the Dutch system. Being adversarial in nature, the hearing is essentially a trial by argument. The state presents its case against the child by calling witnesses and tendering evidence, which the defence cross-examines. Before the state closes its case, there is an option for the matter to be diverted out of the trial system in limited instances.¹²³ If this does not occur, the child offender has the option of applying for discharge from prosecution.¹²⁴ If discharge is denied or not applied for, the defence presents its case by calling witnesses, which may or may not include the child offender, and submit evidence. The court has a limited role in the proceedings and may only call and examine witnesses in line with the narrow provisions of secs 167 and 186 of the *Criminal Procedure Act*. At the close of the case for the defence, the state and defence present closing arguments. The court may then immediately give a verdict or retire to consider. If the child is convicted, the matter proceeds to trial on sentencing. Trial on sentencing may involve the calling and cross-examination of witnesses. The court may decide to sentence the child to a community-based sentence,¹²⁵ restorative justice

118 Van Kalmthout & Bahtiyar 2010:924.

119 Van Kalmthout & Bahtiyar 2010:925.

120 Van Kalmthout & Bahtiyar 2010:925.

121 Van Kalmthout & Bahtiyar 2010:926.

122 Van Kalmthout & Bahtiyar 2010:928.

123 See sec. 67 of the *Child Justice Act*.

124 See sec. 174 of the *Criminal Procedure Act 51/1977*.

125 See sec. 72 of the *Child Justice Act*.

sentence,¹²⁶ fine or alternative,¹²⁷ correctional supervision,¹²⁸ compulsory residence in a child and youth care centre,¹²⁹ imprisonment,¹³⁰ or may decide to postpone or suspend sentencing.¹³¹ Unlike the Dutch system, the South African system allows for a wide range of post-trial remedies such as automatic review, review, appeal, mercy, indemnity and pardon. These remedies are available in the Dutch system, but are not specific to child offenders as they are within the confines of the South African *Child Justice Act*.

7. Evaluating the Dutch juvenile justice system

The Dutch system is obviously tolerant and mild in its treatment of juvenile offenders. The range of discretionary options open to both law enforcement and the office of the prosecutor are admirable, albeit one could argue that both are open to arbitrary decision-making and abuse of power. The minimum age of criminal capacity is in line with the rest of Europe and is a liberal interpretation of age and capacity. In addition, the limits on juvenile sanctions must be considered an advantage of the system, notwithstanding the possibility of waiver to adult criminal court. Some would argue that the use of transfer to adult court in the Dutch system is a distinct disadvantage of a system that prides itself on tolerance and mild treatment. This must, however, be viewed in light of the fact that the Dutch system only permits a maximum custodial sentence of 2 years for serious offences. Thus, particularly heinous crimes cannot be tried under a system of juvenile law, which permits low sentences for serious crimes.

The Dutch juvenile justice system operates under a high degree of discretion at the law enforcement and prosecutorial phases. The child may be diverted away from the formal justice system by law enforcement, or the prosecutor through various diversionary tactics such as cautions and transactions. These orders are informal and are thus neither reviewable nor appealable; this makes the discretion subject, in the author's submission, to abuse.

Coming from an adversarial perspective, it is easy to assume that there is no clear separation of powers in the Dutch criminal justice system. The office of the prosecutor is part of the judiciary and effectively there is no system of checks and balances between the two. This is, however, not entirely the truth of the matter. Although the prosecution is, in essence, in control of the police investigation and forms part of the judiciary, the prescripts of art. 6 of the European Convention on Human Rights prevent any unfair practices in investigation or trial. Fair trial rights, specific to juvenile offenders, are protected by the Convention on the Rights of the

126 See sec. 73 of the *Child Justice Act*.

127 See sec. 74 of the *Child Justice Act*.

128 See sec. 75 of the *Child Justice Act*.

129 See sec. 76 of the *Child Justice Act*.

130 See sec. 77 of the *Child Justice Act*.

131 See sec. 78 of the *Child Justice Act*.

Child as well as art. 6 of the European Convention on Human Rights. The Netherlands ratified the Convention on the Rights of the Child in 1994. From a human rights perspective, art. 93 of the Dutch *Constitution* states that the provisions of the European Convention on Human Rights and the International Covenant on Civil and Political Rights are directly applicable to Dutch law. In this regard, The Netherlands has no constitutional court. Where national and treaty provisions conflict, national legislation is not applicable unless it provides for a right supplementary to those provided by the international law.¹³² Fair trial rights in The Netherlands are contained in art. 6 of the European Convention on Human Rights.¹³³ Unlike the position in South Africa, the Dutch *Constitution* does not include the right to a fair trial. Much like the United Kingdom, fair trial rights in The Netherlands are, as highlighted earlier, based on art. 6 of the European Convention on Human Rights, which provides for fair trial as a “fundamental aspect of the rule of law.”¹³⁴ The Netherlands is mandated to implement these rights under its inclusion in art. 53 of the Charter of Fundamental Rights of the European Union and art. 6(1) of the Treaty on European Union.¹³⁵ Article 18 of the Dutch *Constitution* stipulates that everyone may be legally represented in legal and administrative proceedings, but that the Acts of Parliament regulate the granting of legal aid.

Between 2007 and 2012, The Netherlands was held in violation of art. 6 of the European Convention on Human Rights in three decided cases,

132 Art. 94 of the *Constitution of The Kingdom of the Netherlands*.

133 Art. 6:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand the language of the court.

134 Hirsch Ballin 2012:52.

135 http://home.broadpark.no/wkeim/files/de_human_rights.htm (accessed on 9 October 2013).

namely *Vidgen v the Netherlands*,¹³⁶ *Lalmohamed v the Netherlands*¹³⁷ and *Geering v the Netherlands*.¹³⁸ None of these cases were, however, brought by, or on behalf of juvenile offenders.

Unlike the position in South Africa, the best interest standard is not expressed in the Dutch *Constitution*. The Dutch system is based on the use of discretionary powers which originate in the use of the doctrine of *parens patriae*. The doctrine in The Netherlands made the use of a combined civil and criminal approach to juvenile justice possible under the law. Under this regime, the need for procedural protections is not central; rather, the doctrine necessitates a paternal approach from the system towards the child. It is, however, evident that the best interest principle has been used to a lesser degree in juvenile justice-related matters as it has been in private law, where the interests of the child are threatened by forces outside his/her individual actions.¹³⁹ The juvenile justice system is built on the doctrine that all administrative decisions taken with regard to juvenile offenders are to be based on the best interest of the child standard. Dutch jurisprudence, however, provides no guide as to the meaning of best interest and, as a result, for example, the use of pre-trial detention is high in some regions.¹⁴⁰ Van der Brink argues that the best interest standard does not give rise to concrete rights and/or obligations, but rather sets a foundation against which all other rights are interpreted.¹⁴¹ Clearly, this is a paternalistic principle in the Dutch system. This may, however, arise from its foundation in the *parens patriae* doctrine.

The Dutch system operates on a flexible model in which all children are dealt with by the juvenile justice system, unless sec. 77b of the *Penal Code* is operational. This article allows the court to try children aged 16-17 years under ordinary criminal law if the seriousness of the crime, the personality of the offender, or the circumstances surrounding the crime warrant the action. One must, however, question the use of vague criteria to determine the use of waiver or transfer. The author submits that these criteria are primarily offence-based as opposed to offender-based, and reject the notion that procedural legitimacy is established through fairness and certainty within the rule of law in any state system of criminal trial.

Another questionable category of prosecutorial discretion in The Netherlands relates to the use of transactions as a form of diversion. This entails the juvenile offender either paying a sum of money to the treasury or fulfilling another financial obligation to avoid prosecution. In terms of the *Financial Penalties Act* of 1983, transactions can be applied to any crime, which carries a statutory prison term of less than 6 years.¹⁴² The use of transaction can be questioned in terms of due process (in this case sec. 6

136 Application number 29353/06.

137 Application number 26036/08.

138 Application number 30810/03.

139 Rap 2013:55.

140 Van der Brink n.d.

141 Van der Brink n.d.

142 Sec. 74.

of the European Convention on Human Rights). Paying a sum of money (or forfeiting assets or whatever the condition may be) essentially means that the offender gives up his/her right to be sentenced by an independent court, which clearly infringes the rule of law. The return, however, is the avoidance of public trial and the fact that the accused does not have a criminal record after payment of a transaction agreement. The issue in the Dutch system is that transactions are unregulated and can amount to mere plea-bargaining in a manner, which infringes the notion of separation of powers (in that the prosecution is performing an adjudicatory function), and opens the gate to abuse of power and discrimination.

8. Lessons for South African child justice

Whether accusatorial or inquisitorial in nature, the child justice process is designed to protect children in conflict with the law and to ensure that justice is accomplished. The way in which justice is implemented often influences the degree of success or otherwise of the endeavour to protect the best interest of the child standard and serves the needs of the victim, and demands of society, at the same time. Procedurally and logistically, the Dutch system is far removed from the South African approach; however, the aims of child justice remain constant between both jurisdictions. The author asserts that South Africa may, however, take note of the pre-trial involvement of police officers in the child justice process. At present, South African police cannot grant police bail or order conditions or diversion. The author asserts that the system was specifically designed as such to allow the prosecution to review the work of the police and to prevent abuse of power by the police; this was the case under the apartheid system.¹⁴³ Perhaps, however, the time has come to extend greater discretionary power to police in the field of child justice. This could be done by amending the *Child Justice Act* to the effect that, police officers, above a stipulated rank and guided by specific policy, would be able to release a child on condition without formal charge, or divert the matter in a similar manner to the existing secs. 41 and 42 of the *Child Justice Act*. In order to prevent abuse of power, the National Prosecuting Authority could oversee both of these discretionary measures. The author asserts that such a measure would be effective in the case of minor crimes and lessen the workload of the courts of preliminary inquiry. In addition, such an amendment would protect the best interest of the child standard, because the child offender would not be exposed to the court process at all, provided she complies with police instructions/cautions/diversions.

9. Conclusion

The Dutch system of juvenile justice is well developed and structurally well organised. The aim is to prevent the crime in the first place, as opposed to dealing with the consequences resultant therefrom. In line with international

143 Karels 2015:189.

trends, the system is geared towards prevention, which is clear in the use of alternative disposal methods such as the HALT and STOP programmes. The South African system, by contrast, is often primarily concerned with what happens to the child offender during the criminal justice process and not with the prevention of the crime. This, the author asserts, is the result of an adversarial criminal justice culture, and due to the lack of pre-trial disposal procedures available to deal with children in conflict with the law. Indeed, it appears that the Dutch system is largely geared towards pre-trial preventative measures and South African child justice towards due process and post-trial remedy. One could argue that the Dutch system is proactive, whereas the South African system is reactive. The author submits that extending discretionary powers to the police in South Africa for dealing with children in conflict with the law would extend the preventative aim of child justice and, as a secondary benefit, contribute to greater trust in the police, which is lacking in the current system.

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