INTRODUCTION RESEARCH AND CENTRAL RESEARCH QUESTION

There seems to be a discrepancy between the legislator’s intentions concerning the severest sanctions for juveniles and the way practitioners (i.e. behavioural scientists responsible for personality tests used by the court, public prosecutors and (juvenile) criminal courts) advise, demand or impose these sanctions. This is particularly true regarding the penal treatment order for juveniles ‘Placement in an Institution for Juveniles Order’ (hereinafter: treatment order). This research analyses the legal frameworks of the severest youth sanctions – the treatment order, youth imprisonment, and the behavioural order (a non-custodial treatment order meant to influence the juvenile offender’s behaviour). It also compares these sanctions with each other and with interventions outside the scope of the criminal justice system (i.e. closed youth care and placement in a psychiatric hospital).

This research aims to clarify to what extent practitioners are familiar with the legislator’s objectives regarding the various juvenile sanctions and to what extent the juvenile sanctions are applied accordingly. In addition, this study analyses how the legal requirements provided in the law are applied in practice. This research focuses on individual sanctions, not on combinations of sanctions.

The central research question of this study was: ‘To what extent are youth sanctions for juvenile offenders (treatment order, youth imprisonment, and the behavioural order) applied in accordance with the legislator’s intentions, which by implication results in an optimized influx of juveniles in treatment centres under a treatment order? (i.e. do only those juveniles ‘get a treatment order’ to whom the measure should be applied?). And if not, should the legal framework of the treatment order be changed and how should this be done?'
RECENT DEVELOPMENTS IN THE PENAL SYSTEM FOR JUVENILES

Since the 1995 revision of juvenile criminal law, a tailor-made approach has become the primary objective of the juvenile justice system, together with an increasing emphasis on influencing the juvenile offender’s behaviour. Recent legislative developments have had significant influence on the juvenile penal system. The 2008 Wet Gedragsbeïnvloeding jeugdigen (Act on Influencing the Behaviour of Juveniles), for example, introduced the possibility for courts to combine all kinds of juvenile sanctions (as well as suspended sentences). In addition, a bill was drafted to change the Youth Custodial Institutions Act to repeal the difference between bare placement (in remand homes) and a treatment arrangement (in treatment centres). And recently, the Ministry of Justice announced that a number of penal youth institutions will be closed which generates much discussion. Furthermore, other (non-criminal) forms of deprivation of liberty, like closed youth care and placement in a psychiatric hospital, seem to be of influence on the choice of sanctions by the juvenile court. The developments mentioned above have blurred the original aims and delimitation (in terms of severity) of the judicial interventions. Imposition of sanctions implies a tailor-made approach to each juvenile, while minimizing the use of incarceration. This questions the current distinctions between the separate severest sanctions for juveniles and also raises the issue of how to optimize the ‘treatment order population’.

The doctrine of ‘tailor-made sanctions’ (in which the offender’s personality and her or his environment plays a central role) implies that a detailed legal framework is neither realistic nor desirable. At the same time, the principle of legality requires that criteria for sentences and penal orders are not defined too vaguely or too broad. This can influence legal security and legal inequality.

With the tailored approach as the primary goal of sentencing, it is of great importance to bear in mind the legislator’s original intentions with the various sanctions, their scope and applicability.

LEGAL RESEARCH

This study consists of two parts: 1. a legal analysis, and 2. a survey. The first part concerns a literature study (legal and social-scientific literature as well as relevant case-law and parliamentary documents), which focuses on the treatment order and its connections with other sanctions. Looking at the distinction between sanctions and the objectives of each individual sanction (as provided for by the legislator), the objectives turned out to be not easily recognizable in the law, but it has been possible to construct the legislator’s objectives and the assumed gradual differences between sanctions.

Based on the law, one can distinguish the rationale behind the severest juvenile sanctions and the criteria that are of significance for legal practice.
Firstly, the duration of sanctions differs: the treatment order can last for four or six years in some cases (in the near future this will be changed to five to seven years), while youth detention lasts for a maximum of two years if the juvenile was 16 or 17 years old when he committed the crime. The behavioural order can be imposed for a period of six months with a maximum of one year, with the possibility to prolong this order once more.

A second distinctive criterion concerns the need to deprive the juvenile of her or his liberty. The juvenile’s treatment or his imprisonment in a youth institution can only be ordered if there are no adequate alternatives available. If there is a need to provide custodial treatment the court can impose a treatment order. The behavioural order can be used in an early stage, deprivation of liberty (i.e. a treatment order) is seen as a last resort. Thirdly, a distinctive characteristic are the various targeted groups per sanction. Obviously, the treatment order is meant for the most problematic group of serious young offenders, that is: re-offenders and hardcore delinquents whose personality demands treatment in a closed setting (at least during the first period after conviction). Long-term imprisonment will be used for the same kind of offences, but without the need to impose a treatment oriented measure. The deprivation of liberty is then regarded necessary due to the seriousness of the offence (goal: retribution and deterrence and, possibly, protection of society). The behavioural order is meant for re-offenders and hardcore delinquents (although first offenders are not excluded) who can receive professional treatment (evidence based) in a non-custodial setting (i.e. without deprivation of liberty).

Finally, it is important to keep an eye on the difference between penalties and measures. The differences between these two types of sanctions has been under (severe) pressure during the past years due to the strong emphasis on tailored sentencing, while taking into account the offender’s personality and his environment. In addition, the distinction between a penalty and a measure within the juvenile justice system has become less clear since the law allows a behavioural order to be replaced by youth imprisonment when a juvenile offender does not finish the programme. One could conclude that penalties and measures are merging within the system of juvenile justice.

Although the severest youth sanctions are distinct from each other, the legislator’s objectives with the treatment order and other severe sanctions could not be found directly in the law (i.e. the law does not specifically clarify the objectives). Beyond this, sanctions that deprive someone of his liberty meet with continuous criticism of lawyers and behavioural experts. Using these ‘last resort’ sanctions has been subject to strict empirical research in the last decade and only evidence-based treatment programmes were allowed. There has been criticism regarding the three cumulative requirements of the treatment order (art. 77s (1) Criminal Code) which are broadly defined. They would foster the inappropriate use of this sentence and blur the distinction between penalties and measures, which would result in a melting pot of sanctions. As far as the
relatively new behavioural order is concerned, the requirement of a compulsory recommendation by the Child Care and Protection Board has been criticized. Other critical comments concern the question to what extent the order may amount to deprivation of liberty, the limited availability of evidence-based behavioural interventions and the resemblance between the suspended youth imprisonment with special conditions and the behavioural order.

**Survey**

In order to answer the question to what extent the three most important groups of professionals (behavioural experts, public prosecutors and juvenile judges) handle the individual sanctions and requirements in practice, a mail survey has been conducted. The groups of respondents consisted of 36 behavioural experts, 21 prosecutors and 31 judges.

The distinctions between the severest unconditional youth sanctions are reasonably clear, based on the law as well as on the use of these sanctions in practice. The three groups of respondents seem to use them quite similarly. The unconditional treatment order is considered to be the most far-reaching sanction, followed by youth imprisonment and the behavioural order respectively. Nevertheless a substantial part of the respondents noted that the distinction between the sanctions is not clear enough, so that the decision which sanction fits best in an individual case is not easily made. This may be caused by the possibility to combine all kinds of sanctions, which offers a wide variety of possibilities.

As we have seen the objectives of each severe youth sanction are not clearly specified in the law (and the historical developments). They also tend to be dealt with in different ways by the various groups of respondents. They also use the criteria differently in the decision-making process regarding the treatment order, youth imprisonment and behavioural order. This justifies the question: do we need to improve the decision-making process in which the legislator’s objectives and the distinctive criteria and requirements are weighed in the most optimal way? Assuming that improvement is needed, this could be realized, for example, by fine-tuning the legal framework of the treatment order. This implies that either the legal requirements have to be changed or complemented, or other ways have to be found, such as drafting specific policy regulations, to make the objectives of the treatment order clearer, also in relation to the objectives of the other severe youth sanctions.