Summary

Pre-Trial Detention in the Dutch Juvenile Justice System. Law and Practice in Light of International and European Children's Rights and Human Rights Standards

Background, Research Question and Objectives

Pre-trial detention, under Dutch Law, is a measure of coercion that enables the authorities to deprive a suspect of a criminal offence of his liberty pending trial. The examining judge(s) may, upon request from the prosecutor, order pre-trial detention to prevent the suspect from absconding, frustrating the process of truth-finding, reoffending or causing public disorder. The initial pre-trial detention order can last fourteen days, which can be extended with ninety days (or less) prior to the first trial court hearing. Pre-trial detention can also be ordered when the suspect is a juvenile (age 12 or older).[1] In fact, pre-trial detention seems to play a prominent role in the way in which the Dutch juvenile justice system responds to (severe) crimes allegedly committed by juveniles.

The United Nations Committee on the Rights of the Child and several other organizations have repeatedly expressed their concerns about the use of pre-trial detention of juveniles in the Netherlands. It has been argued that this practice is not in line with internationally recognized rights of the child. Nevertheless, hardly any academic research is available that provides insight into this practice. As described in Chapter 1, the present research aims to address this flaw by analyzing Dutch law and practice of juvenile pre-trial detention in light of the prohibition of unlawful and arbitrary detention, as laid down in Article 37 (b) of the Convention on the Rights of the Child (CRC), Article 9 (1) of the International Covenant on Civil and Political Rights (ICCPR) and Article 5 (1) of the European Convention on Human Rights (ECHR). This prohibition is a core principle for a use of pre-trial detention that is in accordance with children's and human rights. The objective of this research is to provide insight into the extent to which juveniles suspected of having committed a criminal offence are protected against unlawful and arbitrary detention and, if necessary, to contribute to strengthening this protection. The central question of this research is therefore:

> *"To what extent does Dutch law and practice regarding pre-trial detention of juveniles comply with the children's and human rights principle that juveniles should be protected from unlawful and arbitrary detention, does the law and / or practice need amendment, and if so, in what way?"*

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1 In this book, the term 'juvenile' relates to a young suspect that reached the age of 12, but not yet the age of 18 at the time of the offence.

Ultimately, this research aims to provide the legislator, policymakers, judiciary and other stakeholders with recommendations that can help ensure a lawful and non-arbitrary application of pre-trial detention of juveniles in the Netherlands, which is in line with the principles of the CRC, ICCPR and ECHR, without disregarding the various interests that may be at stake when pre-trail detention is considered.

Research Methods

In this research, pre-trial detention of juveniles has been analyzed at three levels: (1) the international and European framework laying down the relevant children's and human rights, (2) Dutch law, and (3) Dutch practice. Ultimately these levels come together in the synthesis that leads to answering the central research question. Desk research into various international and European legal sources has been conducted to establish the relevant children's rights and human rights framework. The Dutch law on juvenile pre-trial detention has been studied by means of desk research into the relevant legal texts, explanatory memoranda, the Dutch High Court's jurisprudence and legal literature.

The analysis of the use of pre-trial detention of juveniles in practice focuses primarily on the judicial decision-making process. Qualitative empirical research methods have been used to analyze three – interrelated – dimensions of the judicial decision-making process: (1) the judges' interpretation and application of the law and the way they exercise their discretion, (2) the influence of the work processes and decisions of, and interactions with, and among other professional actors, and (3) the underlying perceptions of judges and other involved professional actors of the function of juvenile pre-trial detention. Observations have been conducted during 225 juvenile pre-trial detention hearings at five different district courts. In this regard, the researcher has had not only access to the hearings, but was also present during the judges' deliberations. In addition, 71 semi-structured interviews have been conducted with judges, prosecutors, defense lawyers and professionals of the Child Protection Board, youth probation services and youth custodial centers (see Chapters 1 and 6).

International and European Children's Rights and Human Rights Framework

Chapter 2 shows that the prohibition of unlawful and arbitrary detention of juveniles, as laid down in Article 37 (b) CRC, Article 9 (1) ICCPR and Article 5(1) ECHR, entails the comprehensive requirement that pre-trial detention of juveniles should be in accordance with national and international law, including the underlying legal principles. This involves amongst others that pre-trial detention shall be used only on legitimate grounds (i.e. the risk of absconding, collusion, reoffending or public disorder) and, given the presumption of innocence, not to anticipate a custodial sentence. In the

specific context of juvenile justice, the requirements of lawfulness and non-arbitrariness imply that pre-trial detention shall be used only as a measure of last resort and for the shortest possible period of time. Ultimately, this study found that the prohibition of unlawful and arbitrary pre-trial detention of juveniles entails responsibilities for the national legislature, the State (i.e. executive branch) and the judiciary.

Chapter 3 focuses on the perspective of the judge. Based on European and international standards, two (alternative) judicial decision-making schemes for children's and human rights compliant pre-trial detention decisions have been developed, which can be implemented at the domestic level. In these schemes, the decision-making process of the judge is divided into five steps, which must ensure that pre-trial detention of juveniles is applied only as a measure of last resort and for the shortest possible period of time (see Schemes 3.A and 3.B). The most complex 'step' in these decision-making schemes concerns the judicial balancing of interests. In each individual case, the judge has the difficult and delicate task of balancing general criminal justice interests, personal liberty interests of the juvenile suspect, fair trial interests and (pedagogical) interests of early justice intervention, while constantly keeping an eye on 'the best interests of the child' as the overarching, primary consideration in all decisions in the context of juvenile justice. In order to accommodate this balancing exercise, a model has been introduced that provides judges – both methodically and substantively – with guidelines on how to balance these divergent interests at stake. Eventually, the decision-making schemes developed in Chapter 3 have been translated to the specific context of Dutch juvenile justice in Chapter 10.

Pre-Trial Detention in The Dutch Juvenile Justice System

Chapter 4 shows that in Dutch law juvenile pre-trial detention is largely not regulated by child-specific rules and provisions. This means that pre-trial detention in the context of the juvenile justice system is – similar to the adult criminal justice system – classified as a pre-trial measure of coercion that can be used to prevent the suspect from absconding, frustrating the process of truth-finding, reoffending or causing public disorder. However, Dutch law governing pre-trial detention of juveniles contains a small number of child-specific provisions. The most prominent child-specific provision is laid down in Article 493(1) of the Dutch Code of Criminal Procedure (CCP), which prescribes that the judge issuing a pre-trial detention order concerning a juvenile has the obligation to consider whether the execution of that order can be suspended under conditions. Suspending a pre-trial detention order means that the juvenile is released from detention, yet under strict conditions, such as a curfew, a restraining order or an order to participate in a training program. Taking this into account, it can be argued that the judicial pre-trial detention decision regarding juveniles is made up essentially of two (sub)decisions: (1) the decision on ordering pre-trial detention and (2) the decision on executing (or suspending) the pre-trial detention order.

Building on previous research (see Chapter 5), the present study shows – based on observations and interviews (see Chapter 6) – how judicial pre-trial detention decisions regarding juvenile suspects are made in practice. Chapter 7 describes in detail how judges deal with pre-trial detention and the suspension under conditions in juvenile justice cases. Five patterns in the judicial decision-making process have been identified.

A first pattern in the judicial decision-making process concerns the interaction between the decision on ordering pre-trial detention and the decision on executing (or suspending) the pre-trial detention order. The research findings show that in some cases judges appear to order pre-trial detention for the sole purpose of suspending it under special conditions, such as probation supervision, a curfew or a training order, even when this requires a very lenient and/or creative interpretation of the legal criteria for ordering pre-trial detention. Conversely, the findings show that the decision on ordering pre-trial detention can sometimes influence the decision regarding the conditional suspension. It is noted that the system under Dutch law, which requires a pre-trial detention order to impose less restrictive measures (i.e. suspension conditions), can basically 'force' judges – at least in some cases – to be lenient and/or creative in their interpretation of the legal criteria for ordering pre-trial detention.

A second pattern in the judicial decision-making process concerns the dilution of the formal legal relationship between pre-trial detention and the suspension under conditions. In practice, the suspension under conditions does not seem to be used as an alternative to pre-trial detention, but rather as an independent framework for interventions with own objectives. Some judges do not seem to consider the decision on the suspension and the conditions as a decision regarding a measure of coercion in a (criminal) juvenile justice procedure, but rather as a 'pedagogical' or 'child welfare' decision.

A third pattern in the judicial decision-making process concerns the strong interconnection between pre-trial detention decision-making and sentencing. The findings paint a picture of a practice in which the use of detention in the pre-trial stage of the proceedings strongly influences the judicial sentencing decision after conviction. Pre-trial court judges indicate that they are aware of this and that they take this into account in their pre-trial detention decision-making. Thus, it appears that sentencing decisions affect pre-trial detention decisions and vice versa.

A fourth pattern in the judicial decision-making process concerns the judge's dependence on other actors, such as youth probation, and the availability of facilities and services, such as places in treatment facilities and day-care programs. These can limit the judges' room for decision-making in that judges cannot always take the decision they want and sometimes have to look for (temporary) alternative 'solutions'.

A fifth pattern relates to the pedagogical approach that lies at the heart of the judicial decision-making process. Judges usually pay close attention to the 'pedagogical effect' of their decisions. Judges aim to deliver as much as possible 'tailored' decisions to meet the specific pedagogical needs of the

juvenile, especially in the context of the conditional suspension. However, the research findings show that judges' views on which approach is 'pedagogically effective' can be quite different. Furthermore, the pedagogical approach seems sometimes difficult to align with the law and/or legal principles.

In Chapter 8, the judge's decision-making process has been placed in the broader context of the work processes and decisions, and interactions with the other involved officials such as the prosecutor, defense lawyer and professionals of the Child Protection Board, youth probation services and youth custodial institutions. Based on empirical research findings, this comprehensive chapter shows that judges' rulings on pre-trial detention of juveniles cannot be isolated, since it is part of a dynamic process of decision-making and interactions between different actors, in which the output of one actor, provides input for another actor. It thus has become clear that the above-mentioned five patterns of the judicial decision-making process seem to be strongly affected by the dynamics that arise from the interactions between the various actors.

Building on the findings presented in the previous chapters, Chapter 9 distinguishes seven functions of pre-trial detention that play a role in Dutch juvenile justice practice. In addition to the formal legal function of pre-trial detention as (1) a measure of coercion, pre-trial detention also appears to perform 'shadow functions' as (2) a way of 'sending out a signal' that laws will be enforced, (3) a punitive response, (4) an intervention to protect the juvenile's well-being, (5) a framework for diagnosing the juvenile, (6) a framework for behavior modification and (7) a tool to set the tone for the future course of the proceedings and the disposition of the case. The majority of these 'shadow functions' arise from a pedagogically-oriented approach to pre-trial detention and have in common that pre-trial detention and the conditional suspension are used as an instrument in favor of – what the judge and/or other professional actors consider(s) – the interests of the juvenile and his or her development. However, these 'shadow functions' do not have an explicit basis in the law.

Towards a Lawful and Non-Arbitrary Use of Pre-Trial Detention in Dutch Juvenile Justice

The prohibition of unlawful and arbitrary detention of juveniles, as laid down in Article 9 (1) ICCPR, Article 37 (b) CRC and Article 5 (1) ECHR, entails that the application of juvenile pre-trial detention must take place in accordance with the national legal procedures and grounds and in accordance with relevant European and international children's and human rights standards. In the concluding Chapter 10, it is argued that – in theory – it should be possible for judges to structurally deliver lawful and non-arbitrary pre-trial detention decisions under the current Dutch legal framework. To accommodate this, a judicial decision-making scheme has been presented

which gives the judge concrete guidelines on how to deliver pre-trial detention rulings regarding juveniles which are compliant with children's and human rights standards.

Nevertheless, the research findings indicate that the Dutch practice does not always comply with children's and human rights standards on pre-trial detention. It is argued that the reasons for this can be found at three levels: the legal framework, the (judicial) decision-making and the system of institutions and facilities within the juvenile justice system. Apparent flaws in the legislation relate to the 'suspension model', the legal grounds and the length of the time limits for juvenile pre-trial detention. Friction points concerning the judicial decision-making process are to be found in the strong interconnection between pre-trial detention and sentencing, the pedagogical 'shadow functions' of pre-trial detention and the lack of transparency of pre-trial detention decisions. Challenges in the system of institutions and facilities relate to the availability of facilities and services as alternatives to pre-trial detention, the information exchange and coordination between the different professional actors and the internal organization of courts and prosecutor's offices. It is concluded that a thorough review at each of these three levels is necessary to (better) safeguard a lawful and non-arbitrary application of pre-trial detention in the Dutch juvenile justice system.

A core finding of this research is that the current 'suspension model', as laid down in the Dutch CCP, is difficult to reconcile with the existing children's and human rights standards on pre-trial detention of juveniles (see par. 10.3.1.1). For this reason, section 10.4 of this book introduces a model of 'pre-trial preventative measures' intended to replace the suspension model. The proposal is to create a model in which the judge, after finding that there is a serious suspicion and a legitimate ground that makes it necessary to deviate from the premise that the juvenile should be free from coercive measures while awaiting trial, is immediately granted access to a range of pre-trial preventative measures. Different from the current suspension model, the proposed model does not require that the judge first orders the most severe measure (pre-trial detention) so as to get access to less restrictive pre-trial preventative measures. The proposed model aims to create a workable system of pre-trial detention and alternative coercive measures for juveniles that ensures that pre-trial detention is used in a lawful and non-arbitrary manner and only as a measure of last resort and for the shortest possible period of time.

Bearing in mind the overall picture, it can be said that pre-trial detention serves various functions and 'shadow functions' and thereby occupies an important position in the functioning of the Dutch juvenile justice system. At the same time, it must be concluded that within this system the protection of juvenile suspects against unlawful and arbitrary pre-trial detention is not optimally safeguarded. The recommendations made at different

levels in Chapter 10, including the proposal for implementing a new model of pre-trial preventative measures, seek to strengthen this protection without neglecting the various interests that may be at stake when pre-trial detention is considered.

The book concludes with a few final reflections on the value of international and European children's and human rights standards, on future academic research on decision-making in the context of juvenile justice and on the future course of the Dutch juvenile justice system.