

Criminal Law for Young Adults in the Netherlands

Citation for published version (APA):

Hopman, M., & de Vocht, D. (2019). Criminal Law for Young Adults in the Netherlands: The Law and the Practice from the Sociology of Childhood Perspective. In J. Hage, A. Walterman, & D. Roef (Eds.), *Law, Science and Rationality* (pp. 265-292). Eleven International.
http://login.ezproxy.ub.unimaas.nl/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=nlebk&AN=2486343&site=ehost-live&scope=site&ebv=EB&ppid=pp_265

Document status and date:

Published: 01/01/2019

Document Version:

Publisher's PDF, also known as Version of record

Document license:

Taverne

Please check the document version of this publication:

- A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
- The final author version and the galley proof are versions of the publication after peer review.
- The final published version features the final layout of the paper including the volume, issue and page numbers.

[Link to publication](#)

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal.

If the publication is distributed under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license above, please follow below link for the End User Agreement:

www.umlib.nl/taverne-license

Take down policy

If you believe that this document breaches copyright please contact us at:

repository@maastrichtuniversity.nl

providing details and we will investigate your claim.

Law, Science, Rationality

10 CRIMINAL LAW FOR YOUNG ADULTS IN THE NETHERLANDS: THE LAW AND THE PRACTICE FROM THE SOCIOLOGY OF CHILDHOOD PERSPECTIVE

M. Hopman & D. de Vocht

1 INTRODUCTION

Imagine a violent robbery is reported to the police. After investigation, two suspects are arrested: one who is a minor (16 years old) and one who is – legally – an adult (19 years old). Both suspects have priors – a criminal history with violent crimes as well as crimes related to drugs – and their psychological assessment indicates that the 19 year old suffers from a minor developmental disorder. The crime was extremely violent in the sense that weapons (a knife and a gun) were used and two victims were severely injured. How should the criminal justice system deal with the two suspects? Should they be provided with the care and protection offered by juvenile criminal law or does the severity of the crime and/or the difference in age justify taking a more restrictive (adult) approach?

The question whether children should be held responsible for committing criminal offences proves to be difficult to answer, which is also reflected by the fact that there is no global consensus on the minimum age of criminal responsibility (hereafter: MACR). Historically, since the nineteenth century, a distinction is made in criminal law between the adult and the child defendant. The idea is that those categorised as ‘children’ are considered to have limited, or no, responsibility for their (criminal) acts, and therefore a specific type of punishment (or in a less punitive sense: ‘response’) is appropriate. This presumption has led states worldwide to introduce specific juvenile criminal law acts, including the introduction of juvenile courts. To which age category of children these specific provisions apply differs per state. In general, the setting of MACR is inextricably linked to the legal doctrine of *doli incapax* which ties the ability to hold someone accountable to rationality, maturity and age.¹ To a certain extent the setting of MACR means that the child is presumed

1 J.J. Titus, ‘Juvenile Transfers as Ritual Sacrifice: Legally Constructing the Child Scapegoat’, *Youth Violence and Juvenile Justice*, Vol. 3, No. 2, 2005, pp. 116-132, at p. 119.

incapable of criminal intent and therefore cannot be held responsible.² Even though the question of finding the appropriate MACR is not new, states these days are continuously struggling with legally determining the line between the child and the adult and the topic is still the subject of political debate. In general, the dividing line seems to move over time and it seems that changes in the determination of the dividing line are subject to cultural, political and normative changes as well as scientific findings.

Several scientific commentators, in particular in the field of sociology of childhood – a critical field of studies that discusses how childhood is perceived in society, and what the consequences are of these sociological views – have criticized these debates, arguing for example that popular discourse categorizes children as ‘angelic’, ‘innocent’, unless they commit a serious crime, upon which they are suddenly labelled as ‘devils’.³ As Scott explains, while children are in [American] law generally perceived as “innocent beings, who are dependent, vulnerable, and incapable of making competent decisions”:

When children cross the line to legal adulthood, they are assumed to be autonomous persons who are responsible for their conduct, entitled as citizens to legal rights and privileges, and no longer entitled to support or special protection. This picture is deceptively simple, of course. In fact, the legal regulation of children is extremely complex. Much of the complexity can be traced ultimately to a single source – defining the boundary between childhood and adulthood.⁴

Following this line of reasoning there seems to be “an imposition of the highest rationality and responsibility on children who seriously offend.”⁵ Others argue that while political arguments related to drawing the line between childhood and adulthood in criminal

2 For example, within the European Union the MACR is usually set at 14 or 15 but sometimes the age limit is lower, which is – for example – the case in England and Wales and Northern Ireland (10) as well as in the Netherlands (12). With both countries setting the age limit as low as 10, before 1963 it was even lower: 8. Interesting to note is that in some countries the MACR will differ per gender (Iran) or type of offence (Ireland, Malaysia). The USA represent a category on its own where the majority of crimes are tried at state level and while most states have no MACR, others set the MACR as low as 6, 7, 9 and 10.

3 See, e.g.: S. Hackett *et al.*, ‘Community Reactions to Young People Who Have Sexually Abused and Their Families: A Shotgun Blast, Not a Rifle Shot’, *Children & Society*, Vol. 29, No. 4, 2005, pp. 243-254, at p. 244; A. Meyer, ‘The Moral Rhetoric of Childhood’, *Childhood*, Vol. 14, No. 1, 2007, pp. 85-104, at p. 87; Titus 2005, p. 124; E.S. Scott, ‘The Legal Construction of Adolescence’, *Hofstra Law Review*, Vol. 29, 2000, pp. 547-598, at pp. 557-558.

4 Scott 2000, p. 547.

5 Titus 2005, p. 120.

matters may be presented as scientific, underlying reasons are also of a social-political nature.⁶

In the Netherlands, children can be held criminally liable from the age of 12.⁷ In 2014, the new *adolescentenstrafrecht* (criminal law applicable to young adults, hereafter: CLYA) was introduced which stretches the possibility to apply provisions of juvenile criminal law to young adults between the age of 18 and 23. The rationale behind the CLYA, according to its explanatory memorandum (hereafter: EM), are recent findings in neuroscience and developmental psychology. These findings suggest that at the age of 18 young people still have to go through important stages of brain development, which includes emotional, social, moral and intellectual development.⁸ According to the memorandum, research shows that young adults do not always have adequate impulse control and are also more sensitive to external influence (such as peer pressure). These characteristics – connected to the incomplete development of certain brain functions – result in particularly risky behaviour. The underdevelopment of young adults in this area partially explains why one third of all criminal offences in the Netherlands take place before the age of 23 and ends after this age.⁹ It is also argued that for a small group of young offenders their behaviour is not ‘age-bound’. This group can be distinguished by the seriousness of their crimes and the recurring character of their criminal behaviour, which “does not correlate with aforementioned [developmental] factors, but with psychological disorders and/or other criminogenic factors.”¹⁰ The goal of the CLYA is to “maximally stimulate the criminal young adult to take on a responsible role in society, whereby s/he will further refrain from criminal behaviour.”¹¹

In this contribution we focus on how the Dutch judiciary, in practice, decides whether a juvenile defendant should be tried as an adult on the one hand, and whether an adult

6 Scott 2000, p. 564; Titus 2005, pp. 121 and 125; and E. Brown, ‘The ‘unchildlike child’: Making and marking the child/adult divide in the juvenile court’, *Children’s Geographies*, Vol. 9, No. 3–4, 2011, pp. 361–377, at p. 362.

7 Art. 486 Code of Criminal Procedure. Recently, the Council for the Administration of Criminal Justice and Protection of Juveniles (*Raad voor Strafrechtstoepassing en Jeugdbescherming*) advised the Minister of Justice and Security to raise the age limit from 12 to 14. This proposal was based on the presumption that recent scientific research on the brain development of children indicates that children below the age of 14 are not able to oversee the consequences of their actions: Council for the Administration of Criminal Justice and Protection of Juveniles, ‘*Verhoging strafrechtelijke minimumleeftijd in context*’ (“Raising the age or criminal responsibility – with context”), 20 December 2017.

8 Memorie van Toelichting bij Wijziging van het Wetboek van Strafrecht, het Wetboek van Strafvordering en enige andere wetten in verband met de invoering van een adolescentenstrafrecht, *Kamerstukken II* 2012/13, 33 498, nr. 3, p. 1 (*Explanatory Memorandum*, hereafter: EM).

9 EM, pp. 1 and 12–13.

10 Id., p. 13.

11 Id., p. 1.

defendant should be treated as a juvenile on the other. In addition, we reflect upon this decision-making process from the critical perspective of sociology of the childhood, by wondering how this treatment of the child/adult divide in Dutch criminal law and criminal law courts relates to sociological beliefs about the child/adult distinction.

In doing so we attempt to answer the following question: *how do Dutch judges make the distinction between child and adult defendants since the introduction of the Criminal Law for Young Adults (CLYA), and how can we understand this practice from the sociology of childhood perspective?*

To answer this question, the following sub questions will be dealt with:

1. What is the relevant legal framework of the CLYA?
2. How is the CLYA applied in practice?
3. How can both the theory and practice of the CLYA be understood from the sociology of childhood perspective?

Each of these sub questions will be discussed in a separate section below followed by some concluding remarks.

2 METHODOLOGY

To answer the first sub question, on the framework of the CLYA, we analysed the relevant provisions of the Dutch criminal code, its explanatory memorandum and crosschecked our analysis with secondary literature on the topic.

For the second sub question, we first searched the online database of Dutch case law (www.rechtspraak.nl) for cases that were adjudicated between 1 April 2014 and 15 March 2018, which mentioned the term '*adolescentenstrafrecht*' (criminal law for young adults). This resulted in 211 cases. To have a random sample, we decided to analyse three years, 20 cases per year, since the entering into force of the CLYA. This resulted in the analysis of 60 cases, 20 adjudicated and published online after 1 April 2014, 20 after 1 January 2015 and 20 after 1 January 2016.¹² These cases have been subjected to systematic content analysis¹³ according to the following criteria:

1. Number of analysis

12 One case was excluded, based on the fact that its content did not discuss criminal law for young adults in relation to a decision on the child/adult divide (ECLI:NL:RBGEL:2016:1940).

13 M.A. Hall & R.F. Wright, 'Systematic Content Analysis of Judicial Opinions', *California Law Review*, Vol. 96, 2008, pp. 63-122.

2. Case number
3. Date of the (alleged) crime
4. Birth year of the defendant
5. Age of the defendant at the moment of the (alleged) crime¹⁴
6. Gender of the defendant
7. Crime proven by the court
8. Is the defendant tried according to juvenile or regular criminal law?
9. Expert opinion on the child/adult divide
10. Arguments of the defense lawyer on the child/adult divide
11. Arguments of the prosecutor on the child/adult divide
12. Motivation of the judge to apply juvenile or adult criminal law
13. Sanction(s) applied.

In addition to the case law study, we looked at the instruments developed for experts to advise on the child/adult divide (Probation Service (*Reclassering*) and the Dutch Institute for Forensic Psychiatry and Psychology (NIFP)) and at other published research on the practice of CLYA in the Netherlands.

In the fifth section, we compare our findings under section three with the findings under section four, dealing with whether or not the child/adult divide as it is made in practice by the Dutch judiciary adheres to the intentions of the legislator. We will then proceed to reflect upon these results according to literature on sociology of childhood.

3 CRIMINAL LAW FOR YOUNG ADULTS: THE LEGAL FRAMEWORK

In the Netherlands, a specific juvenile criminal law has been part of Dutch criminal law since 1905. Like in many other countries, the question who can or should be considered to be a child in the context of criminal proceedings has been the subject of continuous debate. As mentioned in the introduction, at present, children in the Netherlands can be held criminally liable from the age of 12.¹⁵ Children below the age of 12 cannot be prose-

14 Because in the court decisions only the birth year of the defendant is published, the age of the defendant had to be calculated using the year of the crime minus the birth year of the defendant, unless the defendant's age at the time of the crime was indicated elsewhere in the court decision.

15 Art. 486 Code of Criminal Procedure. Recently, the Council for the Administration of Criminal Justice and Protection of Juveniles advised the Minister of Justice and Security to raise the age limit from 12 to 14. This proposal was based on the presumption that recent scientific research on the brain development of children indicates that children below the age of 14 are not able to oversee the consequences of their actions: Council for the Administration of Criminal Justice and Protection of Juveniles, '*Verhoging strafrechtelijke minimumleeftijd in context*' ('Raising the age or criminal responsibility – with context'), 20 December 2017.

cuted but certain investigative measures can be applied, for example, they can be arrested and interrogated. The age of the juvenile at the moment of the (alleged) committed offence is decisive.¹⁶ Since the introduction of the *adolescentenstrafrecht* (CLYA) in 2014 the judge not only has the possibility to apply adult criminal law to juvenile offenders of age 16 and 17 even though they are below the age of majority (which is set at 18), but also to deal with defendants up until the age of 23 as juveniles (instead of 21 which was the age limit before the law of 2014).¹⁷ The law clearly aims to (further)¹⁸ change the aforementioned divide from a strict binary division into a more flexible grey area. This flexible grey area applies to young adults who committed a crime at the age of 16-23.¹⁹ According to the new law, the standard still is that minors, defined as anyone below the age of 18 at the time of committing the crime, are judged according to juvenile criminal law (*jeugdstrafrecht*) and anyone above the age of 18²⁰ according to regular criminal law. However, in some cases it may be beneficial to try a 16-17 year old as an adult, and a 18-23 year old as a juvenile. Thus, the fact that a defendant has reached the age of 18 is no longer decisive: the applicability of juvenile criminal law may be indicated by the personality of the suspect or the circumstances of the case up until the age of 23. It is important to note that the introduction of CLYA has only changed the applicability of substantive juvenile criminal law – the age limits of criminal procedural law have remained the same. The decision on which system of sanctions should be applied to the case, is ultimately taken by the judge. This decision is an important one since juvenile criminal law clearly takes a different approach to dealing with criminal behaviour than regular adult criminal law. In a nutshell, juvenile criminal law is more focused on providing second chances by taking an individualistic and more protective (sometimes even paternalistic) approach with a strong focus on re-education and rehabilitation of the child. For this reason, juvenile criminal law provides more options for positive interventions – taking into account the developmental stage of the juvenile defendant – compared to adult criminal law. For example, it provides various possibilities for individualised and effective treatment, involvement of family, education *et cetera*.²¹

The judge decides to apply CLYA when this is deemed appropriate given the personality of the defendant or the circumstances surrounding the offence (*omstandigheden waaronder*

16 Art. 488 Code of Criminal Procedure.

17 Before 2014, application of juvenile criminal law was – as an exception – only possible for young adults aged 18-21.

18 Because this was already the case in the sense that 16 and 17 year olds could be tried as adults depending on the seriousness of their crime, since 1995.

19 Although the government intended to include 15 year olds, this has not been incorporated into the law because it would be contradictory to the UN CRC (EM).

20 From hereon whenever we refer to the age of a defendant, we refer to the age at the time of the crime, unless otherwise indicated.

21 The wide variety of sanctions available for juveniles can be found in Art. 77g and 77h of the Criminal Code.

het feit is begaan). Since the entering into force of the CLYA, juvenile criminal law can be applied to:

1. Defendants age 12-16 (Art. 77a and Art. 77b par. 1 Criminal Code)
2. Defendants age 16-17, unless the judge finds reason to apply regular criminal law, based on (Art. 77b par. 1 Criminal Code):
 - a. The seriousness of the alleged crime
 - b. The personality of the defendant or
 - c. The circumstances under which the alleged crime has been committed
3. Defendants age 18-23, if the judge finds reason to judge them according to juvenile criminal law, based on (Art. 77c par. 1 Criminal Code):
 - a. The personality of the defendant or
 - b. The circumstances under which the alleged crime has been committed

The characteristics mentioned under 2 and 3 each are sufficient reasons to warrant such a judicial decision.²² Both situations 2 and 3 need to be read as exceptional. As a general rule, anyone below the age of 18 will be tried according to juvenile criminal law, and anyone above this age will be judged according to regular criminal law.²³

The wording of this legal framework obviously raises many questions of interpretation. What exactly is meant by “the personality of the defendant”, “the circumstances under which the alleged crime has been committed” and “the seriousness of the crime”? Two documents have been issued by the Dutch government which aim to provide answers to these questions: the CLYA’s explanatory memorandum (hereafter: EM)²⁴ and the Guideline and framework for criminal prosecution youth and young adults, including sanction measurements HALT (*Richtlijnen en kader voor strafvordering jeugd en adolescenten, inclusief strafmaten halt*) (hereafter: Guideline (GL)).²⁵

In the explanatory memorandum for the CLYA, it is explained that “the seriousness of the alleged crime” (a) refers to “very serious vice- and violent crimes and homicide”, crimes that “in society may give rise to the question whether juvenile criminal law, with its orientation towards (re)education of the delinquent and sanctions which are limited in time, enables a fitting reaction [to the crime].”²⁶ In the Guidelines, in relation to 16 and 17 year olds, it is stated that adult criminal law will only be applied if the alleged crime concerns

22 See also: M. van der Laan, M.G.C.J. Beerthuizen, C.S. Barendregt & K.A. Beijersbergen *Adolescentenstrafrecht: Beleidstheorie en eerste empirische bevindingen*, WODC, The Hague 2016, p. 22.

23 EM, p. 25.

24 Id.

25 *Staatscourant* 2014, No. 8284.

26 EM, p. 28.

a “very serious (life)crime” and “the expectation is that the type and duration of treatment in the framework of juvenile criminal law will offer insufficient possibilities to protect the safety of others.” Cases of “multiple recidivism, or where young people have been hardened and apply instrumental violence” are supposed to be treated according to juvenile criminal law, so that a change of behaviour can be made possible by taking a personal approach.²⁷

“The circumstances under which the alleged crime has been committed” (c) can refer to a situation where a criminal act has been committed in a group setting including both juveniles and adults, in which case a defendant under the age of 18 should be tried similar to his peers above the age of 18 who fulfilled similar roles.²⁸

The last criterion, of the “personality of the defendant” (a), is (also) quite complicated. In general, this seems to refer to the developmental phase of the defendant, labelled his/her “developmental age”.²⁹ In the explanatory memorandum, it is argued that young people between the age of 15 and 23 may show risk behaviour partly due to the underdevelopment of certain brain functions. This leads to “yet unfinished emotional, social, moral and intellectual development.” Corresponding behavioural characteristics include: inability to inhibit impulses, inability to suppress distracting impulses and associations, peers who greatly influence decisions, inability to oversee the consequences of behaviour and adapt one’s behaviour accordingly, inability to regulate emotions and unfinished development of empathic ability.³⁰ The Guidelines reiterate some of these undeveloped qualities (however only in relation to 18-23 year olds), mentioning underdevelopment of “inhibiting impulses, taking long term consequences into account, regulation of emotions and the development of empathetic abilities” It should thereby be considered whether an intervention under juvenile criminal law might offer a more meaningful reaction which still renders justice to the nature and seriousness of the crime and the judicial past of the defendant. Important criteria to take into consideration for applying juvenile criminal law are “whether the suspect: a) still attends school; b) still lives with his/her parents; c) needs support because of a (slight) mental disorder and d) is open for support and a more pedagogical approach.” In general, juvenile criminal law should be applied to defendants who cannot yet be considered as completely independent and mature.³¹

The explanatory memorandum states that for 16-17 year olds, the “personality of the defendant” as a reason to try a juvenile defendant as an adult, can include cases where

27 GL, p. 1.

28 EM, p. 25.

29 Id., p. 19; GL, p. 1.

30 EM, p. 19-20.

31 GL, p. 1.

based on personality issues, a behavioural expert may estimate that treatment might take longer than possible according to a juvenile sanction, or if the defendant is 18 years old at the time of the trial.³² Specifically for 18-23 year olds, a judge may choose to apply juvenile criminal law when it concerns a serious crime, when the young adult is a known repeat offender, or when the young adult belongs to a designated category of clearly vulnerable young adults, which include: a psychological or psychiatric disorder or a developmental disorder such as the group of slightly mentally disabled (*licht verstandelijk beperkten*).³³

When categorised, the decision of the judge needs to be based on the following considerations (see the table below):

- When considerations are contradictory, the explanatory memorandum has been labelled (EM) and the Guideline has been labelled (GL)
- In some respects, different characteristics apply to either 16-17 year olds on the one hand, and 18-23 year olds on the other. In that case, the 16-17 year old specific characteristics are expressed in *italics*, the 18-23 year old specific characteristics are made **bold**.

Juvenile criminal law	Regular (adult) criminal law
Crime: *is very serious (EM, p. 30) <i>*where young people have been hardened and apply instrumental violence'</i> (GL, p. 1) *has been committed in a group setting that includes both minors and adults (EM, p. 25)	Crime: *is not very serious (EM, p. 30) <i>*is very serious</i> (EM, p. 25) <i>*is very serious (vice- and violent crimes and homicide), so that in society it may give rise to the question whether juvenile criminal law enables a fitting reaction;</i> (EM, p. 28) <i>*is a very serious life crime and it is expected that treatment under juvenile criminal law will not sufficiently protect the safety of others.</i> (GL, p. 1) * has been committed in a group setting that includes both minors and adults (EM, p. 25)
Criminal history: *young adult is a known repeat offender (EM, p. 30) <i>*case of 'multiple recidivism'</i> (GL, p. 1)	Criminal history: *crime is first offense (EM, p. 30)
Personality: *unfinished emotional, social, moral and intellectual development (EM, p. 20) *developmental phase of defendant (EM, p. 26; GL, p. 1) *cannot yet be considered completely independent and mature (GL, p. 1)	Age: <i>*the defendant is 18 years old at the time of the trial</i> (EM, p. 25)
Personality characteristics:	

32 EM, p. 25.

33 Id., p. 30.

Juvenile criminal law	Regular (adult) criminal law
<ul style="list-style-type: none"> *inability to inhibit impulses (EM, p. 20; GL, p. 1) *inability to suppress distracting impulses and associations *peers who have a great influence in taking risky decisions *inability to oversee the consequences of behaviour (GL, p. 1) and adapt one's behaviour accordingly (EM, p. 20) *inability to regulate emotions (EM, p. 20; GL, p. 1) *unfinished development of empathic ability (EM, p. 20; GL, p. 1) 	
Personality (disorder) (EM, p. 30): <ul style="list-style-type: none"> *has a psychological disorder *has a psychiatric disorder *has a developmental disorder such as slightly mentally disabled 	
Intervention: *juvenile criminal law may offer a more meaningful reaction which still renders justice to the nature and seriousness of the crime and the judicial past	Intervention: <i>*based on personality of the defendant, it is estimated that treatment might take longer than possible according to a juvenile sanction (EM, p. 25)</i>
Living circumstances suspect (GL, p. 1): <ul style="list-style-type: none"> *still attends school *still lives with his/her parents *needs support because of a (slight) mental disorder *is open to support and a more pedagogical approach 	

From this scheme, it seems that some of the considerations are quite contradictory. For example: according to the guidelines, a 16 or 17-year-old who commits a violent crime that does not threaten someone's life should be tried according to juvenile criminal law, whereas according to the explanatory memorandum violent crimes by 16 or 17 year olds should be tried according to adult criminal law. In general, a 16 or 17-year-old can be tried as an adult if (s)he has committed a "very serious crime", whereas for an 18-23 year old the seriousness of the crime is a reason to apply juvenile criminal law. Also, on the one hand the limited responsibility of the defendant is considered when the young adult committed the crime in part due to his/her limited capacity to control impulses and oversee long term consequences of his/her actions. On the other hand, if by the time the case comes to court the defendant has reached the age of 18, this is considered a reason to judge him/her as an adult.

4 CRIMINAL LAW FOR YOUNG ADULTS: THE PRACTICE

In practice, the decision to apply adult or juvenile criminal law is, in first instance, made by the public prosecutor, who decides where to detain the suspect until trial: in a youth detention or in an adult detention centre. The dominant role of the public prosecutor in this respect has been repeatedly criticized in Dutch legal literature highlighting that if the

public prosecutor does not decide to ask for the application of juvenile criminal law for young adults in early stages of the proceedings, chances are slim that this will happen at a later stage.³⁴ During the early stages of proceedings, the defendant will sometimes be evaluated by a psychologist, psychiatrist and/or rehabilitation officers. Their (behavioural) reports will also be used during trial. In some cases, these experts use a checklist to help them evaluate the defendant. There are two different lists; one developed by the Dutch Institute for Forensic Psychiatry and Psychology (DIFP)³⁵ and the other by the rehabilitation office/Ministry of Justice (RO/MoJ).³⁶ Both lists consist of indications and counter-indications for applying criminal law for young adults to 18-23 year olds. Unfortunately, there is no list for 16 and 17 year olds. When combined with the legal criteria described above, this results in the following scheme (see below). Again, in some respects, different characteristics apply to either 16-17 year olds on the one hand, and 18-23 year olds on the other. For that reason, the 16-17 year old specific characteristics are expressed in *italics* and the 18-23 year old specific characteristics are made **bold**.

34 See, for a critical perspective on the Dutch practice (among others), E.M. Mijnares & E.R. Rensen, 'De officier van justitie en het adolescentenstrafrecht: Twee geloven op één kussen?', *Tijdschrift voor Familie- en Jeugdrecht*, No. 3, 2017, pp. 58-63; E.M. Mijnares & E.R. Rensen, 'De toepassing van het adolescentenstrafrecht in de praktijk: is het genoeg of kan er nog wat meer bij?', *Tijdschrift voor Familie- en Jeugdrecht*, No. 11, 2017, pp. 280-285; A.H. Tiemens, 'Adolescentenstrafrecht: herbezinning op een onevenwichtige praktijk', *Tijdschrift Praktijkwijzer Strafrecht*, No. 24, 2018, pp. 64-71; Van der Laan, Beerthuizen, Barendrecht & Beijersbergen 2016; L.J.C. Prop, A.M. van der Laan, C.S. Barendregt, M.G.C.J. Beerthuizen & Ch. van Nieuwenhuizen, *Adolescentenstrafrecht – Kenmerken van de doelgroep, de strafzaken en de tenuitvoerlegging*, Cahier 9, WODC, The Hague 2018; and T. Liefwaard & S. Rap, 'Het adolescentenstrafrecht in Nederland: de stand van zaken vier jaar na invoering van de Wet Adolescentenstrafrecht', *Tijdschrift voor Criminologie*, No. 3, 2018, pp. 365-376.

35 DIFP (2014) Wegingslijst adolescentenstrafrecht.

36 Van Montfoort (2014) Instructies en toelichting Wegingskader Adolescentenstrafrecht 2014-02-17.

Gvmt: juvenile criminal law	Gvmt: adult criminal law	NIFP: juvenile criminal law (18-23 year olds)	NIFP: adult criminal law (18-23 year olds)	RO/MoJ: juvenile criminal law (18-23 year olds)	RO/MoJ: adult criminal law (18-23 year olds)
<p>Crime:</p> <p>*is very serious (EM, p. 30)</p> <p><i>*where young people have been hardened and apply instrumental violence'</i> (GL p. 1)</p> <p><i>*has been committed in a group setting that includes both minors and adults</i> (EM, p. 25)</p>	<p>Crime:</p> <p>*is not very serious (EM, p. 30)</p> <p><i>*is very serious</i> (EM, p. 25)</p> <p><i>*is very serious (vice-and violent crimes and homicide), so that it may give rise in society to question whether juvenile criminal law enables a fitting reaction;</i> (EM, p. 28)</p> <p><i>*is very serious life crime and there's expectation that treatment under juvenile criminal law will not sufficiently protect the safety of others.</i> (GL, p. 1)</p> <p><i>*has been committed in a group setting that includes both minors and adults</i> (EM, p. 25)</p>				
<p>Criminal history:</p> <p>*young adult is a known repeat offender (EM, p. 30)</p> <p><i>*case of 'multiple recidivism'</i> (GL, p. 1)</p>	<p>Criminal history:</p> <p>*crime is first offense (EM, p. 30)</p>		<p>Criminal history:</p> <p><i>*has a criminal history of years</i></p> <p><i>*has let previous legal sanctions fail</i></p> <p><i>*is not</i></p>		<p>Criminal history:</p> <p><i>*has a long criminal history</i></p> <p><i>*has let previous legal sanctions fail</i></p> <p><i>*is not impressed by</i></p>

Gvmt: juvenile criminal law	Gvmt: adult criminal law	NIFP: juvenile criminal law (18-23 year olds)	NIFP: adult criminal law (18-23 year olds)	RO/MoJ: juvenile criminal law (18-23 year olds)	RO/MoJ: adult criminal law (18-23 year olds)
			impressed by legal authorities *there is an increase in seriousness of crimes *has had PIJ measurement before		legal authorities *current crime shows an increase in seri- ousness of crimes *has had PIJ measurement before *has been previ- ously convicted as a leader and current fact concerns leader- ship of a group crime
Personality: *unfinished emo- tional, social, moral and intellectual development (EM, p. 20) *developmental phase of defendant (EM, p. 26; GL, p. 1) *cannot yet be considered com- pletely independ- ent and mature (GL, p. 1)	Age: <i>*the defend- ant is 18 years old at the time of the trial</i> (EM, 25)			Physical appear- ance: *appears younger than calendar age	
Personality charac- teristics: *inability to inhibit impulses (EM, p. 20; GL, p. 1) *inability to suppress distracting impulses and associ- ations *peers who have a great influence in taking risky deci- sions *inability to oversee the consequences of behaviour (GL, p. 1) and adapt one's behaviour accordingly (EM, 20)		Personality characteris- tics: *cannot estimate risks of own acts *can hardly organize own behaviour *acts with- out think- ing *in contact, seems younger than calen- dar age		Personality characteristics: *can hardly esti- mate risks of own acts *can hardly organize own behaviour *acts impul- sively *shows more childish behaviour than one would expect based on calendar age *shows copycat behaviour with	Personality characteristics: *does not take victim(s) into consideration (shows no empathy)

Gvmt: juvenile criminal law	Gvmt: adult criminal law	NIFP: juvenile criminal law (18-23 year olds)	NIFP: adult criminal law (18-23 year olds)	RO/MoJ: juvenile criminal law (18-23 year olds)	RO/MoJ: adult criminal law (18-23 year olds)
*inability to regulate emotions (EM, p. 20; GL, p. 1) *unfinished development of empathic ability (EM, p. 20; GL, p. 1)				friends / acquaintances	
Personality (disorder): (EM, p. 30) *has a psychological disorder *has a psychiatric disorder *has a developmental disorder such as slightly mentally disabled		Personality (disorder): *functions at cognitively limited level	Personality (disorder): *displays psychopathic characteristics *has antisocial personality issues *uses others for personal goals	Personality (disorder): *functions at cognitively limited level	Personality (disorder): *displays psychopathic characteristics *has antisocial personality issues *uses others for personal goals
Living circumstances suspect (GL, 1): *still attends school *still lives with his/her parents *needs support because of a (slight) mental disorder				Living circumstances: *there is a current threat of neglect, mistreatment or abuse (for the defendant)	
			Criminal lifestyle: *chooses to commit crimes *is embedded in criminal environment *shows off with criminal activities		Criminal lifestyle: *chooses a criminal lifestyle: consciously plans criminal activities *is embedded in criminal environment *Is proud of (profit from) criminal activities

Gvmt: juvenile criminal law	Gvmt: adult criminal law	NIFP: juvenile criminal law (18-23 year olds)	NIFP: adult criminal law (18-23 year olds)	RO/MoJ: juvenile criminal law (18-23 year olds)	RO/MoJ: adult criminal law (18-23 year olds)
Sanction: *intervention under juvenile criminal law may offer a more mean- ingful reaction which still renders justice to the nature and seriousness of the crime and the judicial past	Sanction: *intervention: based on personal- ity of the defendant, it is estimated that treat- ment might take longer than possible according to a juvenile sanction (EM, p. 25)	Sanction: *treatment through behavioural intervention under juvenile criminal law fits best	Sanction: *long protec- tion of society is necessary *treatment through behavioural intervention under adult criminal law fits best *treatment expected to last until after age 22 *disorder demands pos- sible transfer to psychiatric centre	Sanction: *possible threat to person of defendant by other detainees *detention in youth detention centre is best fitting (because schooling can be continued, fellow detainees are less threaten- ing, different treatment secu- rity)	Sanction: *detention in adult detention centre is best fitting (because would other- wise feel 'between kids', or treated 'like a child') *long protec- tion of society is necessary
Potential pedagogi- cal effect: *is open to support and a more peda- gogical approach (GL, p. 1)		Potential pedagogical effect: *can be (re-) educated *needs to continue schooling, *actively participates in family, *has a dependent relationship with caretak- ers, *needs com- munity-ori- ented envi- ronment.	Potential ped- agogical effect: *pedagogical treatment is not possible *will nega- tively influ- ence other young detainees *is unfit for group ori- ented living environment	Potential peda- gogical effect: *pedagogical treatment is fea- sible * pedagogical treatment is necessary *continuing school is neces- sary *actively partici- pates in the family *family-ori- ented treatment is necessary *has a depen- dent relation- ship with par- ents/caretakers *it is possible to have influence through par- ents/caretakers *needs a group oriented living environment	Potential peda- gogical effect: *pedagogical treatment is not feasible *will negatively influence other fellow detainees of the same age group *cannot stand his/her ground in group ori- ented living environment

Again, we see potential contradicting elements in the different indication criteria. According to the law (and its explanatory memorandum), if the suspect is a repeat offender,

this is a reason to apply juvenile criminal law, whereas according to the DIFP and RO/MoJ this is a reason to apply adult criminal law. According to the legislator, if the defendant has a psychiatric or psychological disorder this is an indication for the application of juvenile criminal law, whereas according to DIFP and RO/MoJ a person displaying psychopathic and/or antisocial personality characteristics is a reason to apply adult criminal law. In the same sense, the lack of empathy on the part of the defendant is – according to the law – an indication to apply juvenile criminal law, whereas – according to the RO/MoJ list – it is an indication for applying adult criminal law.

It is also clear from this scheme that both the NIFP and the RO/MoJ indicate certain characteristics for the child/adult distinction, which cannot be derived from the law, such as the criminal lifestyle of the defendant and his/her physical appearance. On the other hand, other indications mentioned by the law are ignored, such as the seriousness of the crime and the unfinished social, moral and intellectual development of the defendant. Lastly, there are some differences between the list of the DIFP on the one hand and the list of the RO/MoJ on the other: for example, the type of treatment that is most suitable for the defendant is not taken into consideration by the DIFP whereas it is mentioned as relevant both by the RO/MoJ and the law.

Results From the Analysis of Court Cases

Taking into account these different and at times contradicting reasons for applying adult or juvenile criminal law, the next question that automatically comes to mind is: what does this mean in court?. Without a doubt, the decision of a judge to apply adult or juvenile criminal law in a specific case is based on a weighing of many reasons. The law and the weighing lists give certain criteria, reasons for one or the other, but they do not indicate how they should be weighed in a particular case and thus they do not provide for a calculation with one fixed, ‘correct’ answer. Taking this into account, we have focused our analysis on which reasons (pro/contra application of juvenile criminal law) were expressed in court. A difficulty in this respect is the fact that participants to the proceedings – at least as can be derived from the published decisions – do not clearly state whether a certain observation (say, a psychiatric disorder) is considered to be a pro- or contra indication. Neither do judges always indicate the specific reason(s) for their decision on what criminal law system to apply. This lack of motivation can be explained by the fact that the application of juvenile law to young adults is the exception and – consequently – application of adult criminal law is the rule.³⁷ The practice illustrates that judges often use limited and standardized explanations for (not) applying juvenile criminal law to young adults. In many cases

37 Already in 2016 the Dutch Supreme Court stated that the judge is not obliged to motivate the decision not to apply juvenile criminal law: HR 29 november 2016, ECLI:NL:HR:2016:2716.

judges state that they choose one or the other 'based on the personality of the defendant and the seriousness of the crime', which does not give the reader much information other than the – rather general – criteria provided by law. As a result, of all cases analyzed, we were only able to select a small number in which reasons were clearly stated and indicated as reasons pro or contra the application of juvenile criminal law.

In the scheme below, you will find an overview of the reasons used in at least two of the 60 court cases analyzed, categorized according to its different sources (government law and regulation, DIFP/RO&MoJ guidelines, newly introduced in court³⁸). The total number of times a certain reason was used by any of the actors involved in the court case is indicated. The number in between brackets is how often a certain indicator was mentioned by the judge. Whenever new indicators were added in court, these are listed in the right column, on the condition that they were mentioned in more than one case.

Gvmt: reasons for applying juvenile criminal law	Gvmt: reasons for applying adult criminal law	NIFP & RO/MoJ: reasons for applying juvenile criminal law (insofar not mentioned by government)	NIFP & RO/MoJ: reasons for applying adult criminal law (insofar not mentioned by government)	Other court reasons: reasons for applying juvenile criminal law	Other court reasons: reasons for applying adult criminal law
	Crime: *is very serious (16-18 yo) 12 (11) (only mentioned in relation to > 18 yo)		Criminal history: *has failed previous legal sanctions 5(5)	Criminal lifestyle: *defendant takes responsibility for actions 7(6)	Criminal history: *case of 'multiple recidivism' 6(5)
Personality: *unfinished emotional development 4(0) *unfinished social development 4(0) *unfinished intellectual development 9(0)		Personality (disorder): *functions at cognitively limited level 8(4)	Personality (disorder): *has antisocial personality issues 5(2)	Personality (disorder): *limited learning capacity 2(1) *general: disorder 2(1) *vulnerable personality 3(1)	

38 Meaning: reasons introduced in court as a motivation for applying one or the other (Juvenile or Adult Criminal Law), which are not mentioned in the different core documents.

Gvmt: reasons for applying juvenile criminal law	Gvmt: reasons for applying adult criminal law	NIFP & RO/MoJ: reasons for applying juvenile criminal law (insofar not mentioned by government)	NIFP & RO/MoJ: reasons for applying adult criminal law (insofar not mentioned by government)	Other court reasons: reasons for applying juvenile criminal law	Other court reasons: reasons for applying adult criminal law
<p>*cannot yet be considered completely independent and mature 2(0)</p> <p>*general behind in development 9(4)</p> <p>*personality/identity insufficiently developed 3(0)</p>					
<p>Personality characteristics:</p> <p>*inability to inhibit impulses 3(0)</p> <p>*peers who have a great influence in taking risky decisions 4(1)</p> <p>*inability to oversee the consequences of behaviour and adapt one's behaviour accordingly 2(1)</p> <p>*inability to regulate emotions 2(0)</p>		<p>Personality characteristics:</p> <p>*can hardly organize own behaviour 4(0)</p> <p>*shows more childish behaviour than one would expect based on calendar age 7(0)</p>	<p>Personality characteristics:</p> <p>*does not take victim(s) into consideration (shows no empathy) 3(3)</p>	<p>Personality characteristics:</p> <p>*weak verbal conceptual understanding 3(1)</p>	<p>Personality characteristics:</p> <p>*lack of empathetic ability 3(1)</p> <p>*manipulative/calculating 3(3)</p>
<p>Living circumstances suspect:</p> <p>*still attends school 4(2)</p> <p>*still lives with his/her parents 5(4)</p>				<p>Living circumstances:</p> <p>*actively participates in (parental) family 3(2)</p> <p>*dependant relationship with parents 4(0)</p> <p>*has young children, wants to take care of them 2(0)</p>	<p>Living circumstances:</p> <p>*works/has a job 2(2)</p>

Gvmt: reasons for applying juvenile criminal law	Gvmt: reasons for applying adult criminal law	NIFP & RO/MoJ: reasons for applying juvenile criminal law (insofar not mentioned by government)	NIFP & RO/MoJ: reasons for applying adult criminal law (insofar not mentioned by government)	Other court reasons: reasons for applying juvenile criminal law	Other court reasons: reasons for applying adult criminal law
		Sanction: *detention in youth detention centre is best fitting (because schooling can be continued, fellow detainees are less threatening, different treatment security) 4(2)	Sanction: *long protection of society is necessary 2(2) *detention in adult detention centre is best fitting (because would otherwise feel 'between kids', or treated 'like a child') 3(0)	Sanction: *expert advises JCL 6(6)	Sanction: *expert advises CLYA 2(2) *CLYAmore appropriate 2(2)
Potential pedagogical effect: *expect (more) value/effect from pedagogical approach 11 (7)		Potential pedagogical effect: *pedagogical treatment is feasible 4(1) *pedagogical treatment is necessary 7(3) *it is possible to have influence through parents/caretakers 3(3)			

Other lessons learned from practice are what judges consider to be a "serious crime", and the role of age as a reason for determining whether a young person should be tried as a juvenile or an adult:

What is considered to be a serious crime (according to judges)?

*burglary, extortion	1
*extortion (together with others), threatening with violence	1
*theft combined with violence and threats	1
*violent robbery	2
*several counts of dealing harddrugs	1
*several counts of theft (+attempt), entrance house	3
*committing extortion (together with others)	1

*causing explosion of illegal fireworks, causing serious physical harm	1
*public violent act, in group, against person or thing	1
Not serious enough:	
*larceny	1

Age is regularly mentioned in court in the context of deciding between the application of Juvenile Criminal Law (JCL) or Adult Criminal Law (AdCL):

Age	Pro JCL	PRO AdCL
Defendant is young	1(0)	
Defendant was 18 at the time of the crime	3(2)	
Defendant was only just 18 at the time of the crime	2(2)	
Defendant was almost 19 at the time of the crime	3(0)	1(1)
Defendant was 19 at the time of the crime		1(1)
Defendant was 20 at the time of the crime		1(1)
Defendant was 21 at the time of the crime	1(0)	
Defendant was 22 at the time of the crime	1(0)	
Defendant was almost 23 at the time of the crime		1(1)

Summing up, the following reasons are given by judges for applying juvenile criminal law on the one hand or adult criminal law on the other:

Juvenile Criminal Law (JCL)	Adult Criminal Law (ACL)
Defendant takes responsibility for his actions (6)	Crime is very serious (11)
Defendant is behind in development (4)	Defendant has let previous legal sanctions fail (5)
Defendant functions at cognitively limited level (4)	Case of 'multiple recidivism' (5)
Defendant still attends school (2)	Defendant is manipulative/calculating (3)
Defendant still lives with his/her parents (4)	defendant does not take victim(s) into consideration (shows no empathy) (3)
Defendant actively participates in (parental) family (2)	Defendant has antisocial personality issues (2)
Detention in youth detention centre is best fitting (because schooling can be continued, fellow detainees are less threatening, different treatment security) 4(2)	Defendant works/has a job (2)
Expert advises JCL (6)	Long protection of society is necessary (2)
Expect (more) value/effect from pedagogical approach (7)	Expert advises CLYA (2)

Juvenile Criminal Law (JCL)	Adult Criminal Law (ACL)
Pedagogical treatment is necessary (3)	CLYA more appropriate (2)
Influence through parents/caretakers is considered possible (3)	

5 COMPARING THE LAW, GUIDELINES AND COURT PRACTICE

As illustrated above, the law and official guidelines for applying the criteria to decide whether a young defendant has to be tried as an adult or a juvenile are in many respects contradictory. Looking at the arguments expressed in court (by the different participants of the proceedings) and the arguments given by judges to explain their choices, it is perhaps hardly surprising that judges do not clearly follow the law and/or the official guidelines.

A first element considered important by judges for making this decision seems to be the personality of the defendant. A more “social” defendant who takes responsibility for his/her actions is more likely to be tried as a child, while an anti-social defendant who is manipulative/calculating, who shows no empathy and/or has antisocial personality issues, will therefore be tried as an adult. This contradicts the law and its official interpretations (EM, GL). According to the law, certain anti-social personality characteristics may be attributed to the unfinished development of the juvenile, such as an “unfinished development of empathic ability” or psychological/psychiatric disorders (*e.g.* anti-social personality disorder), which should be reasons to try the defendant as a juvenile. Arguably, personality characteristics that lead judges to try defendants as juveniles, such as ‘taking responsibility for one’s actions’, could in fact under the legal framework be considered a sign of maturity. In general, the types of pro-social behaviour that judges cite as reasons to try defendants as juveniles are quite opposite to certain legal indications for childhood in terms of personality characteristics of the defendant, such as “inability to inhibit impulses”, “inability to oversee consequences of behaviour” and “inability to regulate emotions.”

In terms of “showing empathy” as well as categorizing the “anti-social personality disorder”, judges seem to follow the view of the DIFP and RO/MoJ guidelines. These guidelines, however, also indicate that impulsive, unorganized behaviour of someone who can hardly estimate the risks of his/her own acts are indications for treating the defendant as a juvenile, behaviour which may not automatically be connected to “taking responsibility for one’s actions.” According to the law, “showing empathy” is explicitly considered a sign of maturity and lack of empathy, as well as “vulnerability of the young adult”, expressed for example in a psychological or psychiatric disorder, are reasons to try a defendant as a juvenile. A second reason for the court to try someone as an adult is when the crime is

considered “serious”, when the defendant is a repeat offender and/or when previous sanctions have not had the intended effect. In all cases where this was mentioned as a reason for the decision, the defendant was below 18 years at the time of the crime. This therefore also goes directly against the law and its official interpretations, according to which both committing a very serious crime and being a repeat offender are in fact indications to apply juvenile criminal law to 18-23 year olds. In this respect, too, the judges are more aligned with the DIFP and RO/MoJ guidelines, which indeed indicate these as reasons for applying adult criminal law. The fact that the seriousness of the crime is considered a reason to try the young adult according to common (‘adult’) criminal law is most likely also related to the ‘sanctioning gap’ between juvenile criminal law on the one hand and adult criminal law on the other. According to juvenile criminal law, the maximum sentence is 24 months of detention, which in case of a severe criminal offence might be considered too lenient.

In three respects the judges do seem to follow the law:

- when considering the development of the defendant (a limited development is a reason for applying JCL),
- when considering the potential (pedagogical) effect of intervention (whenever positive effects are expected, this is a reason for applying JCL), and
- in considering the living circumstances of the defendant (‘childhood typical’ living circumstances such as living with parents and going to school are reasons for applying JCL).

In this respect, the law and the DIFP and RO/MoJ guidelines are aligned, or at least not contradicting and the case law illustrates that judges regularly follow the advice of experts. It seems that these experts base their advice not on the law, but on the NIFP and RO/MoJ guidelines, therefore the advice may contradict the law (see above).

Lastly, it has to be noted that judges often did not take arguments expressed by parties based on the law into account in their ruling, such as arguments about the limited development of the defendant, personality characteristics, living circumstances and the necessity of pedagogical treatment. However, on the basis of the published decisions it is impossible to tell whether that happens because the judge considered the arguments invalid or irrelevant.

6 TAKING A DIFFERENT VIEW: THE CRITICAL PERSPECTIVE OF SOCIOLOGY
OF CHILDHOOD

Of course, one may wonder how it is possible that the law, the subsequent formal interpretation and official guidelines and what is actually practiced in courts, can be so very different when it comes to creating a dividing line between children and adult defendants. It is our hypothesis that (at least part of) this practice can be explained by looking at the matter from the perspective of sociology of childhood.

Research in sociology of childhood on the topic of this child/adult division in criminal law and proceedings in the Western world, has shown on several occasions how this division is made not based on scientific findings and facts. Rather, arguments for categorizing defendants as either 'child' or 'adult' have most often been based on popular sentiment, politics and other non-scientific considerations.³⁹ Who would or would not be considered a child has been based mostly on popular 'feelings' related to the crime committed, and accompanying classification of children as either 'good and innocent' or 'evil'. Those who committed relatively minor crimes could be considered innocent, and in that sense child-like. A pedagogical approach to punishment would benefit them, and thereby, society. Children on the other hand who committed very serious crimes that shocked society, would be considered 'evil' and therefore would be beyond help and in some sense, beyond 'childlike', and therefore should be judged as adults.

To some extent, the Dutch government seems to have wanted to transcend this line of reasoning by founding the child/adult divide in criminal law on (neuro)scientific findings on the development of children. The goal of this policy was to 'optimally stimulate the criminal young adult to take on a responsible role in society, whereby he/she will further refrain from criminal behaviour'.⁴⁰ However, it seems that large parts of this law are not applied in practice.

So how can both the law and its practical application be explained? We have seen that the law allows for 16 and 17 year olds ('children' in the sense that they are below the age of majority) to be tried as adults if they commit a serious offence. This type of regulation is quite common in Western countries. According to several authors, if the dominant discourse of society is that of the child as pure, innocent, and in need of protection, the child

39 See, among others: C. Jenks, *Childhood*, Routledge, London 1996; Scott 2000, p. 564; Titus 2005, pp. 121 and 125; Brown 2011, p. 362.

40 EM, p. 1.

who commits a violent crime disrupts this romantic image.⁴¹ According to Titus, “a deep social anxiety is provoked when a child’s act violate normative regularities to such an extent that our incompatible frames for understanding childhood conformity and aberrance collide.”⁴² Meyer adds: “if children and childhood are *defined* by innocence then children who do not conform to this image are excluded.”⁴³ In other words: because children who commit serious crimes, challenge society’s image of childhood, they need to be considered as not-children. As Titus explains: “the crisis is resolved when the offender is expelled from the juvenile justice system for being insufficiently child-like...declared not to be a child and denied the social protections associated with the juvenile court”.⁴⁴ According to Titus, the child in this instance is a sacrificial victim, and by sacrificing this child, the state protects morality in society at large “to assure people that society is not out of control. Juvenile transfers serve the symbolic function of reaffirming the community’s belief that there are cases of violence and absolute evil that demand a violent collective response.”⁴⁵

However, while the Dutch legislator meant for only 16 and 17 year old defendants to be ‘sacrificed’, and only those who committed one serious crime and not those who “have been hardened and apply instrumental violence”, the judge seems to apply this type of reasoning to all 16-23 year olds. In all these cases, the seriousness of the crime and recidivism are reasons to try the young adult as an adult, while – originally – the Dutch legislator meant for 18-23 year olds who commit serious crimes to be tried under juvenile criminal law.

We have also shown that the Dutch judge considers certain anti-social personality characteristics of the young defendant as a reason to try the child as an adult, whereas according to the law this should be a reason to try the defendant as a juvenile. At the same time, judges do apply the law when they consider the development of the defendant, the potential pedagogical effect of intervention and the (childlike/adult) living circumstances of the defendant.

All these factors combined align with the image presented in research on sociology of childhood, namely that the basic consideration for the judge who finds a young delinquent in his/her courtroom, is whether it concerns a vulnerable, innocent, inherently virtuous child who is in need of protection, or whether it concerns an ‘unchildlike-child’ who cannot be considered a child at all, a young adult who is inherently evil and against whom society

41 Jenks 1996; Hackett *et al.* 2005, p. 244; Meyer 2007, p. 87; and Titus 2005, p. 116.

42 Meyer 2007, p. 87.

43 Id., p. 94.

44 Titus 2005, p. 119.

45 Id., pp. 122-125.

needs to be protected. The question of the child/adult divide thereby becomes a question of good versus evil, whereby the good will be tried under juvenile criminal law, and the evil will be tried according to adult criminal law.

7 CONCLUSION

With the Criminal Law for Young Adults, the legislator envisaged to facilitate a more flexible and individualistic approach in cases concerning young adults. The underlying presumption of the law is that certain young adults are better ‘served’ with sanctions of the juvenile criminal law allowing for a more pedagogical approach, taking into account the personality of the defendant and his developmental ‘deficits’. Recent findings from neuroscience and developmental psychology – including the view that the human brain continues to develop until the age of 25 – confirm the view of the legislator that considering the age of 18 as a magic number automatically transforming the juvenile into an adult is not realistic and in some cases even untrue.

Despite the intentions of the legislator, applying the Criminal Law for Young Adults in daily practice has turned out to be difficult. Turning back to the main question of this contribution: *how do Dutch judges make the distinction between child and adult defendants since the introduction of the Criminal Law for Young Adults (CLYA), and how can we understand this practice from a sociology of childhood perspective?* We can first of all conclude that practice shows an inconsistent picture which is most likely partly caused by contradicting criteria provided by the law on the hand and official guidelines on the other. The case law shows that often there is still a strong focus on the severity of the crime leading away from the personal characteristics of the child defendant from a neuroscientific or developmental perspective. In some cases, the law itself and the criteria it sets forth are completely disregarded.

Trying to understand this practice from a sociology of childhood perspective, it seems that the judicial reluctance to apply juvenile criminal law to young adults – especially in case of severe crimes – is inextricably linked to the fact that we tend to base our decision on ‘who is a child?’ mostly on ‘popular feelings’ instead of scientific findings and facts. In a way, the severity of the crime shifts the focus away from the ‘child friendly’ approach and legitimizes the judge to deal with the defendant as an adult. The popular saying ‘If you can do the crime, you can do the time’ seems to be a guiding principle in this respect.

Although the current state of case law indicates that – for now – the Criminal Law for Young Adults has not (fully) succeeded to transcend the superficial line of reasoning

expressed in the sociology of childhood, we need not be too pessimistic. After all, it has only been five full years after the entering into force of the law which – of course – is a relatively short period. In a way, (juvenile) criminal justice is only at the beginning of incorporating new insights from other disciplines such as neuroscience. This takes time. In order to fully realize the goal of the Criminal Law for Young Adults – taking a more substantive and individualistic approach and taking full account of the ‘unfinished development’ of the young adult – it will be necessary to shift the focus from the crime to the person. Only then will we be able to slowly move away from the unrealistic and maybe even damaging view considering young adults who commit severe crimes or who illustrate certain anti-social personality characteristics as ‘unchildlike’. It forces us to see the – maybe ugly and hard – truth that also children are capable of committing severe crimes. But this does not necessarily mean that they can no longer be treated as children in the courtroom.

REFERENCES

- Brown, E., 'The 'unchildlike child': Making and marking the child/adult divide in the juvenile court', *Children's Geographies*, Vol. 9, No. 3–4, 2011, pp. 361–377.
- Green, D.A., 'Suitable vehicles: Framing blame and justice when children kill a child', *Crime Media Culture*, Vol. 4, No. 2, 2008, pp. 197–220.
- Hackett, S. *et al.*, 'Community Reactions to Young People Who Have Sexually Abused and Their Families: A Shotgun Blast, Not a Rifle Shot', *Children & Society*, Vol. 29, No. 4, 2005, pp. 243–254.
- Jenks, C., *Childhood*, Routledge, London 1996.
- Liefwaard, T. & Rap, S., 'Het adolescentenstrafrecht in Nederland: de stand van zaken vier jaar na invoering van de Wet Adolescentenstrafrecht', *Kroniek van het jeugdrecht, Tijdschrift voor Criminologie*, No. 3, 2018, p. 365–376.
- Meyer A., 'The Moral Rhetoric of Childhood', *Childhood*, Vol. 14, No. 1, 2007, pp. 85–104.
- Mijnarends, E.M. & Rensen, E.R., 'De officier van justitie en het adolescentenstrafrecht: Twee geloven op één kussen?', *Tijdschrift voor Familie- en Jeugdrecht*, No. 3, 2017, pp. 58–63.
- Mijnarends, E.M. & Rensen, E.R., 'De toepassing van het adolescentenstrafrecht in de praktijk: is het genoeg of kan er nog wat meer bij?', *Tijdschrift voor Familie- en Jeugdrecht*, No. 11, 2017, pp. 280–285.
- Prop, L.J.C., Van der Laan, A.M., Barendregt, C.S., Beerthuisen, M.G.C.J. & Van Nieuwenhuizen, Ch., *Adolescentenstrafrecht – Kenmerken van de doelgroep, de strafzaken en de tenuitvoerlegging*, Cahier 9, WODC, The Hague 2018.
- Scott, E.S. 'The Legal Construction of Adolescence', *Hofstra Law Review*, Vol. 29, 2000, pp. 547–598.
- Tiemens, A.H., 'Adolescentenstrafrecht: herbezinning op een onevenwichtige praktijk', *Tijdschrift Praktijkwijzer Strafrecht*, No. 24, 2018, pp. 64–71.

Titus, J.J., 'Juvenile Transfers as Ritual Sacrifice: Legally Constructing the Child Scapegoat', *Youth Violence and Juvenile Justice*, Vol. 3, No. 2, 2005, pp. 116-132.

Van der Laan, A.M., Beerthuisen, M.G.C.J., Barendrecht, C.S. & Beijersbergen, K.A., *Adolescentenstrafrecht: Beleidstheorie en eerste empirische bevindingen*, WODC, The Hague 2016.