

**The participation of juvenile defendants
in the youth court**

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**The participation of juvenile defendants
in the youth court**

*A comparative study of juvenile justice procedures
in Europe*

**De participatie van jeugdige verdachten
in de rechtszaal**

*Een vergelijkend onderzoek naar jeugdstrafrechtsprocedures
in Europa*

(met een samenvatting in het Nederlands)

Proefschrift

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Chapter 1

Introduction

1.1 Children's rights

Youth court Toulouse, France

A 13-year-old boy was charged with stabbing his mathematics teacher several times in her chest. The incident occurred at school. Three-and-a-half years after the offence was committed the trial took place in the youth court. Because of the severity of the case many people were present at the trial: the juvenile defendant, his parents, the youth court judge and two lay judges, the prosecutor, three defence lawyers, two clerks and two court police officers, the victim, who was accompanied by two lawyers, three expert witnesses, six witnesses and three social workers. The case started at 2 p.m. After four hours of hearing witnesses and experts the judge ordered the first half-hour recess. The second half-hour recess followed at 10.30 p.m. The judgment was finally delivered at 4 a.m. the next morning. The trial had lasted for 14 hours in a row, with only a minimal amount of recesses and the 16-year-old young person and his parents had to stay in court from the beginning until the end. The judge later explained that because of the severity of the case, the trial had to be completed in one session.

The case as displayed above is an example of a case that was observed during the course of this study. This example shows how juvenile justice works in practice. It is an extreme case in several respects: it concerns a serious offence committed by a young child; the time it took to prepare the case was extensive; and in the end the trial itself took a very long sitting of the youth court. The case shows, however, how juvenile defendants can be handled in a youth court in Europe, at a time when the notion of *child-friendly justice* is gaining increasing attention from policymakers, children's rights advocates, practitioners and academics. The present study deals with the specific topic of the participation of

juvenile defendants in juvenile justice procedures in practice, in light of the concept of child-friendly justice.

In 1992 Van Bueren introduced the term *child-oriented justice* in her paper *Child-oriented justice – an international challenge for Europe*. Three years after the adoption of the United Nations Convention on the Rights of the Child [CRC]¹ Van Bueren argued that justice procedures for minors should incorporate specific rights for children. Hence, she argued for some basic principles upon which a child-oriented justice system should be based, according to the international human rights law and standards available at that time (e.g. the CRC, the Beijing Rules² and the Riyadh Guidelines³). A child-oriented justice system should have as its first purpose the encouragement of the well-being of the child and the second aim should be to deal with children in the justice system ‘in a manner proportionate both to their circumstances and to the offence’ (Van Bueren, 1992, p. 385). Moreover, child-oriented justice entails that criminal responsibility should be related to the age of the child at which he is able to understand the consequences of his actions, that diversion from the criminal justice system should be encouraged for minors and that cases should be dealt with speedily, i.e. more rapidly than adult criminal justice cases.

Van Bueren relates important provisions of the CRC to the administration of juvenile justice. The principle of the best interests of the child (art. 3 CRC) can be seen as the foundation underlying her argument with regard to encouraging the well-being of the child and dealing with children, having regard for their circumstances and the offence. Moreover, Van Bueren (1992, p. 394) argues that child-oriented justice means that ‘the child justice environment is conducive to the free expression of the child’. It is argued that the CRC and the Beijing Rules provide an opportunity for states to review hearings and trials for juveniles from the perspective of *child participation*. Van Bueren (1992) explicitly links the right to be heard (art. 12 CRC) to juvenile justice procedures and notices that proceedings and the environment in which they take place can contribute to a child-oriented justice system.

¹ GA Res. 44/25, 20 November 1989.

² GA Res. 40/33, 29 November 1985 (UN Standard Minimum Rules on the Administration of Juvenile Justice).

³ GA Res. 45/112, 14 December 1990 (United Nations Guidelines for the Prevention of Juvenile Delinquency).

The adoption of the CRC by the United Nations and its subsequent ratification by a significant number of countries around the world can be recognised as a turning point in looking at the rights of children. Children were increasingly seen as rights holders and social actors who were attributed autonomy and agency (Doek, 2007; Fitzgerald, Graham, Smith & Taylor, 2009; Freeman, 1992; Hanson, 2012). Having specific rights means that one can exercise agency and being recognised as an agent means that one can participate (Freeman, 2007). In the 1980s and 1990s children were more and more seen as participants, who have a right to participate. Freeman (2007) argues that participation is a fundamental human right, because it enables people to demand rights. The increased attention for and acceptance of children's participation has been fuelled by, among other things, the developing children's rights agenda (Sinclair, 2004).

However, claiming the right to participate was not yet possible for many children across various different settings (Fitzgerald et al., 2009). This is especially true for participation in juvenile justice procedures. Although children are criminally responsible from a certain age, the acknowledgement of certain rights in relation to this responsibility is not always a matter of course (Freeman, 1992). Recent research shows that the extent to which juvenile defendants are granted the opportunity to be heard in the youth court differs between states. Krappmann (2010) made an analysis of concluding observations made by the UN Committee on the Rights of the Child [the CRC Committee]. This review shows that although many states have incorporated the right to be heard in laws or other regulations, these laws are not adequately implemented in every country. In general, only older children are given the right to express their views in judicial or administrative proceedings. With regard to younger children it is often at the discretion of the judge whether to hear the views of the child. Several scholars have therefore argued that the enforcement mechanisms of the CRC are too weak to ensure, for example, the child's right to be heard (see Freeman, 2007; Goldson & Muncie, 2012).⁴ As yet, the CRC does not have an individual complaint procedure (see chapter 2)

⁴ An example of the weak implications of the CRC in the individual states is shown by recent research in the Netherlands. In this study it is concluded that in judgments in juvenile justice cases very few references are made to provisions of the CRC, such as for example articles 12, 37 and 40. Moreover, in the higher courts (most notably the supreme court) the CRC is even less frequently applied (Van der Meij, 2012).

and the extent to which provisions of the CRC are applied directly by national courts differs (see for example De Graaf, Limbeek, Bahadur & Van der Meij, 2012).

Freeman (1992, p. 60) states that the implementation of conventions and the passing of laws is an important step in the recognition of children's rights, but he adds that 'the true recognition of children's rights requires implementation in practice'. And as the same author argues in a later paper, many countries consider the symbolic nature of the CRC to be sufficient (Freeman, 2007). Kilkelly (2008b) notes that the CRC should be seen as a benchmark or reference point, from where children's rights can be further substantiated in practice. The present study deals with exactly this point, the implementation of the right to be heard (art. 12 CRC) in juvenile justice procedures in practice.

In recent years more acknowledgement and attention has been given to hearing the views of children, for example in education (see Lundy, 2007; De Winter, 2012). Kilkelly and Donnelly (2011) note that research concerning the implementation of article 12 CRC in practice has been limited and is mainly conducted in the public sphere (e.g. law and policy reform, education, family law proceedings, see for example Thomas, 2007; De Winter, Kroneman & Baerveldt, 1999; De Winter & Noom, 2001). Lundy (2007, p. 930) notes that the right to be heard is next to a legally binding obligation for states parties to the CRC, 'a model of good pedagogical practice'. Cipriani (2009) states that when children are incapable of participating in juvenile justice procedures, but are nonetheless held criminally responsible for their acts and dealt with within the juvenile justice system, a central right of the child is violated. However, to successfully implement the right to be heard scholars acknowledge that adults need to be trained in order to be able to adequately hear the views of children and young people. Lundy (2007) even goes as far as to state that the right of children to be heard runs counter to the instinct and interests of adults, who are ultimately responsible for securing this right. Therefore, conditions should be created which make it impossible for adults who hear the views of children to ignore those views in the decision they take. In this regard, Fitzgerald and colleagues (2009) propose a dialogical approach to children's participation. A dialogue implies mutual interdependence between adults and children, as well as recognition and respect for the views of children.

To engage in a dialogue with (specific groups of) children requires specific skills from adults and includes ‘familiarising themselves with the child’s context, orienting themselves to ‘read’ and understand the child’s point of view’ (Fitzgerald et al., 2009, p. 302-3). Moreover, it should be kept in mind that within this dialogue power relations play a role. The way in which a dialogue is held, how the content is interpreted by the participants and the consequences that follow there from are influenced by the context and thus the power relations within that particular context (Fitzgerald et al., 2009). This is especially true for the participation of children in the juvenile justice system. In chapter 2 it will be shown that certain procedural safeguards should be in place to guarantee a fair trial for (juvenile) defendants, which implies that the power relations in court are bound by certain procedural rules. The participation of juvenile defendants in the youth court is the central theme of this study; conditions for hearing the views of juveniles will be explored and the implementation of the right to be heard in practice will be studied in depth.

1.2 Interdisciplinary approach

Next to the increased attention for the participation of children in decision-making processes that affect them from a children’s rights perspective, in recent years this topic has also been addressed from a developmental perspective. The books *Youth on Trial* (Grisso & Schwartz, 2000) and *Rethinking Juvenile Justice* (Scott & Steinberg, 2008) are important examples of work that represent this approach.⁵ Within this approach towards juvenile defendants important questions are studied, such as: ‘are youths capable of participating in legal proceedings in a way that provides equal protection of their rights as defendants?’ And ‘are youths in fact adultlike [*sic*] in their cognitive abilities, decisions, judgment, and other psychological factors that pertain to the mental and emotional conditions that are relevant for understanding their crimes?’ (Grisso & Schwartz, 2000, p. 3).

In order to answer these questions, the study of children’s rights and the study of (developmental) psychology are combined in this book. The foundation of the rapprochement of both scientific disciplines lies in

⁵ See also the edited volume *The Law and Child Development* (Buss & Maclean, 2010).

the idea that adolescence is a distinct developmental phase. Within the justice system one should therefore have regard for the developmental stage in which juvenile defendants find themselves. This means that when criminal responsibility is assigned to minors, the actual capacities of adolescents should be accounted for (Grisso & Schwartz, 2000). In order to react effectively to the offending behaviour of young people it is acknowledged in this approach that professionals, such as judges and lawyers,⁶ require specific knowledge and skills. Warshak (2003, p. 375) notes in this regard that legal professionals should have knowledge of child development and training in interviewing children in order to be able to effectively hear the voices of children. This scholar even goes as far as to state that judges and lawyers should be able to ‘elicit children’s private feelings’ and be able to ‘discriminate between children’s mature and reasonable positions and positions that are immature, transient, irrational (...)’. It can be stated, however, that legal professionals are hardly in a position to acquire these skills, since these apply more to psychologists.

This study follows the interdisciplinary approach outlined above, combining the study of children’s rights and the study of developmental psychology. By doing so, the concept of participation will be operationalized for juvenile defendants, taking into account both perspectives. On the one hand, international children’s rights law and standards will be studied to come to a refined definition of the right to be heard, as part of a fair trial. On the other hand, empirical insights from developmental psychology will be used to come to a more concrete interpretation of the notion of participating in juvenile justice procedures. In addition, the theoretical concept of procedural justice, as elaborated upon by Tyler (2006a), will be analysed as well in order to supplement the legal safeguards for a fair trial and to come to a more complete understanding of what a fair trial entails for juvenile defendants. The interdisciplinary approach followed in this study, combining the study of children’s rights and developmental psychology, will be complimented with empirically studying youth court practices.

⁶ In this study when the term *lawyer* is used this refers to the legal defender of the (juvenile) defendant or other party involved in the criminal case, such as a victim or parents of the juvenile defendant.

1.3 Previous studies on court practice

Court practices have been studied in the past by a variety of scholars, in different countries around the world and by means of different methods. In this section previous research in this field will be discussed, giving special attention to observations of courtroom practices.

1.3.1 Initial studies on courtroom practices

Previous research on courtroom practices has been mainly conducted by means of direct observations of court cases. Hence, in several studies defendants and other actors involved have been interviewed concerning their appearance in court and in some studies dossiers or judgments have been analysed.

In the early 1970s Mileski (1971) observed 417 cases in a lower criminal court in the US. Through observation, both qualitative and quantitative data were gathered and a lengthy description was given by Mileski of the courtroom encounters, covering topics such as the role of lawyers, pleading patterns, sentencing practices, racial discrimination in dispositions and the occurrence of moralising by judges. Mileski's studies concerned adult defendants. In 1977 Giller and Morris studied the juvenile court practice in England and Wales. Children and parents were interviewed before and after their appearance in court. Giller and Morris found that both children and parents viewed the court as an institution that punished offenders. They felt that they could exercise little influence on the case and that magistrates were not interested in their views.

In the following decades a small research tradition regarding the courtroom practices in juvenile justice cases evolved. For example, in Australia, where Cashmore and Bussey (1988) observed the criminal cases of 60 youngsters in the children's court in Sydney and interviewed the juvenile defendants prior to and after the hearing about their perception of the court outcome. In general, young people judged the outcome of the case as fair and they perceived that the seriousness of the offence and prior convictions had more influence on the final decision than their personal background situation. Daly and Bouhours studied the verbatim transcripts of the judgments of juvenile defendants who were convicted of a sex offence. They analysed the transcripts focussing on the

judge's justification for sentencing (Bouhours & Daly, 2007) and on morally and legally censuring the young person's behaviour (Daly & Bouhours, 2008). Travers (2007) observed 30 children's court hearings in Tasmania and interviewed professionals working in court. The focus of this study was also on how decisions concerning the sentence were made and how the judge addressed young people.

In the US and Canada similar types of studies have been conducted. Kupchik observed 290 hearings of minors who were prosecuted in an adult criminal court in New York City and conducted interviews with professionals (judges, prosecutors and lawyers). The style of the interaction and language in court and the roles of the different participants were discussed by Kupchik (2003), describing the formal adversarial court practice and how rehabilitative elements can be found in conducting these hearings. Moreover, the manner in which young people are admonished by the judge and the way in which he points to their sense of responsibility was discussed by Kupchik (2004).

In Canada a research tradition has emerged concerning the involvement of parents in the youth court. Hillian and Reitsma-Street (2003) conducted in-depth interviews with 10 parents of children involved in the Vancouver Island youth justice system to explore parents' experiences with the system. This study showed that parents experienced that they were not involved at all in the youth court process of their child, but rather felt blamed, ignored and punished. Varma (2007) reports on the parental involvement in 569 bail and sentencing hearings, studied by means of observation. In this study it was also concluded that parents were not able to participate and it is argued that the structure and organisation of the court needs to be changed in order to facilitate parental participation in Canada. Peterson-Badali and Broeking (2010, 2009) observed 450 youth court cases in Toronto and conducted interviews with 41 key informants (the police, lawyers, prosecutors, judges and probation officers) and 120 young people concerning the involvement of parents in the youth justice process. These scholars agree with Varma's (2007) view that parents were not given the opportunity to interact with any of the other actors in court (see also Broeking & Peterson-Badali, 2010). A final study from Canada involved interviews with 120 juvenile defendants appearing in the Toronto youth court and the observation of their cases. In this research the relation was studied between courtroom atmosphere and

young people's experience of the legitimacy of the court. The outcome of the study was that a negative atmosphere in court related to defendants' more negative perceptions of the justice system (Greene, Sprott, Madon & Jung, 2010).

1.3.2 Studies on courtroom practices in Europe

In Europe in the 1970s scholars started to study practices in court as well. One of them is Hoefnagels (1970), who focused on the interaction between parties involved in the criminal court process. In his study *Rituals at trial* [Rituelen ter terechtzitting], he argued that rituals in court should be functional rather than an obstacle for interaction between the participants. Rituals in court should not be abandoned but should be changed to meet the – at that time – changing social relationships between people, such as judges and defendants.

In the 1990s Hoefnagels' work had some following in the Netherlands. Van Rossum (1998) studied the behaviour of adult Turkish defendants and the question was asked whether their behaviour in court could be interpreted within the context of the court hearing. Van Rossum showed that the defendants displayed signs of respect, but these signs should be read by means of a different interpretative context from the general, majority culture in Dutch society and courtrooms at that time. Komter (1998) studied courtroom practice in the Netherlands as well, by observing violent crime cases and revealing dilemmas that adult defendants and judges encounter in their interaction in court. Following on from these studies, a number of other scholars have studied the Dutch practice in the adult criminal court by means of observations as well (see for example Bal, 1988; Ippel & Heeger-Hertter, 2006; De Jager, Jonker, Röschard, Scherrenburg & Zijdeveld, 2011).

During the last 15 years several comparative studies of juvenile justice systems in Europe have been published. These studies generally provide an overview of countries and their juvenile justice system, on the basis of legislation and policy (see Dünkel, Grzywa, Horsfield & Pruin, 2010; Hazel, 2008; Jensen & Jepsen, 2006; Junger-Tas & Decker, 2006; Mehlbye & Walgrave, 1998; Muncie & Goldson, 2006; Tonry & Doob, 2004; Winterdyk, 2002). These publications have in common that countries are described independently from each other; i.e. in general no

systematic comparisons are made between countries concerning certain aspects of the juvenile justice system. Moreover, little attention is paid to the actual implementation of laws and policies in practice and how, for example, youth court hearings are conducted in practice.

Next to these extensive overview studies of juvenile justice systems, some studies have been conducted of juvenile justice systems in Europe that fall within the previously described tradition of studying courtroom practices. In Scotland several scholars have studied the practice of children's hearings. For example, Asquith (1983) conducted a case study of 30 children's hearings and 35 court cases involving minors in order to study the decision-making and the organisation of both systems in practice. Petch (1988) studied the experiences of parents with the children's hearing by means of interviews and observing the cases of 100 families. Moreover, Hallett and Murray (1998) studied the decision-making in the children's hearings system and Waterhouse, McGhee, Whyte, Loucks, Kay and Stewart (2000) studied children and parents who were confronted with the system. Both studies were commissioned by the Scottish Government. At the same time, Griffiths and Kandel (2009, 2000) studied the children's hearings system as well, by conducting observations of hearings and interviewing children, parents, panel members, safeguarders and social workers. Most recently, Piacentini and Walters (2006) studied the Scottish youth court by means of observations of court hearings and interviews with judges and young people. They commented on the punitive and not so child-friendly approach in the youth court, which contrasts markedly with the approach in the children's hearings system.

Moreover, in Ireland Kilkelly (2008a, 2005) has conducted an extensive study on the children's court, by means of observing hearings. In Italy and England and Wales Field and Nelken (2007) conducted youth court observations. And in England and Wales juvenile defendants' (and other participants') experiences with and views of the court system have been studied by Hazel, Hagell and Brazier (2002) and Plotnikoff and Woolfson (2002). In France Mouhanna and Bastard (2011) studied the practice of the youth court judge, by conducting observations and interviews with judges. Recently, Françoise (2013, 2011) undertook an extensive study of the Belgian practice of the youth court judge, by observing 365 cases in three youth courts (see also Christiaens & Goris,

2012). In other European countries observation studies of the youth court practice do not exist. Either only dossier studies have been conducted (see for example Alberola & Molina, 2000; Blatier, 1999) or studies involving interviews with juveniles and parents (see for example Eggermont, 1993, 1997; Schuytplot, 1999).

In the Netherlands, Weijers has put new life into the research tradition, which Hoefnagels started in the 1970s (see Weijers, 2004; Weijers & Hokwerda, 2003). Under his supervision several studies have been conducted of youth court practices both within and outside Europe (see Kurtovic & Weijers, 2010; Rap, 2013; Rap & Weijers, 2009, 2011; De Vries, 2007; De Vries & Weijers, 2010). Studying the participation of parents in court proceedings is a separate branch within this research project (see Hepping, 2012; Hepping & Weijers, 2011). The current study forms the completion of a longer running research project concerning courtroom practices and more specifically the participation of juvenile defendants in court.

1.4 Definition of key terms

In this section definitions of the key terms that are used in this study are provided. First, the term participation will be further explained; second, the term juvenile defendant will be set out; and third, the term juvenile justice procedure as used in this study will be explained.

1.4.1 Participation

The right to be heard, as it is formulated in article 12 CRC, is mentioned under the broader umbrella of *participation*. The term participation as such is not explicitly used in article 12 CRC (see Lundy, 2007). Confusingly, scholars give different definitions of the term. For example, Krappmann (2010, p. 502) states that participation can be described as ‘that what results from expressing views, listening and giving due weight to the views, interests and goals of the child’. This definition seems to refer more to the acts of adults, compared to having regard for the position of the child. Thomas (2007) notes that participation can be seen as an activity involving decision-making. However, in practice participation

often entails only being listened to or being consulted, which means that the person is only passively involved. Sinclair (2004) argues that active participation means that children are enabled to influence decision-making and to bring about change. This means that children are empowered through participation and can have reason to believe that their involvement will make a difference to the decision that will be taken. Warshak (2003) distinguishes between enlightenment and empowerment. The *enlightenment rationale* for hearing children's voices suggests that what children tell the decision maker influences the decision and makes the decision maker aware of the needs, feelings and preferences of the child. The *empowerment rationale* suggests that children profit by participating in decisions that affect their lives, because they can actively engage in the decision-making process. Moreover, participation can be seen as a process or an outcome and involving collective decision-making or decisions about the individual lives of children (Thomas, 2007).

In the literature concerning children's participation, several purposes of participation can be identified. Sinclair and Franklin (2000, in Sinclair, 2004) list among other things the following reasons for involving children: to uphold children's rights, to fulfil legal responsibilities, to improve decision-making, to promote children's protection, to enhance children's skills, to empower children and to enhance their self-esteem.

The participation of juvenile defendants can be seen as a process, taking place in a specific context, i.e. a dialogue taking place between the juvenile defendant and his parents and the decision maker in the youth court. This process results in individual decisions. The participation of juvenile defendants can be seen as serving the purpose of upholding rights and legal responsibilities, e.g. the juvenile's right to be heard and to a fair trial (see chapter 2) and as a way to empower young people (in line with the CRC) who come into contact with the criminal justice system. Moreover, it will be argued in this study that the decision-making in court can be improved by hearing the views of juvenile defendants. This, in turn, might influence the extent to which juveniles are willing to cooperate with the justice system, fulfil the sentence that has been imposed and abide by the law in the future. These notions will be further elaborated upon in chapter 3, where the concept of procedural justice, as theorised and researched by Tyler (2003, 2006a), will be explained. In short, procedural justice refers to the perception of a person of being treated in a fair

manner by the authorities; it concerns the perceived fairness of procedures and the treatment one receives.

In this study requirements with regard to how the participation of juvenile defendants in the youth court should be shaped will be formulated. The concept of *effective participation* will be used. As will be shown in chapters 2 and 3, this term is derived from international children's rights law and standards and developmental psychological theory. It is aimed to develop a normative framework of what effective participation in practice should entail and to what extent the requirements for effective participation are fulfilled in youth courts in practice. In short, the term effective participation refers to the extent to which the juvenile defendant is enabled to participate in the youth court. The requirements form an ideal typical standard for participation in youth court processes and the extent to which the requirements are or can ever be fulfilled in the youth courts in different countries probably differs substantially. Moreover, it is acknowledged that the extent to which juvenile defendants actually participate in the youth court can be influenced by several other factors as well, for example the personality traits or psychosocial problems of the young person or the mood of the young person on the particular day of the youth court hearing. However, in this study the requirements for effective participation, as will be formulated in chapter 4, will be taken as a normative starting point for studying youth court practices. The requirements are minimal standards to ensure the participation of juvenile defendants, although other factors might contribute to or, on the contrary, undo the contribution of the requirements for effective participation.

It is of importance to note that in this study it is not intended to measure the effectiveness of the participation of juvenile defendants in the youth court. It is expected, though, that participation will contribute to the perceived fairness of the procedures and treatment by decision makers in the juvenile justice system and in turn will have a more long-term effect, for example with regard to fulfilling the sentence and perceiving the justice system as legitimate. Moreover, studying the long-term effects of participating in the youth court process does not fall within the scope of this study.

1.4.2 Juvenile defendant

The CRC defines a *child* as ‘every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier’. Every provision of the CRC therefore applies to children from birth to 18 years. This holds true for article 40 CRC, concerning the administration of juvenile justice, as well, regardless of whether children are treated as adults in the national criminal justice system (Van Bueren, 1992). In the Beijing Rules the term *juvenile* is used. According to rule 2.2 (a) ‘a juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult’. The term juvenile is thus explicitly linked to the justice system of a particular country and it refers to being treated differently in comparison with the adult justice system. The term *juvenile offender* is defined as well in the Beijing Rules, namely as ‘a child or young person who is alleged to have committed or who has been found to have committed an offence’ (rule 2.2 (c)).

This study concerns juveniles who have allegedly committed an offence; hence the term *juvenile defendant* is used rather than the term juvenile offender. Moreover, in this study the participation of juvenile defendants concerns those young people who are under the age of 18 or above the age of 18 when still falling under the jurisdiction of a youth court. This means that in some cases the young person can be 18 years or older, when the offence has been committed before he turned 18 (e.g. in the Netherlands) or when the youth court has jurisdiction over young adults as well (e.g. in Germany). In line with the CRC, the age limit of at least 18 is used, although in some jurisdictions a lower upper age limit of the juvenile justice system is employed (e.g. in Scotland, see chapter 5, section 5.1). If not stated otherwise, the terms child, juvenile, young person (or young people) and adolescent are used interchangeably in this study. Moreover, for the sake of conciseness, where persons are referred to with ‘he’ or ‘him’ in this study, this also covers ‘she’ or ‘her’.

1.4.3 Juvenile justice procedure

The term *juvenile justice procedure* refers to those procedures in which juvenile defendants are involved. Juvenile justice procedures are different from adult criminal justice procedures, for example with regard to the forum in which the juvenile is tried, the persons involved in the procedures and the proceedings that are followed. This study revolves around juveniles who have allegedly committed an offence and as a consequence have to appear in the youth court or before another administrative body that deals with juvenile justice cases. An administrative body included in this study is for example the children's hearings system in Scotland, because this system is not operated by a court but can be considered to be a governmental welfare service. For the sake of conciseness, where a youth court is referred to, other administrative bodies in juvenile justice are meant as well. In case another administrative body is meant, this is explicitly stated.

So, in this study two types of hearings are included: hearings held within youth courts and those held in other administrative bodies. These hearings concern pre-trial detention – or preliminary – hearings and trials. The *pre-trial / preliminary hearing* takes place in the preliminary phase of the process and revolves around the imposition of pre-trial detention, preliminary interventions (such as a protective measure) and/or the investigation of the offence and the background and personality of the juvenile defendant. The *trial* involves the main youth court hearing in which the guilt of the juvenile defendant is established and a sentence is imposed when the juvenile is found guilty. The actual pronouncement of the judgment and sentence is observed in almost every case. However, in some countries involved in this study the judgment is not given orally, but in writing, or orally, but on a later occasion. In these cases it was not (always) possible to observe the judgment. Occasionally, references are made to sentence review hearings. These hearings involve the review of a sentence that has already been imposed. This type of hearing does not take place in every country involved in this study.

1.5 Focus of this study

This study can be characterised as qualitative research, because qualitative methods are used to study the participation of juvenile defendants. Qualitative research is in general applied when the researcher is looking for meaning and when it is useful to look for flexible research methods enabling contact with participants (Boeije, 2010). In the following sections it will become clear that these elements are incorporated in this study. First, the research questions will be formulated and the purpose and relevance of this study will be explained; second, the research strategy and design of this study will be explained; third, the quality of the study will be assessed; and fourth some general findings will be presented to frame the scope of the study.

1.5.1 Research questions

In this study the focus is on the specific application of the right to be heard in the youth court or other competent administrative body in 11 European countries. The countries involved in this study are *Belgium, England and Wales, France, Germany, Greece, Ireland, Italy, the Netherlands, Scotland, Spain and Switzerland*.⁷ The right to be heard is viewed in light of the broader concept of participation. On the one hand, standards are developed to assess the extent to and the manner in which juvenile defendants are enabled to participate in juvenile justice procedures. These standards are based on international children's rights law and standards and on developmental psychological research outcomes. The first research question, therefore, is:

1. *Which requirements for the effective participation of juvenile defendants in the youth court or other competent administrative body can be formulated on the basis of international children's rights law and standards and developmental psychological theory and research?*

⁷ It should be noted that England and Wales and Scotland are part of the same nation state, the United Kingdom. They do, however, represent separate jurisdictions. In this study they are, therefore, regarded as separate countries.

In addition, it is aimed to analyse the variety of practices in youth courts in these countries. The second research question, therefore, is:

2. *In which manner and to what extent are juvenile defendants enabled to effectively participate in the youth court or other competent administrative body in juvenile justice systems in 11 European countries?*

Purpose and relevance

The purpose of this study is twofold. The first aim of this study is to develop requirements to assess the participation of juvenile defendants in court. To date, no systematic analysis has been made of the concept of the effective participation of juvenile defendants. By combining international children's rights law and standards with developmental psychological research outcomes a list of requirements for effective participation will be compiled. The requirements can be seen as guidelines for professionals in working with juvenile defendants. Especially for youth court judges, other decision-makers in the field of juvenile justice, prosecutors and lawyers the requirements are helpful to enable young people to participate in the procedures in which they are involved. The requirements, which aim at an ideal typical practice, are used to describe and to analyse existing situations: i.e. the participation of juvenile defendants in youth courts in Europe.

The second aim of this study is to assess the participation of juvenile defendants in the youth court in the 11 European countries. This assessment is made on the basis of the requirements for effective participation. In each country hearings in which juvenile defendants are involved are studied in order to assess the participation of juveniles. This part of the study has a highly descriptive nature. The participation of juveniles is explored on the basis of describing the existing situation. However, explanations are provided as well. To be able to find explanations it is of importance to know what is compared to what. Nelken (2010, p. 34) speaks of 'comparing like with like', meaning that certain factors need to be constant, in order to make cross-cultural comparisons. In this study, the definition of terms (section 1.4) provides an insight in which foundations can be adhered to with regard to the meaning of certain key terms used in this study. However, more should be

known about the juvenile justice systems that are studied so as to be able to make comparisons. Explanations of the extent to which juveniles are able to participate are therefore provided on the basis of an analysis of the characteristics of the juvenile justice systems (chapter 5) and/or the roles of professionals in these systems (chapter 6).

The development of requirements for effective participation has important scientific as well as societal relevance. The term effective participation has not been operationalized before in concrete terms for juvenile justice practice. This is scientifically of great relevance, because by doing so it is possible to assess the participation of juvenile defendants and to compare juvenile justice procedures in different countries on specific items of participation. The requirements are relevant to the juvenile justice practice as well (i.e. societally relevant), because guidelines are provided to professionals as to how to involve juvenile defendants in the procedures in court. In this study it will be shown that being able to participate has important advantages for people involved in justice procedures. Participation has the potential to make the procedures more effective for juvenile defendants, in terms of their evaluation of the juvenile justice system and the consequences that follow from the court hearing (see chapter 3).

Studying the actual participation of juvenile defendants is scientifically of importance as well because a systematic analysis of juvenile justice practices, by studying *law in action*, has not been conducted before. Brants (2011) notes that lawyers often do not see or study the difference between law in action and law in the books. Previous studies in the field of comparative juvenile justice have either mainly focused on juvenile justice systems in isolation from each other or focused on *law in books* and not its application in practice.⁸ Nelken (2010), for example, notes that edited volumes consisting of reports from different countries (such as Dünkel et al., 2010 and Junger-Tas & Decker, 2006) often do not contain cross-national comparisons. In addition, experts from these countries are used as sources, but how these experts are chosen and which background (scientific discipline, (local) political affiliation) they have, is often not made clear by the editors (Nelken, 2010). The

⁸ The distinction between 'law in books' and 'law in action' was first made by Pound (1910). These terms refer to the activities of lawmakers and law enforcers. Law in the books refers to rules and norms and what those say about what is supposed to happen. Law in action refers to the application of the law in practice (in Nelken, 2010; 1984).

participation of juvenile defendants in practice can moreover be considered to be under-researched in the field of juvenile justice.

It can be argued that the larger the number of countries being compared, the more difficult it will be to find aspects that are salient cross-culturally (Nelken, 2010). Therefore, in this research the topic of the participation of juvenile defendants is chosen as the specific object of study. The societal relevance of comparing the juvenile justice practices in Europe lies in the fact that *best practices* can be identified with regard to the participation of juvenile defendants. Nelken (2010, p. 22-23) states that caution should be taken with ‘identifying universally valid best practices to be adopted wholesale’ by means of comparative research. However, Nelken (2010) also argues that it is not impossible to point out best practices when studying local and particular practices. In this study, practices will be identified within the national contexts that are beneficial to the effective participation of juvenile defendants. Moreover, points of interest that need improvement in terms of the effective participation of juvenile defendants will be identified. Policy and practice can benefit from this systematic analysis, by being provided with points of departure for improvement.

1.5.2 Research strategy and design

In this section the research strategy and the design of the study will be outlined. Explicitly describing how a study was conducted (i.e. what was done, how it was done and why it was done) contributes to the reliability and validity of a study (see section 1.5.3, Boeije, 2010; ‘t Hart, Van Dijk, De Goede, Jansen & Teunissen, 1998).

In this study qualitative methods were used to study the participation of juvenile defendants. There were three reasons for applying qualitative methods (see Boeije, 2010). First, the exploratory nature of this study asked for methods with explorative power. Qualitative methods are in general flexible, so data collection and data analysis can be adjusted to the findings. Second, qualitative methods make it possible to provide rich and detailed descriptions of the phenomenon under research. Third, by using qualitative methods explanations can be found for the subject that is studied. By alternating between data collection and data analysis, data can be compared and new rounds of data collection can be

started to further explore the field and to find explanations for the findings (see also the section concerning data analysis).

As has been explained in section 1.3.2, this study forms the completion of a larger research project concerning courtroom practices that was started in 2000 by Prof. Ido Weijers. The master's thesis by Ytje-Minke Howkerda entitled '*Youth court hearings, a valuable experience? An exploratory study concerning the educative element in the practice of youth court hearings in the Netherlands and England*' (Hokwerda, 2001)⁹ included the first results of this study. This master's thesis was followed by publications by Weijers (2004) and Weijers and Hokwerda (2003) and numerous student theses. Stephanie Rap started to participate in the research project in 2005. In 2009 she took on the coordination of the research project and became responsible for writing the theoretical framework of the study, further developing the research design and analysing the data. This resulted in the publication '*The youth court hearing: a pedagogical perspective. The communication between youth court judge and juvenile defendant*' (Rap & Weijers, 2011),¹⁰ which was commissioned by the Dutch Council for the Judiciary. The entire research project is completed with this dissertation.

Sampling

The two research questions were studied by means of different methods. The first research question was studied by means of literature research. That is, by analysing international children's rights law and standards and the legal literature, as well as existing studies in the field of developmental psychology. The second research question was studied by means of observations of hearings in youth courts and other competent administrative bodies in the juvenile justice systems in the 11 countries.

In this study it is chosen to observe the juvenile justice practice in Europe. The countries involved in this study are selected on the basis of *purposive sampling* (and not with the aim of reaching a statistical-representative sample) (Boeije, 2010; 't Hart et al., 1998). The aim was to select a wide variety of juvenile justice systems in Europe, representing

⁹ Title in Dutch: '*Jeugdstrafzittingen, een leerzame ervaring? Een oriënterend onderzoek naar het opvoedkundige element in de praktijk van jeugdstrafzittingen in Nederland en Engeland*'.

¹⁰ Title in Dutch: '*De jeugdstrafzitting: een pedagogisch perspectief. De communicatie tussen jeugdrechter en jeugdige verdachte*'.

the Anglo-Saxon legal tradition¹¹ as well as the continental legal tradition and representing southern as well as western and northern European countries. However, the selection of countries also depended on practical issues, such as the language skills of the researchers involved in this study. Therefore, the Scandinavian countries were for example excluded from this study. Within the countries involved in this study 50 youth courts and other competent administrative bodies have been studied (see Table 1.1). It was aimed to observe the participation of juvenile defendants in more than one court or administrative body per country to enlarge the generalizability of the findings. In two countries, however, this aim was not fulfilled. In Greece and Scotland (the children's hearings system) cases have been observed in only one site. To overcome this limitation, previous studies have been used to complement the findings of this study. Moreover, in Greece a larger number of cases have been observed in the one site involved in this study.

The cases that were observed per court were not pre-selected, but the selection took place on the basis of the period in which the observations took place. In a certain period of time as many hearings as possible were observed in the court that was visited by the researcher. As will be discussed in section 1.5.3 on external validity, the generalizability of the cases is limited, because not in every court could as many cases be observed. This is partly overcome by comparing the results of this study with those of previously conducted studies. With regard to the background characteristics of juvenile defendants, it was not aimed to achieve a representative sample of juveniles. The study had an exploratory character; therefore it did not fall within its scope to study the relationship between defendants' specific characteristics and the extent to which they were enabled to participate. Therefore, no conclusions can be drawn with regard to the influence of background characteristics of juveniles, such as gender, age and cultural or ethnic background, on their participation in the youth court.

¹¹ In this study, the justice systems of England and Wales, Ireland and Scotland are considered as a part of the Anglo-Saxon legal tradition.

Table 1.1

Countries and cities involved in the study

<i>Country</i>	<i>Cities</i>				
Belgium	Antwerp	Bruges	Dendermonde	Ghent	Mechelen
England & Wales	Liverpool	London	Sheffield		
France	Evry	Grenoble	Paris	Toulouse	
Germany	Bergisch-Gladbach	Berlin	Cologne	Munich	Weilheim
Greece	Athens				
Ireland	Dublin	Limerick	Tallaght		
Italy	Bologna	Rome	Turin		
Netherlands	Alkmaar	Almelo	Amsterdam	Arnhem	Breda
	Haarlem	Groningen	Leeuwarden	Lelystad	Roermond
	Rotterdam	The Hague	Den Bosch	Utrecht	Zutphen
	Zwolle				
Scotland	Airdrie	Glasgow	Hamilton		
Spain	Albacete	Madrid			
Switzerland	Basel	Fribourg	Glarus	St. Gallen	Zurich

Access

The selection of sites within countries was closely linked to the manner in which access was gained to the field, per country. In each country contact was sought with courts, through contact persons in the respective countries. These contact persons were fellow researchers in the field of juvenile justice and professionals working in criminal courts. When no contact person was available, a court was contacted directly by the researcher to try to get in touch with a person who could provide access to the hearings. In each country an attempt was made to gain access to a court in a large town (in many cases the country’s capital) and a court in a smaller town or rural area. In every country this aim was achieved, except for the two above-mentioned countries.

Gaining access to youth court hearings before starting the study in a particular country was of special importance, because in most countries juvenile justice procedures are closed to the public (see Appendix 4). Gaining access to the hearings was not straightforward in every country. For example, in Scotland it was not possible to receive permission to

observe the children's hearings before travelling to Glasgow. On site, however, by visiting the local office of the Scottish Children's Reporter Administration in Glasgow it was possible for the researcher to gain access. In Spain, a similar situation was encountered, because the researcher only gained access to the hearings when already in Madrid. In some countries, gaining access was not a problem at all, because the hearings are open to the public (i.e. Belgium and the Scottish youth court). Overall, it can be concluded that in every country juvenile justice professionals and other court personnel (such as clerks and ushers) were very helpful in providing access to the hearings and information concerning the scheduling of cases.

Conducting observations

The choice of direct observation as a research method in this study is based on several motivations. First, at the start of this study in 2000 little was known about how hearings were conducted in practice in youth courts and other administrative bodies. Conducting observations was thought to be the best method to explore courtroom practices and to gain a preliminary insight into the participation of juveniles and other actors in court. Second, youth court hearings are generally hidden as far as outsiders are concerned, because they are held behind closed doors. To gain an inside view of the hearings it was thought that direct observation would be the best suitable method.

The observations in the different countries were conducted by several researchers, who participated in this study as Bachelor's students (only in the case of observations in the Netherlands), Master's students or senior/junior researchers. The researchers were educated in different disciplines, namely criminal law, criminology, pedagogical sciences and psychology. They had a common interest in studying juvenile law and juvenile delinquency and most of them had followed a university minor programme concerning this topic. In Greece, local researchers from the University of Athens were invited to conduct the observations. Most researchers conducted observations in more than one court and in some cases in more than one country. Every researcher mastered the language of the country in which the observations were conducted. Staying in the country and knowing the language can be seen as absolute necessities in conducting comparative legal research (Brants, 2011). In the Netherlands

the majority of researchers observed the hearings in pairs. In most of the other countries this was not possible, however, due to practical constraints. Nelken (2010, p. 93) has identified three approaches to comparative research, called 'virtually there, researching there and living there'. In this study a combination of the latter two approaches was used. Researchers went to the countries for short or extended periods of time; researching or living there. Researchers were always in direct contact with informants and they never solely relied on the accounts given by experts (being only virtually there). In some cases researchers actually lived in the country under study and therefore had a large engagement with the juvenile justice system in that country. This was the case in Greece and the Netherlands. Nelken (2010) argues that actually living in a country for a longer period is one of the better ways of coming to know what are important issues in a country. The shortcoming of not being able to live in every country involved in this study has been somewhat overcome by employing several research methods (see section 1.5.3). In Appendix 2 the period in which the observations were conducted and the researchers who conducted the observations are listed, per country and city.

Boeije (2010) states that gaining entrance and building and maintaining trust with participants is of special importance in participant observation. It was experienced that gaining trust from actors working in court was of special importance in conducting the observations. Gaining trust meant that researchers were kept informed about court dates and schedules and that researchers were given the opportunity to sit in places in the courtroom from where they were able to follow the procedures clearly. For example, in some courts researchers were able to sit in front of the juvenile defendant, in a witness stand or next to the clerk or prosecutor, instead of being seated in the public gallery.

In order to structure the observations, an observation list was compiled during the course of the research project (see Appendix 5). At the start of the project exploratory observations were conducted, by means of taking notes. Because several researchers participated in this study, it was of importance to have a structured observation scheme. In this way it was ensured that the same items were observed in every country and for every type of hearing. However, especially in the early years the data collection did not take place on the basis of a structured observation list.

Therefore, several countries have been revisited and additional data have been collected by using the observation list (see Appendix 2).

The observation list consists of the following elements: 1) general information, 2) information – juvenile defendant, 3) people present, 4) explanation – by judge, 5) understanding, 6) content – communication with juvenile defendant, 7) content – communication with parents, 8) moral appeal upon juvenile defendant, 9) judgment. Under subheadings 5 to 8 items are scored on a five-point scale. In this scale, 1 indicates ‘not at all’ while 5 indicates ‘much’, except when indicated otherwise (see subheading 5). The other subheadings contain items which are filled out by the researcher. Moreover, space for additional notes is reserved on the list as well, next to or below the items. Thus, the research method employed in this study can best be described as structured observation.

To conclude this section, it is important to note that the respondents in this study are given anonymity. Participants’ names and other personal details are not attached to the data. In the majority of courts researchers have signed a confidentiality statement, although practices differ between courts. Moreover, juvenile defendants were able to object to the presence of a researcher (in case of a hearing in camera), by indicating this to the judge or their lawyer. In practice, researchers were not often refused access to a hearing. Only in a small minority of cases did the young person or the judge decide that the researcher could not observe the hearing. In the quotes of professionals, provided in chapters 7 and 8, and in the descriptions of cases fictitious names of juvenile defendants are used, which are chosen by the author of this book.

Interviews

Interviews were conducted with actors in court, on a case-by-case basis. These were unstructured interviews with for example judges, prosecutors, lawyers, social workers and other court personnel. In every court (50 in total) at least one judge has been interviewed. The interviews served the purpose of gathering additional information concerning procedures that were followed in court, decisions that were taken and legal complexities. By interviewing people, the researchers gained more understanding of what happened at the hearings. The data derived from the interviews are not systematically presented in this study, because it served the purpose of

understanding practices in their context and not to collect individual experiences and opinions of actors involved in the juvenile justice system.

Data analysis

Analysing the data that have been collected means that the data must be segmented and reassembled in order to transform the data into findings. In qualitative research sampling, data collection and data analysis often occur simultaneously (Boeije, 2010). In this study the majority of the data were ordered by means of the observation list (see Appendix 5). The observation list provided structure to the data-gathering process. The reassembling of the data was done by means of ordering the data along the lines of the requirements for effective participation. For example, the findings regarding the atmosphere in the youth court were based on the parts of the observation list named ‘description setting courtroom’ and ‘people present’. The items on the observation list, which were scored on a five-point scale, were not statistically analysed. Per research site the mean scores were calculated in MS Excel sheets. These mean scores were compared with each other so as to come to an overall description of practices within a country and to compare practices between countries.

The method of *constant comparison* was applied (Boeije, 2010) to describe the variation between court practices with regard to the requirements. This means that the data, collected in the different countries, were systematically compared with each other. Comparison provides descriptions of the courtroom practices, on the basis of the earlier developed requirements for effective participation. Boeije (2010) notes that in constant comparison data collection and data analysis are usually alternated. In this study this is clearly the case. The analysis of the data yielded new questions and knowledge gaps, which led to new rounds of data collection in other courts and countries. The interim results were tested in a new round of data collection. These new rounds of data collection provided cases that were suitable for comparison and enriched the data that were already collected. An example is the data collection process in Switzerland. First, cases were observed in the court of Fribourg, which followed procedures that were only common practice in the French-speaking part of the country. After learning this, it was decided to conduct a new round of observations in the German-speaking part of the country to be able to compare the practices within the country.

1.5.3 Quality of the study

In this section the quality of the study is considered. The quality of research is also referred to as *objectivity*. Boeije (2010, p. 168) explains quality as follows ‘an assessment of the accuracy of the insights gained as a result of the research’. Judging the quality of a study means that one looks at the extent to which the findings and conclusions accurately represent the subject that was studied. Objectivity is considered to be a confusing term in relation to qualitative research, because it is sometimes thought to refer to the alleged subjectivity of researchers and the subjective knowledge of research participants. Hence, the use of the term quality of research (Boeije, 2010). In the following sections factors will be explained that contributed to the quality of this study. Moreover, threats to the quality of this study are highlighted as well.

Reliability

The reliability of observations can be increased by standardising the method of data collection and by making sure that researchers are well trained (Boeije, 2010). In this study a standardised observation list was used to conduct the observations. This list was constructed in the early phases of the study, after making preliminary exploratory observations. The list made it possible to obtain more consistency between the observations of court cases (*intra-observer reliability*). In practice, however, the usefulness of the list was limited in the Anglo-Saxon countries included in this study (England and Wales, Ireland and Scotland). Because the list was compiled after mainly having observed youth court hearings in continental Europe, the items did not always apply to the content and structure of the hearings in the countries of the British Isles. For example, it appeared that a large amount of hearings in these countries did not contain elements with regard to the content of the case, because the case was resolved or a new court date had to be scheduled. As a consequence, these hearings took little time and only some parts of the list could be filled in. In these countries the observation list was only used when a full trial was observed. In other cases the researchers took notes of the observations. This might influence the reliability of the observations. However, the large number of cases observed in these countries, and

thereby the high probability that data saturation was reached, adds to the reliability of the findings (see Appendix 1).

The reliability of the findings was further increased by aiming at conducting the observations by two researchers (*inter-observer reliability*). However, it was not possible to have more than one researcher conducting observations in every case, due to time and financial constraints. Therefore, only in three countries (Greece, Ireland and the Netherlands) were the same cases observed by two or more researchers (see Appendix 2). In these cases the reliability of the observations was increased, because the researchers consulted with each other about the completion of the observation list and came to an agreement on the scoring of specific items. In other countries, however, two or more researchers conducted observations of different cases, in different courts and during different periods. This was the case in Belgium, France, Germany, Italy, England and Wales and Switzerland.

The limited inter-observer reliability was partly overcome by training the observers who participated in this study. Next to using a standardised observation list, this was done to increase the consistency of one observer. The observers made exploratory observations in court, before starting the actual data collection. When the observer went to a country outside the Netherlands, exploratory observations were also conducted in the Netherlands as part of the preparation for conducting research abroad. By conducting these initial observations (in the Netherlands and in the specific country under study), observers familiarised themselves with the observation list and the manner in which the youth court hearings were structured. Moreover, the observers were part of a larger research team, in which feedback was given on each other's work. Every researcher was supervised by one of the two coordinating researchers (Ido Weijers or Stephanie Rap), who guided them through the research.

Triangulation

To increase the reliability and internal validity of this study several forms of triangulation have been employed. First, *theoretical triangulation* was used to formulate the requirements for effective participation. That is, different theoretical sources from different scientific disciplines were employed to come to the formulation of the requirements. As is explained

in section 1.2, children's rights law and standards and insights from developmental psychological research were combined to come to an overarching theoretical framework concerning the effective participation of juvenile defendants.

Second, *methods triangulation* was used. Observations and interviews were employed to study the participation of juvenile defendants. By employing more than one method a more in-depth and rich description of courtroom practices can be given (see Boeije, 2010). The interviews serve the purpose of complementing the observation data in this regard.

Third, *researcher triangulation* was used. This means that several researchers conducted the research. Boeije (2010) points out that when several researchers are involved, the potential bias that comes from one researcher is reduced. The researchers involved in this study worked in teams. During the course of this study regular meetings took place, during which experiences with conducting observations and interviews, findings and methods of analysis were discussed. A further advantage of using several researchers was the fact that they came from different disciplines, namely law and social sciences. This means that researchers brought with them their own knowledge and experience and they were able to learn from each other's perspectives.

Member validation

A further method that was employed to enhance the reliability and internal validity was to apply *member validation*. This means that findings were presented to participants in order to assess their validity (Boeije, 2010). For several countries, judges or other persons involved in the justice system were asked to provide feedback on the findings of the study. These findings concerned the analysis of the 'raw' observation data. This member check in general confirmed that the findings of a specific courtroom practice were accurate. In some cases minor adaptations were made. An example of this is the fact that through member validation it was discovered that hearings in chambers were not conducted in every court in Germany. For example this was not the case in Berlin, whereas this was common practice in Munich. This finding could therefore not be generalised to the whole sample of German cases. In other countries,

differences between practices in different courts were discovered through member validation as well.

Reactivity

One of the major disadvantages of using observation as a research method is the fact that observers tend to affect the situation they are observing. People who are observed have the tendency to change their behaviour. And therefore the presence of an observer can disturb, distort or otherwise contaminate the natural interaction (Hutchby, 2007). This is called *reactivity* and it has a negative influence on the validity of the study (Boeije, 2010; Robson, 2011). From this perspective it can be argued that social situations can only be studied if the researcher is able to stand behind a one-way mirror or become a ‘fly-on-the-wall’ (Hutchby, 2007, p. 42).

In this study it might be possible that judges and other professionals working in court adapted their behaviour as a reaction to the presence of a researcher and knowledge concerning the research topic. It is however impossible to determine how and to what extent their behaviour changed. To reduce the effect of reactivity a researcher should be in the field for a longer period, so the respondents become used to the presence of the researcher. This is called *adaptation* or *habituation* (Boeije, 2010). Researchers in this study aimed to achieve this by observing cases in court for a prolonged period. This means that researchers went to a court several times per week and for several months (see Appendix 2). Due to time and financial constraints, this was not possible in every court involved in this study. So, it should be kept in mind that in some settings it is possible that reactivity took place.

External validity

External validity, also called *generalizability*, indicates the extent to which the results of a study can be generalised beyond the specific research (Boeije, 2010). In this study specific cases are studied: youth court hearings in courts in the countries selected for this research. In qualitative research it is often difficult to generalise from cases in specific contexts (Boeije, 2010). However, to increase the generalizability of the findings per country, in this study it was attempted to include more than one court per country. For every country this aim was achieved, except for

Greece where it was not possible to do so, due to practical constraints. The limited external validity has been somewhat overcome by working with a local research group in Greece, which was instructed to use the observation list and conducted the data gathering. Moreover, an external researcher was asked to comment on the Greek findings (researcher triangulation).

In general, it can be stated that this study consists of a multitude of case studies of youth courts in 11 countries. In total 50 courts were included in this study. However, caution must be taken in over-generalising the findings per country. First, to obtain a complete picture of the youth court practices of a country, more courts should have been visited and in some cases for a more prolonged period. In every country, practices might differ from court to court. For example, in the Netherlands the place where the lawyer has a seat in the courtroom differs among the 19 courts. In some courts the lawyer sits next to the young person, whereas in other courts he sits at a different table. To be able to say something about the specific seating place of lawyers in the Dutch courtroom, every court should have been visited, which is not the case. Second, in every country cases have been observed during a certain period of time. It was aimed to reach saturation with regard to the extent to which new findings could be distracted from the data. In most countries, in which a large number of cases were observed, this saturation point was reached after collecting data for several months in the same court. However, not in every court was it possible to gather data for a longer period of time and in some courts the number of cases in a certain period appeared to be low. The generalizability of this study is therefore limited and the findings should be considered with some caution.

1.5.4 Scope of the study

Between 2000 and 2012, the cases of in total 3,019 juvenile defendants were observed in youth courts and other competent administrative bodies in the juvenile justice systems in 11 European countries. It should be noted here that in a number of countries (e.g. France, Germany, Greece, the Netherlands, Switzerland) it was possible that more than one juvenile defendant was tried during the same youth court hearing. Because the focus of this study is on the participation of juvenile defendants, it was

chosen to count the number of juveniles instead of the number of court hearings.

In this study a distinction is made between two types of settings in which juvenile justice cases are handled. These are hearings in chambers and hearings in formal courts. In the 11 countries different types of hearings are held in the two different settings, ranging from first and subsequent pre-trial (detention) hearings, hearings in which the case is settled before one judge in chambers or in court, trials before one judge or a panel of judges (a full court), sentencing and sentence review hearings. In Table 1.2 the total numbers of observed juveniles per setting can be found. The much larger number of juveniles observed at a hearing in the youth court results from the fact that in several countries (i.e. England & Wales, Greece, Ireland, Italy and Spain) juvenile justice procedures do not take place in chambers at all.

Table 1.2

Number of observed juveniles per setting

<i>Setting</i>	<i>Number of juveniles</i>	<i>Percentage</i>
Chambers	312	10%
Youth court hearings	2,707	90%
Total	3,019	100%

1.6 Structure of the book

The rationale of this book is to present the findings concerning the requirements for the effective participation of juvenile defendants in the youth court and empirical data on the implementation of these requirements in practice. The book consists of three parts.

In part I of this book the normative framework of the study is outlined. In chapter 2 the children's rights framework concerning the participation of juvenile defendants will be outlined. The instruments of international children's rights law and standards will be analysed focussing on the participation of juvenile defendants. The Beijing Rules and the CRC form important starting points in looking at the right to be heard. Moreover, relevant case law of the European Court of Human Rights (ECtHR), General Comments of the UN Committee on the Rights

of the Child and the Council of Europe's guidelines on child-friendly justice will be examined. The aim of chapter 2 is to present the relevant provisions of international children's rights law and standards and to come to a further concretisation of the right to be heard in juvenile justice procedures.

In chapter 3 a developmental psychological perspective on the participation of juvenile defendants will be presented. The concept of procedural justice will be linked with participation in juvenile justice procedures. This will show that a fair trial is not only a fundamental human right, but also that procedural justice contributes to perceiving procedures as fair. Participation forms an important component of procedural justice. Moreover, in this chapter a developmental psychological light will be cast on the participation of juvenile defendants. It will be shown that understanding the juvenile justice process forms an important part of participation in juvenile justice procedures. The lawyers representing the young persons and their parents are especially highlighted as participants who can contribute to the understanding of juvenile justice procedures by juvenile defendants.

In chapter 4 requirements will be presented for the effective participation of juvenile defendants, on the basis of the analysis made in chapters 2 and 3. The requirements are divided between the topics of hearing the views of juvenile defendants and contributing to juvenile defendants' understanding. This chapter will be concluded with a synthesis of the first part of the book and an answer will be provided as to the first research question.

Chapters 5 and 6 comprise part II of the book. In chapter 5 general characteristics of the juvenile justice systems involved in this study will be outlined. These characteristics – age limits, the relationship between the juvenile justice and child protection system and the legal tradition of the justice system – are considered to influence the participation of juvenile defendants in practice and are therefore analysed for each country involved in this study. Chapter 6 provides an overview of the roles of the main actors involved in the juvenile justice system, because the roles these actors play is thought to have an influence on the participation of juvenile defendants as well. Therefore, the role of the police and the prosecution service, lawyers, the youth court judge, social workers and parents will be described.

In part III of this book the empirical findings of this study with regard to the participation of juvenile defendants in practice will be presented. The findings concerning the manner in which the views of juvenile defendants are heard in the 11 countries will be presented in chapter 7 and the findings concerning the understanding of juvenile defendants will be presented in chapter 8.

In the concluding chapter 9 the key findings of this study will be highlighted. From the findings as found in certain countries best practices with regard to the participation of juvenile defendants will be presented. In addition, some remarks will be made concerning the interpretation of the findings of this study and the implications these findings might have for the participation of juvenile defendants in the practice of the youth court.

Part I

Normative framework of the study

Chapter 2

A children's rights perspective on the participation of juvenile defendants

2.1 Introduction

At the end of the 19th century the first juvenile justice system in the world was set up in Illinois, the United States of America [USA] and thereby the first juvenile court was established. The Illinois Juvenile Court Act (1899) is recognised as the first example of legislation that established a separate justice system for juvenile offenders (Sloth-Nielsen, 2001). However, in many countries age was already considered to be a mitigating factor when juveniles were sentenced by the court because of law violations. In the past it was common practice to punish children less severely compared to adults or not to punish them at all (Weijers, 2011). From the end of the 19th century onwards a trend developed to separate juvenile offenders from adult offenders and to treat juveniles differently from adults. Following in the footsteps of the USA many countries established separate legislation for juvenile offenders with separate juvenile courts, sentences and institutions (Sloth-Nielsen, 2001). Parallel to the establishment of these new laws, separate criminal procedures for juveniles were developed as well. By establishing specialist courts and adapted court procedures attempts were made to speed up the court process for juveniles, reduce the stigmatisation of a trial in an adult court and protect the child against harmful influences from adults in the criminal justice system (Sloth-Nielsen, 2001). The idea grew that court procedures had to be different from those used in adult court cases, on the basis of the age and maturity of the juvenile defendant.

The objective of this chapter is to present the most relevant provisions of international and regional human rights law and standards regarding the participation of juvenile defendants in the youth court. The international human rights law and standards will be analysed and interpreted. Two overarching themes that emerge throughout this chapter are, first, taking into account the age and level of maturity of juvenile

defendants and its implications for their participation in the youth court. And second, the right to a fair trial for juvenile defendants, the requirements that follow from this right and its implications for the participation of juveniles in the youth court.

First, an introduction will be provided concerning the historical development of international children's rights (section. 2.2). Second, the focus will be directed towards guidelines on the administration of juvenile justice as outlined in the Beijing Rules (section 2.3). Subsequently, the relevant provisions of the UN Convention on the Rights of the Child regarding the participation of juveniles in the youth court will be outlined (section 2.4). Furthermore, the developments that followed from the adoption and implementation of the CRC, on both the international and regional (European) level, will be analysed (section 2.5). These developments have further concretised the concept of participation in the youth court. In short, this chapter aims to provide (together with chapters 3 and 4) a normative framework concerning the concept of the participation of juvenile defendants in the youth court.

2.2 The historical development of international children's rights

At the beginning of the 20th century international law on the rights of the child started to develop. This development occurred in tandem with the development of international human rights law (Van Bueren, 1995). A legal acknowledgement of human rights for specific groups of human beings started to emerge and one of these groups concerned children. At that time the then existing League of Nations¹ adopted the 1924 Declaration of the Rights of the Child (also known as the Declaration of Geneva), consisting of a preamble and 5 articles.² This declaration contains several children's rights, such as that children's normal development must be ensured (art. 1) and that they should be protected from exploitation (art. 4). Moreover, the delinquent child is explicitly referred to as a child that must be 'reclaimed' (art. 2). The importance of this document stems from the fact that it is one of the first examples of international human rights law and it 'established the concept of the rights

¹ Founded in 1919 and the forerunner of the United Nations [UN].

² League of Nations, 'Declaration of Geneva', 26 September 1924.

of the child internationally' (Liefgaard, 2008, p. 22). However, the Declaration was not legally binding and at that time it merely served as a guideline on children's rights (Sloth-Nielsen, 1995).

The 1924 Declaration of Geneva was followed by the 1959 Declaration of the Rights of the Child.³ In the meantime, however, some important developments had taken place with regard to the international law on human rights. It is of importance to acknowledge the adoption of the 1948 Universal Declaration of Human Rights [UDHR]⁴ and the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR]⁵ first, as important binding legal instruments, at the international (i.e. the United Nations [UN]) and regional (i.e. the European) level. After World War II the UN was established and it adopted the UDHR. This declaration is considered to be the first codification of human rights at the international level (Liefgaard, 2008). At that time the international community acknowledged that every individual, including a child, is the object of international law and requires international legal protection (Van Bueren, 1995). It was widely agreed among states that a separate declaration for children was needed, next to the UDHR.

In the meanwhile the Council of Europe had adopted its own human rights Convention, the ECHR. This Convention refers occasionally to minors, for example regarding the right to a fair trial: '(...) everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial (...) where the interests of juveniles or the protection of the private life of the parties so require' (art. 6 (1) ECHR). In this context 'everyone' includes minors. Furthermore, it is specified that the press and public can be excluded from the court hearing when it is deemed to be in the interest of the juvenile. In general, the provisions of the ECHR are applicable to everyone, including children, but it can be concluded that it lacks a clear orientation towards children and juvenile justice (Van Bueren, 1992; Liefgaard, 2008).

³ GA Res. 1386 (XIV), 20 November 1959.

⁴ GA Res. 217 A (III), 10 December 1948.

⁵ Council of Europe, Rome, 4 November 1950, CETS No. 194.

A more child-specific declaration was adopted in 1959: the UN Declaration of the Rights of the Child (consisting of a preamble and 10 principles).⁶ The 1959 Declaration is a more specific instrument, acknowledging the special needs of the child and at the same time attributing to the child the same rights and freedoms as adults. The delinquent child was no longer mentioned specifically in this document, as it had been in the Declaration of Geneva. However, the *best interests* principle was introduced in the 1959 Declaration. Principle 2 states that: ‘In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration’.⁷ This principle can be seen as the predecessor of article 3 of the 1989 UN Convention on the Rights of the Child (Liefwaard, 2008).

The 1966 International Covenant on Civil and Political Rights [ICCPR]⁸ is the first international treaty that adopted specific provisions regarding the administration of juvenile justice (Van Bueren, 2006). The ICCPR entered into force in 1976 (Henderson, 2010; Liefwaard, 2008). First, it is of importance to consider the relevance of the ICCPR for children in general, before elaborating on the provisions with respect to the administration of juvenile justice. Namely, the ICCPR is the first legally binding international treaty in which a provision is adopted that gives the child the right to measures of protection.⁹ Article 24 (1) ICCPR states that ‘Every child shall have (...) the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State’. According to Liefwaard (2008) this provision also has implications for the interpretation of other provisions of the ICCPR that do not specifically refer to children, for example with regard to the guarantees for a fair trial as laid down in article 14 ICCPR. Specifically with regard to minors article 14 (4) states that ‘the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation’. Other minimum guarantees for a fair trial set out in article 14 (3) equally apply to minors and are of even more

⁶ GA Res. 1386 (XIV), 20 November 1959.

⁷ See also principle 7: ‘The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.’

⁸ GA Res. 2200A (XXI), 16 December 1966.

⁹ The ICESCR also states that ‘Special measures of protection and assistance should be taken on behalf of all children and young persons’ (art. 10 (3) ICESCR). However, this provision is not formulated as an explicit right, as it is in the ICCPR (see Liefwaard, 2008).

importance in guaranteeing the welfare and protection of a minor defendant.

Article 10 (2)(b) ICCPR specifically guarantees that 'accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication'. Besides, 'juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status' (art. 10 (3) ICCPR). In both article 10 and 14 ICCPR the idea of taking into account the age of a juvenile defendant is highlighted. The age of the young person should be considered during a criminal trial, also regarding the manner in which the young person is treated. The Human Rights Committee [HRC] (2007) stresses that the guarantees and protections laid down in article 14 ICCPR are accorded to juveniles just as they are to adults (para. 42). However, according to the HRC (2007) juveniles need special protection (as indicated by art. 24 (1) ICCPR) and several issues should be given special attention with regard to juvenile defendants. That is, in criminal proceedings juvenile defendants should 'be informed directly of the charges (...), be provided with appropriate assistance in the preparation and presentation of their defence; be tried as soon as possible in a fair hearing in the presence of legal counsel, (...) and their parents or legal guardians, unless it is considered not to be in the best interest of the child, in particular taking into account their age or situation' (para. 42). Article 14 (3)(a) ICCPR provides that everyone who faces a criminal charge shall not only be informed promptly about the charge, but also 'in detail in a language which he understands'. With regard to juvenile defendants this means that states do not only have the duty to communicate with the child in a language he understands, but also in a manner in which the child is capable of understanding the information (Van Bueren, 2006). In order to achieve these goals, states are advised by the HRC (2007) to establish a juvenile criminal justice system, including a minimum age of criminal responsibility [MACR] that takes into account the physical and mental maturity of the child (para. 43). The HRC does not indicate a specific minimum and maximum age of criminal responsibility, but in General Comment no. 17 (HRC, 1989) it is stated that states must set an upper age limit 'at which the child attains his majority in civil matters and assumes criminal responsibility' (para. 4).

The special position of juveniles, and more specifically juvenile defendants, is recognised in the ICCPR. As a result of the young age and

immaturity of the child, he needs to be allocated special protection and the procedures should be adapted to his age (and at the same time fully acknowledging the minimum guarantees for a fair trial). According to Cipriani (2009, p. 52) the ICCPR is ‘an early forerunner to the Beijing Rules and the CRC’, because it considers age in its provisions; however, it does not yet indicate a MACR (as is the case in the Beijing Rules and the CRC as well, see section 2.3 and 2.4.1).

After the adoption of the 1959 Declaration of the Rights of the Child it took 30 years before a specific international children’s rights treaty was adopted. At first many states opposed the idea of adopting a Convention on the rights of the child, but over the years the acceptance of a specific Convention gradually increased. The awareness grew that children are rights bearers and that they are not only in need of care and protection (as indicated by for example art. 24 (1) ICCPR). Moreover, children were increasingly seen as human beings who require specific rights, different from the rights of adults and a separate international instrument was seen as the most appropriate to meet the needs of children. The human rights provisions enshrined in every other human rights Convention also apply to children. However, one of the reasons for a separate children’s rights Convention was that the general human rights provisions did not specifically take into account the concept of childhood and immaturity (Cantwell, 1992; Sloth-Nielsen, 1995). Another reason to draw up an international treaty was to have a legally binding instrument available that created uniformity among the already existing multitude of international standards (Van Bueren, 1995). After a decade of drafting, this resulted in the adoption of the UN Convention on the Rights of the Child, comprising 54 articles. After it was unanimously adopted by the General Assembly it took less than a year to have the CRC enforced and at that time it was the longest UN human rights Convention in force. Today, 193 countries have ratified the CRC, so it applies to almost every child, including those who are involved with the criminal or juvenile justice system (Liefwaard, 2008).¹⁰ Furthermore, the CRC is the most widely ratified international human rights treaty and is far more popular

¹⁰ Three countries have not ratified the CRC: Somalia, the USA and South Sudan. Somalia lacks an officially recognised government to ratify the Convention. The USA lacks the will to ratify, but signed the Convention in 1995 (Liefwaard, 2008; Sloth-Nielsen, 2001). South Sudan is a newly founded state.

with governments than, for example, the ICCPR and ICESCR (Abramson, 2006).

Before the CRC was adopted, the non-binding 1985 UN Standard Minimum Rules on the Administration of Juvenile Justice (commonly known as the Beijing Rules) were adopted by the UN.¹¹ The Beijing Rules were prepared as a response to a call made by the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1980¹² to develop minimum rules regulating the administration of juvenile justice. In the same time period, specifically with regard to minors, the Council of Europe listed procedural safeguards for a fair trial in its non-binding Recommendation on Social Reactions to Juvenile Delinquency (1987).¹³ According to the Council of Europe juveniles must be afforded the same procedural guarantees as adults. One of these guarantees concerns the 'right of minors to speak and, if necessary, to give an opinion on the measures envisaged for them' (art. 8), which can be seen as a precursor of the right to be heard as included in the CRC.

The Beijing Rules and the CRC can be considered to be the juridical basis of this study. The rules concerning the administration of juvenile justice and the procedural rights of juvenile defendants as laid down in article 40 CRC form important points of departure for analysing the participation of juvenile defendants in the youth court.

2.3 UN Standard Minimum Rules on the Administration of Juvenile Justice (Beijing Rules)

Important guidelines with regard to the administration of juvenile justice can be found in the Beijing Rules. The Rules can be seen as a framework and model for national juvenile justice systems (Van Bueren, 1992). The Beijing Rules can be seen as 'the first child-specific instrument setting standards for the administration of juvenile justice' (Liefwaard, 2008, p. 110). Moreover, it influenced the drafting of article 40 CRC and some of

¹¹ The rules are named after the city, Beijing, where the conference was held and where much of the drafting of the document took place.

¹² UN Doc. Res. 4, Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, No. E.8.IV.4.

¹³ Recommendation No. R (87) 20 of the Committee of Ministers to member states on Social Reactions to Juvenile Delinquency, 17 September 1987.

the Beijing Rules are incorporated into article 40 CRC (see section 2.4) (Liefwaard, 2008; Sloth-Nielsen, 2001). Although the Beijing Rules are not legally binding, the monitoring body of the CRC, the UN Committee on the Rights of the Child (2007), has recommended applying the rules to all children (para. 4). Besides, some of the rules have become binding, because they are incorporated in the CRC. Other rules serve the purpose of providing more detail on the contents of existing rights regarding the administration of juvenile justice (Van Bueren, 2006).

The Beijing Rules are a starting point when looking at the rights of children who are involved in the juvenile justice system. However, the standards do not only apply to juvenile defendants, but ‘all juveniles in conflict with the law’, which includes, according to rules 3.1-3.3, also young people who have committed a so-called status offence,¹⁴ juveniles involved in the welfare and protection system and young adult offenders. With respect to the age at which a young person can be held criminally responsible it is stated that the ‘age shall not be fixed at too low an age level’ (rule 4.1). In the commentary¹⁵ accompanying this rule it is stated that one must have regard for the ‘individual discernment and understanding’ of the child, in order to assess whether the child can be held responsible for delinquent behaviour. The notion of responsibility is considered to be meaningless when the minimum age of criminal responsibility is fixed at a too low level or does not exist at all, because criminal responsibility is linked to the intellectual and emotional maturity of the child (Lansdown, 2005). At the time of drafting the Beijing Rules a broad consensus on a MACR among the UN states parties was impossible, although one hoped to reach agreement about a reasonable lowest MACR applicable internationally (Cipriani, 2009). No consensus was reached, however. In 2005 the CRC Committee recommended that ‘Under no circumstances should young children (defined as under 8 years old; see paragraph 4) be included in legal definitions of minimum age of criminal responsibility’ (para. 36 (i)). More importantly, the CRC Committee (2007) recommends states to employ a minimum age of 12 years for criminal responsibility (para. 32). The Committee refers to Beijing Rule 4.1 in stating that 12 years is not considered to be too low and according

¹⁴ Behaviour that would not be punishable when committed by an adult, such as truancy, school and family disobedience, etc. (rule 3.1).

¹⁵ The commentaries are given immediately after the rules and are intended to be read as an integral part of the rules (Cipriani, 2009).

to the Committee it can be seen as an internationally acceptable minimum age.¹⁶ Moreover, states parties to the CRC are 'encouraged to increase their lower MACR to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level' and 'not to lower their MACR to the age of 12' when the current MACR is set at a higher age (CRC Committee, 2007, paras. 32, 33). As yet, no real consensus has been found, since a fixed MACR is not provided for by any international legal instrument, including the CRC (Kilkelly, 2008b; Liefwaard, 2008).

An important basic assumption that is laid down in the Beijing Rules is the fact that juvenile justice must be conceived of as an integral part of a 'national development process' towards a social and fair treatment of juvenile offenders (rule 1.4). Moreover, this assumption can be combined with what is considered to be one of the two most important objectives of juvenile justice, the idea that any reaction to delinquent behaviour should be proportional to both the circumstances of the offender and the offence (rule 5.1). The other important objective of juvenile justice is 'the promotion of the well-being of the juvenile' (rule 5.1). States in which juvenile offenders are dealt with in the welfare or protection system (e.g. family courts) are considered to have the promotion of the well-being of the child as their main focus. However, states in which children are handled in the juvenile justice system should also emphasise the well-being of the child (rule 5.1). Taking into account the best interests of the child is, according to the Beijing Rules, an important objective of a fair juvenile justice procedure and rule 5.1 therefore calls for a fair response to juvenile delinquency. The fair response to juvenile delinquent behaviour is further elaborated upon in rule 7.1, in which the basic procedural safeguards are outlined that should be taken into account at all stages of juvenile justice proceedings. These safeguards include 'the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-

¹⁶ According to the Council of Europe Secretariat of the European Social Charter (2005), article 17 of the 1996 revised European Social Charter (Council of Europe, Turin, 18 October 1961, ETS No. 35. Council of Europe, Strasbourg, 3 May 1996, CETS No. 163) also requires that 'the age of criminal responsibility must not be too low' and that criminal procedures must be adapted to the age of children and young persons. The European Committee of Social Rights, to which states parties have to report annually, has consistently made remarks about MACRs that are found to be too low (i.e. below the age of 12).

examine witnesses and the right to appeal to a higher authority' (rule 7.1). In the commentary on this rule reference is made to article 11 UDHR and article 14 (2) ICCPR, in which the presumption of innocence is also laid down. The list of procedural safeguards can be seen as non-exhaustive, because the words 'such as' precede it (Van Bueren, 2006). Important to note is the fact that several of these basic procedural safeguards are later laid down in article 40 (2)(b)(i-vii) CRC.

Moreover, several principles are laid down concerning the adjudication and disposition of juvenile defendants. These principles therefore apply for a large part to proceedings in a youth court or other appropriate body that deals with juvenile delinquents. Rule 7.1 contains the 'most basic procedural safeguards in a general way', whereas rule 14 delves deeper into the specific proceedings for juvenile defendants. The initial contact of the young person with the juvenile justice system is especially referred to as a circumstance which can be potentially harmful for the young person. Rule 10.3 therefore states that harm must be avoided when the child comes into contact with law enforcement agencies. The commentary part of rule 10 points out that 'compassion and kind firmness are important' elements of the juvenile justice process to be regarded by juvenile justice professionals.

In light of this study rule 14.2 is of eminent importance. This rule provides that juvenile justice proceedings should take place in 'an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely'. The concepts of understanding and participation are introduced in this rule; however, in the commentary on this rule no directions are given on how to fulfil the need for an atmosphere of understanding and the participation of juvenile defendants in the youth court. It is clear, though, that the right to participate in juvenile justice proceedings as laid down in rule 14.2 has served as an example for article 12 CRC (the right to be heard, see section 2.4.2).

Other rights that are laid down in the Beijing Rules are the right to free legal aid (rule 15.1) and the right of parents to participate in the proceedings (rule 15.2). This right is not (only) in favour of parents, but also benefits the position of the child, because it is stated that the participation of parents in youth court proceedings serves the purpose of assisting the child in a psychological and emotional manner.

A final important issue that is addressed in the Beijing Rules is the need for professionalization and specialisation. In rule 22.1 it is stated that everyone dealing with juvenile cases should be provided with training and education to ensure specialisation in the field of juvenile justice. 'A minimum training in law, sociology, psychology, criminology and behavioural sciences' is recommended. This reminds states to provide courses that fall outside the professionals' own field of study (such as providing courses on child/adolescent development to legally educated judges, prosecutors and lawyers).

Before further discussing the right of juvenile defendants to be heard in court, the relevant provisions of the CRC for this study will be analysed. In the following section, first the administration of juvenile justice in general, as outlined in article 40 CRC, will be elaborated upon (section 2.4.1). Second, the general principles of the CRC will be outlined in light of the involvement of juveniles in the juvenile justice system (section 2.4.2).

2.4 The UN Convention on the Rights of the Child

Almost a century after the establishment of the first juvenile court in the USA, in 1989 the UN Convention on the Rights of the Child was adopted. The CRC gave children a status under international law and granted them specific rights. It can therefore be seen as the single most important international human rights Convention for children and the adoption of the CRC signified a significant moment for children worldwide (Van Bueren, 1995; Liefwaard, 2008).

The CRC is seen as one of the nine core human rights treaties adopted since the UDHR (Cipriani, 2009).¹⁷ In the Convention civil, political, social, economic and cultural rights are adopted and interwoven

¹⁷ The other eight core human rights treaties are the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, the 1966 International Covenant on Civil and Political Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, the 1979 Convention on the Elimination on All Forms of Discrimination Against Women, the 1984 Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, and the 2006 Convention on the Rights of Persons with Disabilities.

in a single document (Abramson, 2006). The CRC resulted from the development in which children are increasingly seen as rights holders entitled to human rights, instead of only in need of protection (Beijer & Liefwaard, 2011; Doek, 2007). This notion is closely related to the notions of the dignity, autonomy and integrity of the individual child (see Freeman, 1992). It contrasts with a paternalistic or welfarist approach in which children are regarded as dependent upon adults (Sloth-Nielsen, 2001). However, the CRC also recognises that children have special needs and are entitled to protection and special treatment. Extra support and protection are provided for vulnerable children in this regard (Beijer & Liefwaard, 2011; Doek, 2007).

The Convention does not yet have an individual complaint procedure,¹⁸ but the instrument is legally binding for states parties (CRC Committee, 2003).¹⁹ One of the objectives of the CRC was to create legally binding standards, which were previously only covered by non-binding recommendations such as the Beijing Rules. Furthermore, rights were adopted in the CRC that were previously only acknowledged in case law under regional human rights treaties, such as the right to be heard (art. 12 CRC) (Van Bueren, 1995). To monitor the implementation of the CRC, the UN Committee on the Rights of the Child has been established. It is comprised of 18 elected members drawn from the states parties who act independently of their country. The Committee reviews the obligatory reports that states submit to the CRC Committee every five years (Doek, 1992). Furthermore, it issues General Comments, providing states parties with guidelines on how to apply the provisions of the CRC in practice (Liefwaard, 2008). The Committee has so far issued 17 General Comments.

In the past scholars have broken down the provisions adopted in the CRC into different categories in order to conceptualise the rights set

¹⁸ In 2011 an individual complaint procedure has been prepared by the UN, which allows a child or his representative to submit a complaint regarding a violation of a right set forth in the CRC to the CRC Committee. The optional protocol to the Convention on the Rights of the Child on a communications procedure will enter into force three months after the tenth state party has ratified the protocol (art. 19 Human Rights Council, 2011, A/HRC/17/L.8).

¹⁹ The CRC Committee (2003) 'believes that economic, social and cultural rights, as well as civil and political rights, should be regarded as justiciable' (para. 6). Especially the general principles (art. 2, 3, 6 and 12) are named as civil and political rights and domestic law must 'set out entitlements in sufficient detail to enable remedies for non-compliance to be effective' (para. 25).

forth in the CRC (see Van Bueren, 1995; Cantwell, 1992).²⁰ One of those concerns the participatory rights of children. Cantwell (1992) notes that the CRC is the first international children's rights instrument in which participatory rights for children are introduced. Moreover, Van Bueren (1995) has called the participatory rights of children the most significant of the CRC, because they acknowledge the growing autonomy of children and grant children the opportunity to participate in the decisions that affect their immediate lives. The participatory rights of the child are central to this study, because they also apply to the participation of juvenile defendants in the youth court.

The CRC follows a holistic approach towards children's rights (Liefgaard, 2008; Sloth-Nielsen, 1995). Hammarberg (1995) notes that all the rights in the CRC are interdependent and interrelated. This means that every right adopted in the CRC must be acknowledged when dealing with children in specific situations, such as when the child is suspected of having committed an offence. Before elaborating more on the general principles of the CRC, first the administration of juvenile justice as provided for in article 40 CRC will be addressed.

2.4.1 Article 40 CRC – juvenile justice

Article 40 CRC contains special provisions for the administration of juvenile justice. This article operates in conjunction with the other rights included in the CRC, most importantly the general principles as indicated by the CRC Committee (articles 2, 3, 6 and 12 CRC, see section 2.4.2). It is argued that the text of article 40 CRC is the longest and most detailed of all the provisions of the CRC (Cantwell, 1992). The lengthy wording is due to the fact that the provisions of article 40 CRC should be applicable to all types of juvenile justice systems and proceedings of the states parties around the world (Van Bueren, 2006,1995; Sloth-Nielsen, 2001).²¹ The international rules concerning juvenile justice proceedings have been

²⁰ Cantwell (1992) has identified three Ps: rights regarding the *protection* of children; rights regarding the *provision* of assistance to children; and rights regarding the *participation* of children in all decisions affecting them. Van Bueren (1995) has added one category of rights; rights regarding the *prevention* of harm to children.

²¹ Van Bueren (1995) specifically mentions the administrative boards that handle juvenile delinquency cases in Scandinavia and Scotland as examples of authorities that differ from the regular (youth) courts.

significantly improved with the adoption of several minimum guarantees for a fair trial for juvenile defendants in article 40 CRC (Sloth-Nielsen, 2001).

First, article 40 CRC has strengthened the legal position of juvenile defendants by formulating several due process rights (i.e. minimum guarantees for a fair trial / procedural safeguards) that apply to juvenile justice proceedings. This article mentions under paragraph 2 (b) that children are presumed to be innocent until proven guilty according to the law by states (para. 2 (b)(i) CRC), children have the right to be notified promptly of any charges (para. 2 (b)(ii) CRC), they have the right to legal assistance (para. 2 (b)(ii-iii) CRC), the right to have their parents present at the proceedings (para. 2 (b)(iii) CRC), the right to a fair hearing by an impartial and competent authority (para. 2 (b)(iii) CRC), the right ‘Not to be compelled to give testimony or to confess guilt’²² and to confront and cross-examine witnesses (para. 2 (b)(iv) CRC), the right to a judicial review of the case (para. 2 (b)(v) CRC), the right to an interpreter (para. 2 (b)(vi) CRC), and the right to have their privacy protected throughout all stages of the court process (para. 2 (b)(vii) CRC). As a minimum guarantee, these rights must be ensured. Most of these procedural safeguards are not child-specific but apply to children as well as adults (see art. 6 ECHR, art. 14 ICCPR, art. 10, 11 UDHR), except for the *trial in camera* principle (para. 2 (b)(vii) CRC) and the particular role assigned to parents or legal guardians (para. 2 (b)(iii) CRC). The CRC as well as the Beijing Rules (rule 15.2) provide for the participation of parents in the proceedings, because they can provide the child with support and emotional assistance. However, the parents’ presence has to be in the best interests of the child and can therefore be limited or prohibited when this is not in his best interests. The decision regarding the participation of parents in the proceedings should moreover be based on the child’s consent (Van Bueren, 2006, 1995). The right to privacy is also substantiated in the Beijing Rules (rule 8.2), which state more explicitly that no information should be published that can lead to the identification of the young person (such as his name).²³

²² Rule 7 of the Beijing Rules is more extensive, by stating that the right to remain silent is a ‘basic procedural safeguard’. The right to silence assists children in not confessing their guilt when they feel pressured. See for more on this topic Van Bueren (2006).

²³ See also article 14 (1) ICCPR which implies that the public can be excluded from juvenile justice proceedings and that it is possible not to make the judgment public.

Primarily, the right to a fair trial for minors has been accepted in a legally binding international human rights Convention, the CRC. However, these procedural guarantees should be combined with the notion of the best interests of the child and they do not have the purpose of making way for a pure justice approach (Cipriani, 2009). Van Bueren (1992, p. 392) notes that operating in line with the CRC means that states parties should 'maintain a balance between child-oriented and informal proceedings and the protection of the fundamental rights of the child'. Article 40 CRC has a pedagogical approach, which distinguishes it from, for example, article 14 ICCPR and article 6 ECHR. This can be illustrated by article 40 (1) CRC, which states that states parties must 'recognize the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth (...) which takes into account the child's age and the desirability of promoting the child's reintegration (...)'.²⁴ Taking into account the age of the child and promoting the reintegration of the child into society can be considered to be interests that suit the child best and which contribute to promoting the well-being of the child (see also art.40 (4) CRC). The notion that the best interests of juvenile defendants should be served is also highlighted in the Beijing Rules. In the commentary on rule 5 of the Beijing Rules it is stated that 'the well-being of the juvenile should also be emphasised in legal systems that follow the criminal court model'. This means a recognition of the fact that a hearing in the youth court must be adapted to the needs and specific rights of juveniles. Article 40 CRC can be regarded as representing the pedagogical character of the juvenile justice system (Liefwaard (2008), by formulating specific positive rather than punitive aims (Hodgkin & Newell, 2007). This pedagogical character implies that states keep a steady balance between adapted, informal proceedings in court and the protection of the fundamental procedural rights of the child.

Furthermore, article 40 (3) CRC encourages the creation of 'a separate and special juvenile justice system' (Liefwaard, 2008, p. 109). It states that states parties should 'seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children

²⁴ Compare with article 14 (4) ICCPR, in which rehabilitation is defined as an aim of the administration of juvenile justice. The term rehabilitation has been replaced by reintegration in the CRC (Van Bueren, 1992).

alleged as, accused of, or recognised as having infringed the penal law' (art. 40 (3) CRC). So, article 40 (3) CRC encourages states to provide juvenile defendants with specific treatment in a separate youth court, as part of separate juvenile criminal proceedings. Sloth-Nielsen (2001) argues that the CRC gives states parties a great deal of room for discretion in determining how specialised laws, procedures, authorities and institutions must be implemented in national criminal justice systems. This means that some countries have a separate juvenile justice system, with youth courts in which juvenile defendants are tried (more or less resembling the adult criminal court), whereas other countries have a welfare or family law system in which both delinquent and endangered children are steered towards adequate protection and intervention. With regard to the latter system, it has been argued that non-judicial authorities in a welfare system operate in line with international children's rights law as long as the hearings in these systems are conducted in a fair manner (as provided for in international children's rights law, such as article 40 (2) CRC) and when enough separation is maintained from the adult criminal justice system (Van Bueren, 1995; Sloth-Nielsen, 2001).

When considering specific authorities and (legal) procedures for children, the definition with regard to which children can be subjected to juvenile justice proceedings must be clear. Every provision adopted in the CRC applies to every child and young person under the age of 18 years (art. 1 CRC). The CRC Committee has specified that they thus also apply to juvenile defendants below the age of 18. Every child below the age of 18 should therefore be treated in accordance with the provisions of article 40 CRC (CRC Committee, 2007, paras. 36, 37). When children below the age of 18 are transferred or excluded from the juvenile justice system this can be regarded as a violation of international children's rights law (Sloth-Nielsen, 2001). Concerning juvenile justice procedures article 40 (3)(a) CRC provides that a minimum age should be established '(...) below which children shall be presumed not to have the capacity to infringe the penal law'. Cipriani (2009, p. 56) states that although the establishment of a MACR, as prescribed by the CRC, is for the first time framed as an explicit treaty obligation, the provision is open to 'wide conceptual interpretation without any substantive guidance' (as was also the case with rule 4.1 of the Beijing Rules). In 2007 the CRC Committee recommended increasing the MACR to at the very least 12 years of age

and not to lower it if it is already set at a higher age (paras. 32, 33). Besides, children below this minimum age should not be held criminally responsible (although they are capable of committing offences) and should not face formal charges. These (very) young children should be subjected to special protective measures, according to the CRC Committee (2007, para. 31).

The final two provisions of article 40 CRC are respectively concerned with the promotion of the use of diversion (art. 40 (3)(b) CRC) and the need for a variety of dispositions which ensure the well-being of children (i.e. alternatives to institutional care) and are proportionate to the circumstances and the offence (i.e. the principle of proportionality) (art. 40 (4) CRC).

The CRC and the Beijing Rules contain the premise that involvement with the juvenile justice system is potentially harmful for the child, so this potential harm must be prevented by applying adapted juvenile justice procedures (Van Bueren, 2006). Not only imprisonment, but also arresting a child should be a 'last resort', because it can cause stigmatisation and the risk of becoming involved in the justice system more often in the future (Dohrn, 2005). The ultimate goal of a national juvenile justice system should therefore be to reintegrate the child into society, so that he can contribute constructively to society in the future. The CRC provides that the child should be treated with respect for the child's dignity and worth throughout the entire juvenile justice process. When treated with respect for one's dignity and worth the child will be reinforced to respect the human rights and freedoms of others as well. The CRC Committee (2007) states that juvenile justice professionals must set an example by respecting the fair trial guarantees as outlined in article 40 (2) CRC, in order to educate the child on respecting the rights of others (para. 13). By enabling juvenile defendants to participate in a constructive manner in adapted youth court proceedings, which take into account the age and maturity of the young persons, their sense of dignity and worth will be promoted. The participation of juvenile defendants in the youth court can be seen in light of adapted procedures for juvenile defendants.

2.4.2 Articles 2, 3, 6 and 12 CRC – general principles

As has been stated before, the CRC follows a holistic approach towards children's rights and all the rights in the CRC are interdependent. The meaning of individual rights should be understood by reading and interpreting the other rights of the CRC (Lundy, 2007). Therefore, Abramson (2006, p. 27) notes that 'virtually every CRC right can be seen as a juvenile justice right'. The holistic approach and interrelatedness of rights can best be seen with regard to the 'general principles', as distinguished by the CRC Committee.²⁵ These four general principles form 'the value system on which the Convention is based' (Sloth-Nielsen, 1995, p. 408): the non-discrimination principle (art. 2 CRC), 'the best interests of the child' principle (art. 3 (1) CRC), the right to life and development (art. 6 CRC) and the right to be heard (art. 12 CRC). These principles operate in conjunction with the other provisions of the CRC and these are of importance for juvenile defendants as well.

The non-discrimination principle

In article 2 (1) CRC it is stated that 'States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind'. The value of the *non-discrimination principle* for juvenile defendants lies in the prevention of unequal treatment, for example on the basis of age, gender or ethnicity. According to the CRC Committee (2007) this principle also provides grounds for attempting to prevent the stigmatising effects of being exposed to the formal juvenile justice system and the long-term negative effects it can have on juveniles. To become involved in this system should therefore be prevented to the largest extent possible (paras. 6-8). However, this study concerns the phase in which a juvenile has already become involved in the juvenile justice system and has to appear before a youth court or other appropriate body.

²⁵ These articles were distinguished as general principles by the Committee during its first session in 1991, when guidelines were formulated on how states should structure their reports to the Committee (see Hammarberg, 2001). See CRC Committee (1991), para. 13; CRC Committee (1996), paras. 25-47; CRC Committee (2003), para. 12.

The best interests of the child principle

The best interests of the child principle is of importance for the operation of the juvenile justice system as well. In article 3 (1) CRC it is stated that 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. The best interests of the child means that children should be ensured 'such protection and care as is necessary for his or her well-being' (art. 3 (2) CRC). In article 40 CRC some important references are made to the best interests of the child principle as well. First, the treatment in the youth court should promote the child's sense of dignity and worth, and reintegration into society (art. 40 (1) CRC). This can be considered to be in the best interest of the child. Second, the available dispositions in the youth court should ensure the well-being of the young person, and promote his best interests (art. 40 (4) CRC). Moreover, the CRC Committee (2003) states that every body or institution that is concerned with children directly and/or indirectly should consider 'how children's rights and interests are or will be affected by their decisions and actions' (para. 12). Decisions made in courts are specifically named by the Committee as examples of decisions that affect the life of children and in which the best interests of the child should be of paramount concern. Dohrn (2005) notes, however, that the principle of the best interests of the child is less frequently used as guidance in juvenile justice matters, compared to other court procedures that affect the child, such as with regard to child protection or adoption.

The right to life principle

The third principle entails that 'every child has the inherent *right to life*' (art. 6 (1) CRC). States parties are under the obligation to 'ensure to the maximum extent possible the survival and development of the child' (art. 6 (2) CRC). The Committee (2003) has argued that states should interpret the term 'development' in a broad sense, taking into account 'the child's physical, mental, spiritual, moral, psychological and social development' (para. 12). Optimal development for all children, including juvenile defendants, should be achieved by states. This implies that every judicial intervention should promote the development of the child in a positive sense, based on the premise that delinquent behaviour negatively

influences the child's development (CRC Committee, 2007, para. 11). To treat young people in accordance with this principle – and the non-discrimination principle (art. 2 CRC) – implies that diversionary measures or alternative (therapeutic or educative) measures and sanctions should be considered and applied to avoid the negative effects that can arise from becoming involved in the more formal juvenile justice system. The call for diversion is also made in article 40 (3)(b) CRC.

The right to be heard

The fourth principle entails the *right to be heard* (art. 12 CRC), which encompasses 'the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child' (art. 12 (1) CRC). This right applies to children who are capable of forming their own views. The CRC Committee (2009) states that the child does not have to prove his capability to express his views (para. 20), but adults should be sensitive to the manner in which the child communicates (Krappmann, 2010). Any child is able to form and communicate his views, although different communication methods can be employed (e.g. non-verbal communication) (Beijer & Liefwaard, 2011; CRC Committee, 2009, para. 21).

Generally, the right to be heard is mentioned under the heading of participation.²⁶ In this context, the term participation was first used in rule 14.2 of the Beijing Rules, which states that juveniles should be able to participate in juvenile justice proceedings. Article 12 has significant practical value for the protection of the participatory rights of the child. It places a duty upon the states parties to involve children in all matters that affect them, also with regard to judicial and administrative proceedings

²⁶ The right to be heard is laid down in several provisions of the CRC regarding different contexts. Article 9 (2) provides for the hearing of the views of the child in case of a separation from the parents; article 21 (a) provides that the informed consent of the persons involved in an adoption has to be obtained, which included the child's when possible; article 23 (1) provides for the participation of mentally or physically disabled children; article 31 (1) provides for the participation of children in cultural activities; article 37 (d) provides that the child can object against the deprivation of his liberty, which means that the child has the right to express his views on the case; art. 40 (2)(b)(iv) provides that the child may decide to examine witnesses on his behalf at a criminal trial or not; and more generally participation is also provided for in articles 13 (freedom of expression), 14 (freedom of thought, conscience and religion) and 15 (freedom of association) (see also Hodgkin & Newell, 2007).

(art. 12 (2) CRC), such as proceedings in the youth court (Van Bueren, 1995). Moreover, the right to be informed of the charges, to legal or other appropriate assistance (art. 40 (2)(b)(ii) CRC) and the right to an interpreter (art. 40 (2)(b)(vi) CRC) can be seen as contributing to the participation of juvenile defendants in the justice system.

According to Lücker-Babel (1995) the right of the child to be heard implies that the child can no longer be seen as a passive and silent being and individual children should be heard in all cases affecting them concretely and directly. Listening to the views of the child and giving those views due weight seems to be a simple message, but it has to be fulfilled effectively and with respect for the child (Krappmann, 2010). In general the Committee acknowledges that giving due weight to children's views is challenging and requires change. The Committee (2003) continues that 'Listening to children should not be seen as an end in itself, but rather as a means by which States make their interactions with children and their actions on behalf of children ever more sensitive to the implementation of children's rights' (para. 12).

However, in the CRC no further guidelines are given concerning the implementation of this right to be heard in justice procedures. States are implicitly encouraged to make the decision-making process with regard to matters affecting the child accessible to the child, because states must 'assure to the child (...) the right to express those views freely' (art. 12 (1) CRC). This may mean that the decision-making process, or at least a part thereof, has to be adapted to the age and level of maturity of the child (Van Bueren, 1995). Lundy (2007) notes that the word 'assure' indicates that proactive steps should be taken to obtain children's views and that adults should not wait until children give their own views by themselves. Opportunities should therefore be created for children, within a safe space, to be involved in a certain procedure or decision-making process.

Lücker-Babel (1995) notes that the right to participate relates directly to article 3 CRC. To fully implement article 3 the right to be heard should be taken into consideration, because the best interests of the child cannot be adequately determined without hearing the views of the child (Krappmann, 2010; Lücker-Babel, 1995). The best interests of the child can only be adhered to when keeping a balance between, on the one hand, the decision-making executed by adults and, on the other, the

growing autonomy and capacity of the child to give his opinion on matters that closely affect him. Cipriani (2009) states that a delicate balance exists between articles 3 and 12. The best interests of the child principle does not indicate that children should have an active role in the determination of their best interests. Adults should determine and protect the best interests of children, but the right to express views cannot be denied on the basis that adults in the life of the child know what is best for him (Lundy, 2007). Article 12 guarantees children the possibility to express their views in all matters affecting them, and therefore ‘imposes obligations on how adults interpret and implement the best interest of the child’ (Cipriani, 2009, p. 27). However, when hearing the views of the child authorities must weigh these views taking into account the age and level of maturity of the child, in determining what is in the best interest of the child.

In this regard, article 12 should also be read in light of article 5 CRC which stipulates the ‘evolving capacities’ of the child to exercise his rights. Both article 5 and 12 relate to the development of the child and both have implications that change over time as the child develops into maturity (Lücker-Babel, 1995). The concept of evolving capacities means that the child’s ‘competence to exercise his rights autonomously may be subject to limitations and fall under the responsibility of others, such as parents’ (Beijer & Liefwaard, 2011, p. 74). Therefore, the child’s level of maturity should be taken into account when he is heard; only children who are capable of forming their own views have the right to be heard; moreover, the views of the child should be weighed in accordance with his age and level of maturity. Article 5 gives guidelines on how to interpret the term maturity in article 12. Maturity increases when the child grows older, and as a consequence the weight to be given to the child’s views becomes heavier (Krappmann, 2010). In some instances, it can however be in the best interest of the child not to follow his views entirely in the decision-making process. Although the views of the child must be seriously considered, the final responsibility of making the decision about the child lies with the adult (Krappmann, 2010).

The concept of evolving capacities implies that a balance must be maintained between regarding children as active agents in their own lives, who can exercise their own rights, and providing them with protection, because of their immaturity and development (Lansdown, 2005). Beijer

and Liefwaard (2011) note that article 12 (1) CRC can be considered to be of a dynamic nature, because of the implications that the age and maturity of the child have on his (level of) participation. Individual assessments of the level of maturity have to be made in every case involving a child, because the weight given to the views of the child depends on his level of maturity. Therefore, it is rather difficult to establish fixed age limits with regard to the right to be heard, because individually different developmental trajectories and, as a consequence, individual differences in the capacity to express views should be taken into account when assessing the extent to which the child's views should be taken seriously (Lansdown, 2005; Saywitz, Camparo & Romanoff, 2010; Stalford, 2012). The right to be heard has been made contingent on the level of maturity of the child and this implies that adults can still make decisions on his behalf when the child is deemed to be immature and not able to express his views (Beijer & Liefwaard, 2011).

A final implication of article 5 CRC is the fact that parents are recognised as the appropriate persons 'to provide (...) appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention'. Regarding article 12 CRC this means that the views of the child are not found to be of more importance than the views of the parents (or legal guardians), but that the role of parents should develop simultaneously with the development of the child towards maturity. This means that children are given more responsibilities and the parents' role diminishes when children's capacities evolve (Krappmann, 2010; Lansdown, 2005; Lücker-Babel, 1995). The question can be posed whether article 12 CRC undermines the autonomy of parents in determining the best interests of their child (see for example Van Bueren, 1995). Sloth-Nielsen (1995) argues that the fact that due weight must be given to the views of the child, in accordance with his age and maturity, presupposes that the child's right to be heard does not outweigh the fact that the primary responsibility of the child rests with the parents and that their views should be taken into account as well when deciding about the child. The views of children are given more weight when their capacities develop over time; however, in the case of younger children the views of parents have to be given due weight in this regard (see also CRC Committee, 2009, para. 84). Doek (2007) argues that the interests of parents and children can compete, but the CRC adequately balances these

concerns. This is shown in article 5, which provides that ‘the responsibilities, rights and duties of parents’ should be respected, taking into account the evolving capacities of the child. This endorses the statement made by Sloth-Nielsen (1995): the competence of children to participate in the decision-making process varies and evolves over time, which implies that parents still play an important role in the decision-making concerning their child, when children are not fully matured.

Sloth-Nielsen (1995) notes that article 12 demonstrates the new philosophy of children’s rights to be found in the CRC. It shows the, at that time, growing recognition of the autonomy of the child. Therefore, this provision is seen as rather controversial but important, because it necessitates that children (as social actors) are consulted when decisions are taken concerning them and that adults are not the only actors whose views should be taken into account. This applies not only to the matters in which the child has a specific right to be heard, but all matters affecting him. The child is therefore seen as a holder of rights and for whom it is in his best interests to have his say about matters affecting him (Doek, 2007; Lansdown, 2005; Sloth-Nielsen, 1995, 2001).

According to Abramson (2006) one of the most valuable developments stemming from the CRC is that the participation of children at all levels of society is promoted by its provisions. As a consequence, the right to be heard, and more broadly the right to participate, has important implications for the treatment of juvenile defendants in the youth court. Krappmann (2010) notes that the position of children in legal systems has fundamentally changed since the introduction of the right to be heard. Dohrn (2005, p. 92) even states that ‘children have the right to participate and express their views’ and this is a procedural right in juvenile justice, which ensures that the best interests of the child are safeguarded in the procedure.

Article 12 (2) CRC provides that the child should be given ‘the opportunity to be heard in any judicial and administrative proceedings’. This means that special procedures and guidelines should be created by the states parties for the judicial and administrative bodies (such as youth courts) that have to ensure the participation of children in matters that affect them directly (see also CRC Committee, 1996, paras. 43-44). The procedural capacity of the child to be heard (either directly, or through a representative) is provided by this provision (Van Bueren, 1995). The

more important the decision is with regard to the impact on the child and on his future, the more precise and directive the rules governing the procedures and the assessment of the maturity of the child should be (Bruning & van der Zon, 2010). Furthermore, adequate places for hearing children and the training of adults who hear children must be provided for (Lücker-Babel, 1995; see also Lundy, 2007). And the child has to be properly informed (i.e. in a child-friendly manner) about the matter on which his views are expected, about the way in which the hearing will take place and about the impact his views can have on the decision that has to be made (Beijer & Liefwaard, 2011; Krappmann, 2010). Decisions made in the youth court can have a profound impact on the life and future of a young person and it is therefore justified to state that procedures concerning the participation of juvenile defendants in court and the provision of information to them with regard to the procedures should be thoroughly developed and carefully implemented.

Conclusion

In this section participation is regarded in light of the CRC. First, it is explained that article 40 CRC is based on two fundamental principles. On the one hand, it recognises the right to a fair trial for minors in line with the principles and rights that also apply to adult defendants, on the basis of general human rights law. On the other hand, article 40 CRC calls upon states to guarantee special treatment for juvenile defendants in accordance with their age and maturity.

Moreover, the four general principles of the CRC indicate that juvenile criminal law and juvenile justice procedures should not focus exclusively on repression and retribution, but more on resocialization and reintegration (compare to art. 40 (1) CRC). The right to be heard is of particular importance to this study. On the one hand, the opinion of the young person should be taken seriously, but on the other hand it should be judged on its merit, taking into account the age and maturity of the young person. In the following section developments that followed from the adoption of the CRC will be presented, which are relevant to the interpretation of the right to be heard in juvenile justice proceedings.

2.5 Developments following the adoption of the CRC

Recent recommendations by the UN Committee on the Rights of the Child (2007, 2009) have strengthened the notion that juvenile defendants should be able to participate in juvenile justice procedures. Moreover, the provisions of the CRC are incorporated into the ECHR through the case law that has been developed by the European Court of Human Rights [ECtHR]²⁷ (Dohrn, 2005).

In this section, first the relevant case law generated by the ECtHR regarding the participation of juvenile defendants in court will be analysed (section 2.5.1). Second, the recommendations made by the CRC Committee in its General Comments with regard to the right to be heard will be analysed (section 2.5.2 and 2.5.3). And third, the most recently adopted guidelines on child-friendly justice by the Council of Europe will be regarded in this light as well (section 2.5.4). The developments, which have taken place both on the international and European level, will be presented in order of appearance following from the adoption of the CRC. It will be shown that these developments have given shape and direction to the child's right to be heard in juvenile justice procedures.

2.5.1 Relevant case law of the European Court of Human Rights

The CRC does not have a designated court to adjudicate claims (Dohrn, 2005). However, with regard to the participation of juvenile defendants some critical jurisprudence has been produced by the European Court of Human Rights, which has been established by the ECHR (Cipriani, 2009; Kilkelly, 2008b). The judgments of the Court are made on the basis of complaints concerning violations of rights as adopted in the ECHR. The Court can order that a state puts an end to a violation of the Convention and to redress its effects (Dohrn, 2006).

For this study judgments made with regard to article 6 ECHR are of particular importance and the five most important judgments are presented here. The Court has ruled in the case of an adult applicant (the case of Stanford against the United Kingdom²⁸) that article 6 ECHR 'guarantees the right of an accused to participate effectively in a criminal

²⁷ In the following also called the Court.

²⁸ ECtHR, 23 February 1994, Appl. no. 16757/90.

trial'. Moreover, the Court has stated that 'this includes, inter alia, not only his right to be present, but also to hear and follow the proceedings' (para. 26). What effective participation entails (for juvenile defendants) is not further specified by the Court. Only to hear and follow the proceedings can be seen as a very minimal requirement for participating in court procedures.

Specifically with regard to juvenile defendants the Court delivered important decisions in the English Bulger case (the cases of T. and V. against the United Kingdom²⁹). The 1993 case involved two 10-year-old boys who had kidnapped and beat to death a two-year old, James Bulger. The two minors (at that time they had turned 11 years old) were prosecuted on indictment in the *Crown Court*. Their trial took place in public before a judge and 12 jurors. The trial was made much of by the media, with massive national and international publicity, hostile crowds outside the court building and a packed public gallery in the courtroom. After three weeks both defendants were found guilty by the trial jury (Cipriani, 2009; Dohrn, 2006).

Subsequently, both defendants complained before the European Court of Human Rights that a number of their fundamental rights had been violated during the trial and sentencing. Both argued that they had not been given a fair trial, because they were not able to fully participate (Beijer & Liefwaard, 2011; Cipriani, 2009). The Court found in the case of T. 'that it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings' (para. 84). Furthermore, in the case of a young child charged with a serious offence causing significant social turmoil 'it would be necessary to conduct the hearing in such a way as to reduce as far as possible his or her feelings of intimidation and inhibition' (para. 85). The Court maintained the view that 'the formality and ritual of the Crown Court must at times have seemed incomprehensible and intimidating for a child of eleven' (para. 86) and the defendant(s) had been 'unable to participate effectively in the criminal proceedings against him and was, in consequence, denied a fair hearing (...)' (para. 89). Criminal trials – whether these are held in an

²⁹ ECtHR, 16 December 1999, Appl. no. 24724/94; ECtHR, 16 December 1999, Appl. no. 24888/94.

adult court or a specialist youth court – must therefore be adapted to the intellectual abilities and the developmental stage of a juvenile defendant, irrespective of the MACR set in a specific country. In these specific cases the Court decided that the defendants had been denied a fair trial by prosecuting them in an adult court and in public. Furthermore, the Court stated that the well-being of the juvenile defendant is considered to be of more importance than public court procedures (para. 85).

The fact that court procedures have to be adapted to the developmental stage of the juvenile defendant has been further interpreted by the Court in the 2004 case of S.C. against the United Kingdom.³⁰ The 11-year-old S.C. was charged with the attempted robbery of a 87-year-old woman and was indicted to the Crown Court. The hearing in the Crown Court was adjusted to the child's age: the defendant was accompanied by a social worker, he was not required to sit in the dock, the judge did not wear a wig and gown and frequent breaks were taken (Dohrn, 2006). Despite the special arrangements that were made, the Court concluded that S.C. 'was unable fully to comprehend or participate in the trial process' (para. 26). The Court explained that article 6 ECHR does not imply that a juvenile defendant should understand every legal detail during the criminal trial. 'Given the sophistication of modern legal systems, many adults of normal intelligence are unable fully to comprehend all the intricacies and all the exchanges which take place in the courtroom' (para. 29). Therefore, legal representation serves the purpose in this respect of informing and guiding the defendant through the trial. The Court, however, more thoroughly explained what 'effective participation' should entail for juvenile defendants:

“effective participation” in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make

³⁰ ECtHR, 15 June 2004, Appl. no. 60958/00.

them aware of any facts which should be put forward in his defence (...)
(para. 29).

It becomes clear from the case law of the Court that a juvenile defendant should be able to form a general understanding of the nature of the process, the consequences of his appearance and attitude in court and the consequences of a possible sanction or measure. In this specific case the Court decided that the defendant should have been tried in a specialised court, with adapted procedures, to have regard for the young age and low level of intellectual maturity of the defendant (para. 35).

More recently a 15-year-old Turkish boy complained that he had been deprived of a fair trial because he was not able to participate effectively in his trial (the case of *Güveç against Turkey*³¹). The Court has repeated in its judgment that the right to a fair trial (under art. 6 (3) ECHR) 'includes not only the right to be present, but also to hear and follow the proceedings' (para. 123). As has been determined in the earlier case of *S.C.* effective participation means, according to the Court, that the defendant has a general understanding of the nature of the trial, what is at stake for him and the significance of the sanctions that can be imposed. Besides, the defendant should be able to understand in general what is being said in court, if necessary with assistance. He should be able to follow what is brought forward by witnesses, to explain his side of the story to his lawyer, to express with which statements he disagrees and to put forward facts that strengthen his defence (para. 124). In this case it is stressed that the lawyer plays an important role in the effective participation of juvenile defendants. The defendant's lawyer had failed to attend the majority of the hearings scheduled by the court and failed to defend the defendant adequately (para. 131). The Court therefore concluded that the 'lack of legal assistance for most of the proceedings, exacerbated the consequences of the applicant's inability to participate effectively in his trial and infringed his right to due process' (para. 132). The attendance of the lawyer at the hearings could have assisted the defendant in his participation and could have contributed to a more effective participation in the court hearings.

The case law generated by the Court has important implications for the concrete interpretation of what a fair trial should entail for juvenile

³¹ ECtHR, 20 April 2009, Appl. no. 70337/01.

defendants. Besides the procedural safeguards adopted in article 6 ECHR, a fair trial also means that a juvenile defendant should be able to participate effectively in his criminal trial, with the assistance of his lawyer. From these five judgments it can be concluded that a fair trial (as guaranteed by art. 6 ECHR) implies that defendants should be able to participate effectively in court. This jurisprudence thereby gives a further specification of rule 14.2 of the Beijing Rules, in which it is stated that juvenile justice proceedings should take place in an atmosphere of understanding in which the juvenile defendant can participate. According to the Court, understanding is considered to be an important part of participation.

To hear the defendant in person (as is prescribed by art. 12 CRC) is not mentioned in these judgments. Emphasis is placed on the fact that the legal representative should bring forward the views of the defendant. Furthermore, lawyers play an important role in explaining the nature of the process and what is said during the trial. The importance of legal representation for defendants – including minors – is also acknowledged by the Court in the cases of *Salduz against Turkey*³² and *Panovitz against Cyprus*.³³ The Court has ruled that defendants should always be provided with legal assistance before the first interrogation by the police starts. Because this study is focussed on the procedures in the youth court and not on the procedures on the level of the police, these judgments will not be further elaborated upon. However, they do show that lawyers are deemed to be of great importance for the protection of the rights of defendants and the participation of defendants in different phases of the criminal process.

With regard to judicial procedures the Court also acknowledges the notion of children's evolving capacities (see also art. 5 CRC). Not every legal detail has to be understood, but in order to receive a fair trial one must understand the general nature of what is happening. The Court states that explaining what is happening can for example be done by an interpreter, lawyer, social worker or friend, leaving open the option that the judge gives explanations to the defendant, but not mentioning this option explicitly.

³² ECtHR, 27 November 2008, Appl. no. 36391/02.

³³ ECtHR, 11 December 2008, Appl. no. 4268/04.

Moreover, the Court recommends that juveniles should be tried in specialised youth courts. Concrete guidelines regarding these adapted procedures in a specialised youth court are not given by the Court. However, the notion of understanding the procedures can be interpreted as an important condition for participation during the hearing in court. The UN Committee on the Rights of the Child has attempted to further concretise the concepts of effective participation and has adapted courtroom procedures in its recent General Comments on juvenile justice. In the following sections the recommendations made in these documents will be analysed.

2.5.2 General Comment no. 10 – Children's rights in juvenile justice

In 1997 the Economic and Social Council of the United Nations (ECOSOC) indicated in a resolution the core notions that member states should consider when developing a juvenile justice system that is in line with article 40 CRC.³⁴ This resolution is also known as the Vienna Guidelines and contains 'guidelines for action on children in the criminal justice system'.³⁵ In these guidelines it is recommended by ECOSOC to establish specialised 'juvenile courts', in which primarily juveniles who have committed criminal acts are prosecuted and which employ special procedures that 'take into account the specific needs of children' (art. 14 (d)). This resolution states explicitly that the UN member states should appoint specialised youth court judges, who apply child-centred procedures within the juvenile justice system, as part of their compliance with article 40 CRC. The UN Committee on the Rights of the Child (2007) has further specified the notion that child-centred procedures should be employed in a specialised youth court, in its General Comment no. 10.

In 2007 General Comment no. 10 was published, entitled *Children's rights in juvenile justice*. This document serves the purpose of providing guidelines on the implementation of article 40 CRC. The CRC Committee (2007) recommends states parties 'to implement a comprehensive juvenile justice policy' and the objective of the General

³⁴ UN Guidelines on the Administration of Juvenile Justice, ECOSOC Resolution 1997/30, 21 July 1997.

³⁵ *Ibid.*, Annex.

Comments is to provide guidance and recommendations on the development and implementation of juvenile justice policy. To develop a comprehensive policy on juvenile justice the general principles contained in articles 2, 3, 6 and 12 CRC and the juvenile justice principles laid down in articles 37 and 40 CRC should all be considered by the states parties (para. 4).

Of special importance to this study is the implementation of article 12 CRC in the juvenile justice process. In the General Comment the right to be heard (art. 12 CRC) is further elaborated upon and recommendations are given on how to apply this principle in the youth court. The CRC Committee (2007) states that ‘The right of the child to express his/her views freely in all matters affecting the child should be fully respected and implemented throughout every stage of the process of juvenile justice’ (para. 12). The CRC Committee (2007) states explicitly that ‘the right to be heard is fundamental for a fair trial’ (para. 44). The fact that a child is accused of having committed an offence and is deemed to be criminally responsible implies that he should ‘be able to effectively participate in the trial’, as one of the requirements for a fair trial (para. 46). The Committee herewith refers to the jurisprudence of the European Court of Human Rights, as is explained in section 2.5.1.

The CRC Committee (2007) assumes that when a juvenile can be held accountable for having committed an alleged offence (and therefore can be prosecuted), he should also be capable of participating in criminal proceedings. The procedural capability of the minor is implied by this assumption (see also section 2.4.2). This starting point has implications for the treatment of juvenile defendants throughout the juvenile justice process, and implies that the child needs to be given ‘the opportunity to be heard in any judicial or administrative proceeding’ (para. 43) and during the entire process, from the pre-trial stage until the execution of a sanction or measure (para. 44). Furthermore, the CRC Committee refers to rule 14.2 of the Beijing Rules, which states that the proceedings should be conducted in an atmosphere of understanding to allow the child to participate and to express himself freely. Subsequently, the Committee (2007) argues that this may also require that courtroom procedures and practices should be modified, depending on the age and maturity of the child (para. 46). Besides, when a child is considered to be criminally responsible for his acts he should not be treated as a passive object,

because that will not contribute to an effective response to his behaviour. According to the CRC Committee (2007), research shows that the active engagement of the child in, for example, the implementation of measures contributes to a positive result (para. 45). The active participation of the child in juvenile justice procedures is thereby justified. This implies, however, that when the child is unable to participate effectively, he should not be submitted to justice procedures in which he is accused of committing an offence. Cipriani (2009) notes that when a child is incapable of participating effectively he should not be submitted to any criminal justice process, but welfare-oriented responses should be put in place to ensure that the right of the child to be heard is guaranteed.

The call for modified procedures in court for juvenile defendants is substantiated by the CRC Committee by giving more concrete guidelines on what these procedures should entail. As is explained by the European Court of Human Rights in the case of *S.C. against the United Kingdom*, the juvenile defendant needs to understand the charges and the possible consequences and outcomes of the trial in order to be able to effectively participate in his trial.³⁶ This notion is further explained by the CRC Committee. The child has the right to be informed of the charges brought against him as soon as possible in a language he understands. The CRC Committee (2007) states that 'This may require (...) a 'translation' of the formal legal jargon often used in criminal/juvenile charges into a language that the child can understand' (para. 47). This may necessitate adjustments to the manner in which the information is formulated and communicated to the young person and his parents and it is the responsibility of juvenile justice professionals, such as the police, prosecutor or judge, to ensure that the defendant understands each charge. Information should be communicated to the young person directly and the provision of information to parents or legal guardians should therefore not be seen as an alternative to communicating information to the young person (para. 48). The responsibility of professionals to ensure that the juvenile defendant understands the charges that are brought against him requires a certain amount of specialisation in communicating with young people. This is underpinned by the fact that the CRC Committee notes that to treat children in accordance with their age and to promote their reintegration, all professionals involved in the administration of juvenile

³⁶ ECtHR, 15 June 2004, Appl. no. 60958/00, para. 29.

justice must have knowledge of child development, the continuing growth of children and what is considered to be appropriate to their well-being (para. 13; see also CRC Committee, 1996, para. 46). Moreover, the CRC Committee recommends that specialised divisions be established within the police, the courts, and the prosecutor's office and that specialised legal representation for children is ensured. This means preferably to establish youth courts, but if this is not possible to at least appoint specialised juvenile judges (paras. 92, 93).³⁷ To appoint specialised professionals provides for a stronger basis for the effective participation of juvenile defendants in the youth court.³⁸

During the youth court hearing it is important that the young person is able to determine his own position in the process and that he is defended by a lawyer or other appropriate legal aid worker (see also section 2.5.1). The right to legal or other appropriate assistance is vital to the realisation of effective participation. Other appropriate assistance can for example be provided by a social worker. The CRC Committee (2007) argues, though, that 'that person must have sufficient knowledge and understanding of the various legal aspects of the process of juvenile justice and must be trained to work with children in conflict with the law' (para. 49). Lawyers can play an important role in informing the young person (para. 44; see for more chapter 3, section 3.3.2). Lawyers must be aware of the importance of providing the young person with adequate information about the charges, the content and course of the process and the possible sanction or measure to be ordered and ensuring that their client understands the information provided (paras. 44, 49, 50). Providing the juvenile defendant with information about the evidence that is brought before the court is also of importance, because it enables him to properly direct his lawyer, make considered decisions about giving (additional) statements and about whether or not to question witnesses (see also the case of S.C. against the United Kingdom, para. 29).

In article 40 (2)(b)(iii) CRC it is stated that parents (or legal guardians) should be present during the juvenile justice procedure, unless

³⁷ See also UN Guidelines on the Administration of Juvenile Justice, ECOSOC Resolution 1997/30, 21 July 1997, Annex, art. 14 (d).

³⁸ Van Bueren (2006, p. 22) argues 'that the same need for child centred proceedings should apply to review or appeal proceedings (...) as well'. According to the author this requires the further specialisation of professionals who conduct appeal procedures in most countries.

this is not considered to be in the best interests of the child. The CRC Committee has further concretized the role of parents. The Committee (2007) finds it important that parents are able to be involved to the maximum extent possible in the proceedings against their child. It is argued that the involvement of parents contributes to an effective response to the child's delinquent behaviour (para. 54). Moreover, parents should be present at the proceedings to 'provide general psychological and emotional assistance to the child'. Parents, however, should not act in defence of their child and should not be involved in the decision-making process (para. 53). The Committee (2007) also noted that it opposes the criminalisation of parents, because that will not contribute to the resocialization of the child (para. 55). In these provisions the CRC Committee makes a clear distinction between the role of the legal representative and the parents of the juvenile defendant. The involvement of parents should be directed towards emotional support for the child, whereas the lawyer has the task of defending the child and participating – together with his client – in the decision-making process.

Finally, the young person should also be informed about the content and consequences of potentially ordered sanctions and measures, so that he is able to share a well-informed opinion with the judge and the prosecutor (CRC Committee, 2007, para. 46). This means, among other things, that the juvenile defendant should be given the opportunity to express his opinion on the possible sanctions or measures and that he should be able to express his preferences with regard to the sentence. This enables the prosecutor and/or the judge to make an estimation of the extent to which the young person commits himself to the sanction or measure and whether it would be wise to impose a particular sanction or measure.

The emphasis on the *right* of the child to be heard, instead of the mere acceptance of participation in court and the determination of the best interests of the child by adults is of particular importance to this study (Cipriani, 2009). It provides juvenile defendants with the explicit possibility to be heard, to participate in the procedures and thereby to express their views on the matter(s) at hand. Cipriani (2009) notes that the requirements for effective participation, as indicated by the European Court of Human Rights and the CRC Committee, have important implications for the procedures in the youth court. Taking into account the

age and maturity of the minor implies that proceedings in court should be adapted to both the emotional and cognitive abilities of the young person. Modified procedures and practices and assistance to the child are called for. However, a more concrete interpretation of how these adapted procedures should look like is not given by the CRC Committee in General Comment no. 10. The emphasis in this General Comment is placed on the fact that juvenile defendants should receive adequate information, which they understand with the help of a lawyer who is specialised in representing adolescents. Other court professionals should also be specialised in working with adolescents in order to be able to apply adapted procedures. Again, these modified courtroom procedures and practices are not described in detail in this document. It can be concluded that the CRC Committee lays emphasis in General Comment no. 10 on the juvenile defendant understanding what happens in court and much less attention is paid to hearing the views of the young person as part of effective participation. The CRC Committee thereby largely follows the jurisprudence of the Court.

The CRC Committee has also drafted a General Comment specifically on the issue of participation. General Comment no. 12 will be analysed in the following section in order to find more specific guidelines on the implementation of procedures that promote the effective participation of juvenile defendants in the youth court.

2.5.3 General Comment no. 12 – The right of the child to be heard

Two years after publishing General Comment no. 10, the CRC Committee published General Comment no. 12, entitled *The right of the child to be heard*. This document gives further guidelines on how to implement article 12 CRC, with special provisions concerning the right to be heard in judicial proceedings. The goal of the recommendations is among others to ‘propose basic requirements for appropriate ways to give due weight to children’s views in all matters that affect them’ (CRC Committee, 2009, para. 8). Three initial observations will be made with respect to the view of the CRC Committee on article 12 CRC, before turning to the provisions regarding the right to be heard in judicial proceedings.

First, the CRC Committee (2009) defines the term ‘participation’ as ‘(...) ongoing processes, which include information-sharing and

dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes' (para. 3). In the definition of the term participation the CRC Committee places emphasis on the position of the child. Children do not only have the right to give their views, but they should also be able to learn from how their views have had an effect on the decision-making. This implies that the extent to which the view of the child is taken into account and has had an influence on the final decision should be made clear to the child, in order for him to comprehend the significance of his contribution. Therefore, in order for a juvenile defendant to understand the importance of his contribution to a youth court hearing, judges should provide explicit reasoning for their judgment or sentencing decision. In the definition of participation as formulated by the European Court of Human Rights in the case of *S.C.* against the United Kingdom the emphasis is more firmly laid on the juvenile defendant understanding the criminal process; i.e. what is said during the hearing and what the consequences of the criminal trial are. Hearing the views of the child is interpreted by the Court as hearing those views through the lawyer and not per se by hearing the juvenile directly (para. 29).

Second, the CRC Committee (2009) states that expressing views should be seen as a choice for the child and not an obligation. Therefore, 'The child (...) has the right not to exercise this right' (para. 16; see also para. 58). Regarding judicial procedures this means that juvenile defendants have the right to remain silent, as part of a fair trial.³⁹ The CRC Committee argues that when the child has decided that he wants to be heard by the judge or other authority, he has to decide how he would like to be heard (i.e. 'either directly, or through a representative or appropriate body' (art. 12 (2) CRC)). The Committee (2009) recommends that children should be favourably heard and directly (para. 35). However, it can be questioned whether children are in the position to take this

³⁹ The European Court of Human Rights has stated in the case of *John Murray* against the United Kingdom that 'Although not specifically mentioned in Article 6 (art. 6) of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 (art. 6)' (ECtHR, 8 February 1996, Appl. no. 18731/91 (Case of *John Murray* against the United Kingdom), para. 45; see also ECtHR, 25 February 1993, Appl. no. 10828/84 (Case of *Funke* against France), para. 44).

important decision by themselves and are not guided by the directives of an individual judge or lawyer. When the child has designated a representative (e.g. a parent, lawyer or social worker), it should be someone with ‘sufficient knowledge and understanding’ of the procedures and decision-making process in the youth court and experience in working with children (para. 36). The notion that children can choose themselves to be heard directly or through a representative (and choose a particular representative) fits with the idea of the child’s growing autonomy in his right to participate in the decisions that affect his life (Beijer & Liefwaard, 2011). The Committee (2009) adds to this that parents and children can have conflicting interests. Therefore, when a parent represents the views of his child it should be ensured that the views of the child are brought forward correctly (para. 36).

Third, article 12 (1) CRC states that states parties ‘shall assure’ the right of the child to freely express his views. This means, according to the CRC Committee (2009), that states ‘are under strict obligation to undertake appropriate measures to fully implement this right for all children’ (para. 19). So, although a juvenile defendant is not obliged to give his views on the case at hand, the authorities do always have to offer the opportunity for the juvenile defendant to express his views when the young person in question is ‘capable of forming his or her views’ (art. 12 (1) CRC). Moreover, the point of departure should be that the child is capable of forming and expressing his views. It is up to the authorities to prove that the child does not have this capacity when there are reasons to believe this, and ‘it is not up to the child to first prove her or his capacity’ (para. 20; see also section 2.4.2). Furthermore, the child should be able to express his views from his own perspective, which implies that the child is able to express his views freely (para. 22). From General Comment no. 12 it can be concluded that children should be heard in all matters affecting them, without feeling pressured and with the possibility to waive the right to be heard. Youth court hearings revolve around particular important matters in the life of a young person; therefore, the right to be heard and to express his own views is of particular importance for a juvenile defendant.

According to the CRC Committee (2009) every judicial procedure concerning minors should be both ‘accessible and child-appropriate’ (para. 34). The meaning of this notion is further specified by the Committee by

stating that: 'Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of courtrooms, clothing of judges and lawyers, sight screens, and separate waiting rooms' (para. 34). The more specific interpretation of, for example, an accessible and child-appropriate design of the courtroom is left to the interpretation of the states parties. No clear directives are given on how a courtroom should be arranged in a way that would qualify as accessible and child-appropriate. This holds true for the clothing of judges and lawyers as well. One can assume that the CRC Committee refers to the use of small courtrooms, in which all the parties are seated within hearing distance of each other, where procedures are less formal and judges and lawyers do not wear formal court attire (i.e. gowns and wigs). However, the General Comment leaves this open to interpretation and it only states that 'A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age' (CRC Committee, 2009, para. 34).

However, some more directive recommendations are given by the CRC Committee (2009). The views of juvenile defendants should be heard in any proceeding – throughout the entire juvenile justice process (paras. 35, 58) – and it should take place by means of a talk or dialogue, rather than an 'one-sided examination' (para. 43). The dialogue can best be held in an environment in which the child feels safe and respected, and the states parties are responsible for creating such a child-appropriate court environment (paras. 23, 60).

Beijer and Liefwaard (2011) state that article 12 CRC prescribes that in every judicial proceeding and decision-making process the child has to participate effectively, which has large implications for juvenile defendants who appear in the youth court. The implications of article 12 CRC for the procedures in the youth court are such that the child should be encouraged to give his views on the criminal case and that these views should be considered seriously by the professionals in court. The CRC Committee (2009) states that 'simply listening to the child is insufficient; the views of the child have to be seriously considered (...)' (para. 28). The context in which the child is heard should be enabling and encouraging, and the child should favourably be heard in closed court sessions (paras. 43, 61). So, a judge should make room for the child to give his views on the matter, should be willing to listen to the child and should seriously

consider the child's story in his decision-making (para. 42). Furthermore, adults need to be trained in communicating with children, because they require 'preparation, skills and support to facilitate children's participation effectively (...)' (para. 134 (g)). From these provisions it can be concluded that effective participation should be influenced by, on the one hand, the setting in which a child is heard and, on the other, the amount of training the person who hears the child has had in communicating with children and adolescents.

As explained before, article 12 (1) CRC states that the views of the child must be considered in light of his age and maturity. This implies that not only the biological age, but also the level of social, cognitive and emotional maturity should be considered in weighing the child's views. Besides, the impact of the decision on the life of the child should also be taken into consideration when assessing the level of maturity of the child and with that the weighing of his views (CRC Committee, 2009, paras. 28-30). In short, the more impact a judicial decision has, the more important it is to hear the child and to seriously consider the child's views.

A crucial aspect that is connected to the notion of participation is the right to be properly informed (CRC Committee, 2007, paras. 47, 48; see also section 2.5.2). For the child to be able to form his opinion he should be 'informed about the matters, options and possible decisions to be taken and their consequences (...). The child must also be informed about the conditions under which she or he will be asked to express her or his views' (CRC Committee, 2009, para. 25).⁴⁰ This means that the child must be instructed and prepared before a court hearing, by the person who is responsible for hearing the child, on what will be discussed, what the possible outcomes are and more generally what the procedures in court will look like and who the participants will be (paras. 41, 134 (e)). This enables the young person to form a well-informed opinion and to share his views on the case with the judge, the prosecutor and other participants in court (paras. 25, 60, 82). The obligation for the states parties to provide the child with adequate information also requires adequately trained professionals who are able to provide the information in a manner that is

⁴⁰ The responsibility of the parents or legal guardians is also highlighted in paragraph 92, in which the Committee (2009) states that parents should be advised to support their children in expressing their views freely.

comprehensible for the child (paras. 34, 49, 134 (a), 134 (g)).⁴¹ The CRC Committee (2009) states that the person who is responsible for hearing the child (also called the decision maker) is responsible for preparing the child and providing him with information before that child is heard (para. 41). The CRC Committee has further specified that those who hear the child can be 'an adult involved in the matters affecting the child, a decision maker in an institution or a specialist' (para. 42). With regard to juvenile defendants this person will normally be a decision maker in an institution (i.e. a judge), who has to prepare the young person before he is heard in court. As opposed to the jurisprudence generated by the European Court of Human Rights, the Committee does not place the emphasis on the role of the lawyer as the person who should prepare the juvenile defendant before the hearing and guide him through the criminal trial. This task is more explicitly granted to the actual decision maker in the process.

A further observation is the connection the Committee (2009) makes between expressing views freely and conducting the hearing behind closed doors. *In camera* hearings should be the rule and exceptions should be very limited and justified in writing by the court, taking into account the best interests of the juvenile defendant (para. 61; see also CRC Committee, 2007, para. 65). It must be stressed that the CRC Committee acknowledges that a child does not have to understand every detail of the matter affecting him in court, but he should have sufficient understanding to be able to form his views (para. 21). The Committee thereby reaffirms explicitly the claims made by the European Court of Human Rights in the case of S.C. against the United Kingdom (para. 29).

A final point of importance is the fact that 'the decision maker has to inform the child of the outcome of the process and explain how her or his views were considered' (CRC Committee, 2009, para. 45). This means that the juvenile defendant should be properly informed about the outcome of the hearing (the judgment and sentence) and about the extent to which the story of the young person has played a role in the decision-

⁴¹ Every professional working with, and for, children should receive training in the application of article 12 CRC in practice, 'including lawyers, judges, police, social workers, community workers, psychologists, caregivers, residential and prison officers, teachers at all levels of the educational system, medical doctors, nurses and other health professionals, civil servants and public officials, asylum officers and traditional leaders' (CRC Committee, 2009, para. 49).

making of the judge. The CRC Committee (2009) states that ‘The feedback is a guarantee that the views of the child are not only heard as a formality, but are taken seriously’ (para. 45).

To conclude this section a final document of importance to this study will be analysed; the guidelines on child-friendly justice, as formulated by the Council of Europe.

2.5.4 The Council of Europe’s guidelines on child-friendly justice

A final, more recently published document of importance to this study contains the (legally non-binding) Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (2010, hereafter referred to as the guidelines on child-friendly justice). In 2007 the European ministers of justice adopted Resolution no. 2 on child-friendly justice which states that European guidelines on child-friendly justice should be prepared (art. 23 (e)).⁴² The ministers of justice also specified that the participation of children ‘(...) is an important element of a modern and fair justice system (...)’ (art. 9) and ‘(...) that the development of a secure and friendly environment for children involved with the justice system, with specially trained persons and efficient procedures (...)’ contributes to a child-friendly justice system (art. 12). The guidelines on child-friendly justice serve the purpose of handing practical tools to the member states of the Council of Europe to adapt their juvenile justice system to the specific rights and needs of children and as a consequence make their procedures in the youth court more child-friendly. Of importance is the fact that in the guidelines on child-friendly justice a definition is given of the term ‘child-friendly justice’. It is stated that:

“Child-friendly justice” refers to justice systems which guarantee the respect and the effective implementation of all children’s rights at the highest attainable level, bearing in mind the principles listed below and giving due consideration to the child’s level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to

⁴² Council of Europe, 28th Conference of the European Ministers of Justice, Lanzarote, 26 October 2007, MJU-28 (2007) Resolution 2E.

understand the proceedings, to respect for private and family life and to integrity and dignity (para. II, c).

In the guidelines several fundamental principles with regard to child-friendly justice procedures are stipulated, which emanate from existing human rights law and standards and the case law of the European Court of Human Rights. Two principles that are named, among other things, are *participation* and the *rule of law*. Every child has the right 'to be informed about their rights, to be given appropriate ways to access justice and to be consulted and heard in proceedings involving or affecting them' (para. III, art. 1). The rule of law principle stresses the importance of due process rights for children involved in the justice system (para. III, art. 1-3).

The guidelines furthermore contain what are called general elements of child-friendly justice. One of these elements is to be informed and given advice from the first involvement with the juvenile justice system and throughout the justice process. Children should for example be informed of their rights, the juvenile justice system and its procedures and different procedural steps that have to be taken, the charges and the court dates. Parents should be informed when charges are brought before the court as well, but giving information to parents should not be an alternative to providing the child with information (para. IV, art. 3, see also CRC Committee, 2007, para. 48). Other general elements of child-friendly justice are that children should be heard in closed court sessions⁴³ and that professionals working with children should be trained in communicating with children from different age groups and that these professionals receive education on children's rights and needs and regarding proceedings that are adapted to children (para. IV, art. 9, 14, 15).

With regard to the principles that concern the judicial proceedings the guidelines state that children should have the right to have their own free legal representation. Moreover, the right of the child to be heard should be respected and the hearing of a child should be adapted to the child's level of understanding. It is stated that 'Children should have a choice of or at least should be consulted on the manner in which they wish to be heard' (para. IV, art. 44). The guidelines on child-friendly justice

⁴³ Interestingly, Van Bueren already noted in 1992 that hearings behind closed doors contribute to child-centred procedures, informality and the reduced stigmatisation of children.

therefore leave the manner in which a juvenile defendant would like to be heard more open than the CRC Committee (2009, para. 35) does, because it is not specified which ways of hearing are available to the child and it assumes that the child is capable of reflecting on this question and responding to it in a well-considered manner. Some doubts can be expressed concerning these assumptions, especially with regard to children who come into contact with the justice system for the first time.

Concerning the right to be heard it is stated that it is of importance to explain the judgment or outcome of the court case to the child and it is stressed that this is of particular importance when the views of the child are not followed in the decision-making (para. IV, art. 49). Whether this is the responsibility of the judge or another professional is left aside. However, it is stated that the lawyer (or legal guardian or legal representative) 'should explain the given decision or judgment to the child in a language adapted to the child's level of understanding' (para. IV, art. 75). The lawyer therefore has an important role in assisting the juvenile defendant after the court hearing has taken place and giving advice on whether to take further steps in the procedure (e.g. an appeal or complaint).

With regard to the organisation of the proceedings it is recommended that children should be dealt with 'in non-intimidating and child-sensitive settings' (para. IV, art. 54), although no further specification of these terms is given. Furthermore, children should be given an explanation of the layout of the court and the roles of the professionals before the youth court hearing starts (para. IV, art. 55). No guidelines are given, however, on who should provide this information to the child. The child's lawyer can play an important role in preparing his client before the hearing (see also chapter 3, section 3.3.2). Judges can play an important role in providing information to the juvenile defendant during the hearing, on the roles of the different parties and on the procedures that will be followed. Furthermore, it is recommended that language should be used that children understand (para. IV, art. 56); that professionals should treat children 'with respect and sensitivity' (para. IV, art. 57); that children should be able to be accompanied by their parents (para. IV, art. 58); and that court sessions are adapted to the 'child's pace and attention span' (para. IV, art. 61). It is recommended that hearings should not last too long, that regular breaks should be scheduled and that

during the hearing distractions should be avoided (para. IV, art. 61). It seems that these recommendations refer mainly to the youth court hearings in adversarial procedural systems, where trials can last for a long time as a result of the oral presentation of evidence and distractions that occur because it is more common especially for lawyers to walk in and out of the courtroom when hearings take place.

In the explanatory memorandum of the guidelines further practical implications of child-friendly procedures are mentioned: '(...) child-friendly court settings may mean that no wigs or gowns or other official uniforms and clothing are worn'. However, it is also added that wearing uniforms (by, for example, a police officer or social worker) can contribute to the child's feeling that he is being taken seriously. The drafters of the guidelines conclude by stating that 'the setting may be relatively formal, but the behaviour of officials should be less formal and, in any case, should be child-friendly' (explanatory memorandum, art. 123).

To conclude, the guidelines state that '(...) specialist courts (or court chambers), procedures and institutions should be established for children in conflict with the law' (para. IV, art. 63). The guidelines on child-friendly justice can best be put in practice in specialised youth courts and by specialist professionals working in these courts. The European Court of Human Rights has also ruled in the case of *S.C.* against the United Kingdom that effective participation can best be attained in specialised youth courts, because only then is it possible to take into account the age and level of maturity of the child (para. 35).

A first observation with regard to the guidelines on child-friendly justice is the fact that these guidelines provide probably one of the most extensive accounts of how child-friendly justice should be defined and substantiated in national juvenile justice systems.⁴⁴ However, it seems that the guidelines are mainly written from the perspective of the adversarial legal tradition. Characteristics such as the wearing of gowns and wigs, extensive court sessions and disruptions and distractions during the court hearing seem to mainly apply to adversarial court procedures. This is remarkable because the guidelines apply to all 47 member states of the

⁴⁴ The General Comments of the CRC Committee have a broader reach: the CRC has 193 states parties, compared to 47 member states of the Council of Europe.

Council of Europe, of which many employ a (juvenile) justice system with inquisitorial characteristics.

Moreover, in this document it remains unclear to some extent which party has to take responsibility for enabling the effective participation of the child. An explanation of the court layout and the roles of the professionals and an explanation of the judgment and the consequences of the outcome of the case are examples of issues that can be dealt with by the lawyer or by the judge, or even the prosecutor. Although it is stated in the preamble that providing practical tools is the purpose of the guidelines, the drafters of the guidelines do not give specific recommendations to the member states of the Council of Europe other than stating that establishing specialised courts with specialised judges and lawyers is recommended. However, compared to General Comment no. 12 a larger role is allocated to lawyers. In the General Comment the decision maker has to prepare and inform the child on the proceedings in which he will be heard. In the guidelines on child-friendly justice more emphasis is placed on the role of lawyers, who are not the final decision makers. They should ‘be capable of communicating with children at their level of understanding’ (para. IV, art. 39) in order to explain the procedures and the judgment made by the judge. The Council of Europe thereby refers to the case law of the ECtHR, which is established by the Council’s Convention, in which an important role is allocated to the lawyer of the defendant in informing him and bringing forth his views to the court.⁴⁵

Conclusion

The premise that the young person has the right to freely express his opinion in all matters affecting him has important implications for the treatment of juvenile defendants throughout the juvenile justice process. On the one hand, effective participation must be seen as part of the right to a fair trial (see also art. 40 (2)(b)(iv) CRC). On the other hand, hearing the views of the young person is vital to the effective treatment of young offenders and to substantiate the goals of juvenile criminal law, namely resocialization and reintegration. In this section further concretisations of

⁴⁵ The Dutch Supreme Court has confirmed this as well, because it has ruled in the case of a minor that the presence of a lawyer presumes that the lawyer informs the juvenile defendant before the hearing about the sanctions that can possibly be imposed (HR 28 August 2012, LJN BX3807, NJ 2012, 506).

the concept of participation have been drawn from case law and children's rights standards.

The European Court of Human Rights has ruled that it is important that juvenile defendants understand what is happening during a court hearing. Effective participation does not only mean that the defendant is present at his own trial, but also that he can understand the general nature of the trial and the consequences it entails for him. In General Comment no. 10 this notion has been further developed. In General Comment no. 12 the right of juvenile defendants to be heard in youth court procedures is further substantiated. The Council of Europe's guidelines on child-friendly justice provide even more directives as to how to enable juvenile defendants to participate to the largest extent possible through adapted procedures employed in specialised courts.

2.6 Conclusion

At the start of the 20th century the legal acknowledgement of human rights for specific groups of people, including children, started to emerge. The first example of international human rights provisions with respect to children can be found in the 1924 Declaration of the Rights of the Child. This declaration was followed by the 1959 Declaration of the Rights of the Child and eventually by the 1989 UN Convention on the Rights of the Child. The CRC is considered to be the most important human rights instrument specifically geared towards children.

Before the adoption of the CRC, the UN Standard Minimum Rules on the Administration of Juvenile Justice (Beijing Rules) were formulated to provide the UN member states with recommendations on the administration of a justice system for minors. With regard to this study the acknowledgement in the Beijing Rules that juvenile justice proceedings should be conducted in an atmosphere of understanding in which juvenile defendants can participate and express their views freely is of significant importance.

With regard to the participation of juvenile defendants in the youth court articles 40 and 12 CRC are the most relevant. Article 40 CRC contains procedural safeguards for juvenile defendants and in article 12 CRC the basis is laid for the participation of juveniles in the youth court,

namely the right to be heard in every decision that affects the child. Juvenile defendants equally have the right to express their views in all matters affecting them and those views have to be taken seriously.

Hearing the child can be seen as a basic requirement for participation in the youth court. Moreover, the case law of the European Court of Human Rights and recommendations made by the CRC Committee indicate that understanding the justice procedures is a second basic requirement for participation. Participation is seen by the Court and the Committee as a requirement for a fair trial (art. 6 ECHR). It can be concluded that in order to achieve the effective participation of juvenile defendants in the youth court specialised courts with adapted procedures and trained professionals should be established. The age and evolving capacities of the child require that the procedures in the youth court should be adapted to his level of maturity.

The binding and non-binding international documents analysed and interpreted in this chapter provide a legal framework for the effective participation of juvenile defendants in the youth court. The exact application of the numerous recommendations, guidelines and case law that have emanated from the CRC is not always clear. The international instruments are deemed to be applicable to a wide variety of juvenile justice systems and are, therefore, to some extent written in general terms. Although individual states' governments are addressed by these instruments, no consensus has been reached on which participant (e.g. the judge, lawyer or prosecutor) plays which particular role in practice in enabling juvenile defendants to participate in the procedures. The concrete application of international children's rights law and standards is left to the discretion of the individual states. As a result, the right to be heard can be interpreted and given shape rather differently throughout Europe.

Chapter 3

A developmental psychological perspective on procedural justice for juvenile defendants

3.1 Introduction

International children's rights law and standards concerning juvenile justice stipulate that juvenile defendants should be heard in decisions that are taken concerning them and that they should be able to understand the juvenile justice process in which they are involved. Taking into account the age and maturity and the evolving capacities of children is highlighted in the CRC (articles 5 and 12) and other children's rights standards. Moreover, guidelines have been formulated with regard to child-friendly procedures and appropriate settings in which to try minors. However, in certain respects these guidelines remain vague and it is at the discretion of individual states how adapted procedures for juvenile defendants are implemented. In this chapter it will first be shown that strong evidence from developmental psychological research indicates that procedures adapted to minors are necessary to take into account the age and maturity of the young person.

The aim of this chapter is to provide an overview of adolescent development, because it is of importance to take this into account when dealing with juveniles in the youth court. However, first, the concept of *procedural justice* will be elaborated upon. From the theorising and empirical research conducted by Tyler (2003, 2006a), general requirements for a fair trial will be deduced (section 3.2). Second, in sections 3.3 and 3.4 it will be explained how the general procedural requirements for a fair trial can be completed, taking into account the cognitive and emotional development of juveniles and their understanding of the juvenile justice process. On the basis of this chapter guidelines will be provided in chapter 4 regarding special courtroom procedures to enable juvenile defendants to effectively participate in the youth court.

3.2 Fair trial and procedural justice

The term procedural justice refers to the perceived fair treatment of persons by the authorities (Greene, Sprott, Madon & Jung, 2010). It concerns the perceived fairness of the procedures and the perceived fairness of the treatment one receives (Murphy & Tyler, 2008). Since the end of the 1980s scholars in this field have found that people are more willing to cooperate with authorities and are more willing to comply with the decisions made by those authorities, when they are treated with trust, fairness, respect and neutrality (Tyler, 2006a).¹

The extent to which people perceive that procedures and their treatment are fair (i.e. procedural justice) influences the acceptance of the decisions made by the authorities and results in a more positive evaluation of the decision maker (Tyler, 2003). Research shows that perceived injustice is to a large extent based on the evaluation of how decisions are made. Regardless of the outcome of the procedure, the decision is perceived as fair when one perceives the treatment as respectful (Tyler, 2009; Tyler & Blader, 2003). Central to the concept of procedural justice is the fact that people are not only concerned with the outcome of a procedure (which should be fair), but even more so with the treatment they receive before the decision is taken (Murphy & Tyler, 2008).

Tyler (2003) has identified several elements in a procedure that people perceive as being fair. These elements are ‘that decision making is viewed as being neutral, consistent, rule-based, and without bias; that people are treated with dignity and respect and their rights are acknowledged; and that they have an opportunity to participate in the situation by explaining their perspective and indicating their views about how problems should be resolved’ (Tyler, 2003, pp. 300-301). Moreover, the degree to which people believe that authorities act with benevolent and caring motives also plays a role in experiencing procedural justice (Tyler, 2006a; see also Fagan & Tyler, 2005).

Procedural justice can be defined in two different ways. First, procedural justice implies that the decision, which is the outcome of the procedure, is fair. In earlier research it was concluded that the decision

¹ Fair treatment by the authorities does not only concern encounters with the justice system, but it also applies, for example, to encounters with the government and in the workplace (Tyler, 2006a; Murphy & Tyler, 2008).

maker must be facilitated in making equitable judgments and equitable outcomes should be achieved. People value fair procedures, because they influence the decision that is eventually taken by the decision maker (Tyler & Blader, 2003). Making decisions in a neutral and unbiased way enhances the *quality of decision-making*. The neutrality of decision-making can be attained by applying rules consistently across situations and persons. Another way of making the decision-making process more neutral is by showing openness and providing explanations. By way of explaining the procedures and decision-making process, it is shown that decisions are reached in a neutral and fair manner. Moreover, when people understand the actions of others they tend to trust those others more. The effect of understanding the procedures and decision-making process reaches even further, because the degree of acceptance of the sentence is higher when a person understands the argumentation behind the imposition of a certain sentence (Tyler, 2003, 2006a).

Second, researchers in the field of procedural justice moved their attention in later studies to the interpersonal aspects of procedures (Tyler & Blader, 2003). If people are particularly concerned with the treatment they receive during the course of decision-making, this implies that the perceived fairness of a procedure is influenced by the social interaction between the persons involved in the procedure. Tyler (2003) has called this the *quality of interpersonal treatment*. Aspects of interpersonal treatment are 'neutrality, lack of bias, honesty, efforts to be fair, politeness and respect for citizens' rights' (Murphy & Tyler, 2008, p. 653). Allowing people to voice their own story and/or opinion can enhance the quality of interpersonal treatment. This is true even when the contribution of the person has no influence on the final decision. A procedure is still seen as being fairer when people can express their views, even when they know that their views have no influence on the decision. However, this is only true when people feel that the decision maker takes their contribution into account, that is when they feel they are being treated with respect (regardless of whether their view is taken into account in the decision that is made) (Tyler & Blader, 2003).

In international human rights law the term fair trial is used and defined as well and several links can be found with procedural justice research. First, in several human rights provisions procedural safeguards are laid down for (minor) defendants to ensure that they receive a fair trial

before an impartial tribunal.² These safeguards ensure that procedures are neutral, consistent and based on rules that are internationally agreed upon. These aspects can be considered to promote procedural justice as well. The European Court of Human Rights has added to this in its case law that understanding the procedure in which one is involved is a fundamental aspect of a fair trial for juveniles.³ As is shown, understanding the procedure contributes to understanding the manner in which the decision is reached and therefore to the perceived fairness of the trial.

In the CRC links with the requirements for a fair trial, as derived from research concerning procedural justice, can be found as well. First, the importance of participating in procedures is laid down in article 12 CRC. As is explained in chapter 2 participation is regarded as a fundamental right of the child and children should be enabled to participate by providing them with adapted procedures and specialised courts. As has been argued before, voicing one's opinion and expressing one's views on a matter contribute to the perceived fairness of the treatment by the authorities. Moreover, article 40 (1) CRC states that the child's sense of dignity and worth should be promoted in juvenile justice proceedings, which can also be seen as contributing to procedural justice.

An important argument that follows from research findings concerning procedural justice is that it leads to viewing the justice system as more legitimate and this, in turn, influences compliance and the cooperative behaviour of people (Fagan & Tyler, 2005; Tyler, 2009). Researchers have found that people who feel that they have been treated fairly are more inclined to accept the decision and to defer to it (Jackson, Bradford, Hough, Myhill, Quinton & Tyler, 2012; Murphy & Tyler, 2008). When, for example, a judge acts in a way that is perceived to be fair, this increases the probability that his decision will be accepted, which increases the effect of the decision in question on the person's behaviour (Tyler, 2003, 2006b).

So far, the described outcomes of research concerning procedural justice only concern adults. Fagan and Tyler (2005) have argued that legal socialisation is an important part of adolescent development and that experiences with the justice system shape this development. However,

² See arts. 10 and 11 UDHR, art. 14 ICCPR, art. 6 ECHR and art. 40 CRC.

³ ECHR, 15 June 2004, Appl. no. 60958/00 (Case of *S.C. v. the United Kingdom*).

they note that little if any knowledge is available about children's evaluations of the fairness of the law and how these evaluations might 'change over time as experiences accumulate' (Fagan & Tyler, 2005, p. 222). Fagan and Tyler (2005, p. 236) have replicated earlier studies among adults concerning procedural justice with a sample of children (aged 10 – 16) in the community and conclude: 'Like adults, adolescent views about the legitimacy of authority are influenced by procedural justice judgments about their own and others' experiences with the police'. Piquero, Fagan, Mulvey, Steinberg and Odgers (2005) have found a similar result among adjudicated adolescents (aged 14 – 18). Young people who experience police and court procedures as more just are more likely to see the justice system as legitimate. It is therefore concluded that 'situational experiences with criminal justice personnel influence more general attitudes about the law and legal system' (Piquero et al., 2005, p. 296). More recently, Sprott and Greene (2010) have replicated the study of Piquero and colleagues (2005) and they also conclude that being treated with respect and honesty, being listened to by professionals in court and being satisfied with the outcome of the case are predictors of viewing the justice system as legitimate (Sprott & Greene, 2010). Tyler (2003, p. 301) states however that there is not 'a single procedure that is universally regarded as fair'. People's views regarding the fairness of procedures vary across different types of procedures and different types of problems that have to be solved.

The above sketched requirements for a fair trial derived from the concept of procedural justice, such as neutrality, being treated with respect and being able to participate in a procedure, are not only of importance for *juvenile* defendants, but for people who come into contact with the justice system in general. Melton (1989, p. 169) notes that 'the appearance of fairness is at least as important in juvenile court as in other legal contexts'. So, the question can be posed if and to what extent these requirements must be adapted and/or completed to respond to the needs of juvenile defendants. Research by Kilkelly (2010) indicates that juveniles who are involved in the justice system do not always feel respected and heard by adults. Moreover, they often have little faith in the authorities and mistrust these authorities because they feel as though they are not respected and their special needs are not taken into consideration. Although the requirements for a fair trial are equally important for adults

and juveniles, the latter are in general less empowered to voice their own opinions before an authority. Moreover, juveniles lack experience in interacting with authorities.

In the following sections, by presenting developmental psychological research findings, it will be shown that juveniles' cognitive and emotional development is not yet complete. This indicates that special attention should be paid to their understanding of the juvenile justice process as a whole, the actual procedures in court and their role therein. Several children's rights instruments also point to the fact that the age and maturity of children must be acknowledged when taking decisions in their regard. The age and maturity of a young person require adapted courtroom procedures, in order for him to understand what is happening and to participate effectively. It is expected that a better understanding and increased participation lead subsequently to the feeling of being treated in a fair manner and to accepting the final decision.

3.3 The importance of procedural justice from a developmental psychological perspective

Over the past 10 years an interesting, new perspective has emerged in the field of children's rights (in juvenile justice). Besides a children's rights perspective, a developmental psychology perspective has gained importance in this field. A wealth of studies have recently been published not only on the cognitive and emotional development of adolescents in general, but also specifically on juveniles' competence to participate in youth court procedures. Research following this perspective has yielded interesting findings and new insights into the notion of the effective participation of juvenile defendants in the youth court. This trend is marked by key publications such as *Youth on Trial* (Grisso & Schwartz, 2000) and *Rethinking Juvenile Justice* (Scott & Steinberg, 2008). In the following sections the cognitive development (section 3.3.1) and the emotional development (section 3.3.2) in adolescence will be outlined and its implications for juveniles' understanding of youth court procedures will be discussed in section 3.4.

3.3.1 Cognitive development

During adolescence several normative developmental changes occur that distinguish adolescents from children and from adults. Physically children change dramatically during puberty (Steinberg & Schwartz, 2000). They experience a growth spurt in height and weight, up until they are 16 to 18 years of age. Furthermore, during adolescence muscle mass and lung volume increase and the weight of bones continues to grow until a person is around 23 years old. The grey matter in the brain develops earlier; the brain experiences a growth spurt until 14 to 15 years of age (Dorelijers & Fokkens, 2010). Adolescents undergo a marked change in appearance, because of these physical developments. The timing and tempo of these developmental changes differs, however, between individuals. Puberty can start as early as nine, but others have not completed all the physical changes by 16. Therefore, young people who share the same chronological age can differ markedly in their physical appearance. Moreover, when an adolescent has a full-grown physical appearance, expectations can arise concerning his intellectual and emotional abilities. However, no relationship exists between the timing of puberty and the intellectual and emotional development of adolescents (Steinberg & Schwartz, 2000).

During adolescence the intellectual abilities of young people develop markedly as well. Adolescents are able to think in more advanced, abstract, efficient and effective ways. Intellectually they have higher aspirations and search for challenges and their thinking is more advanced than that of children (Steinberg, 1999; Steinberg & Schwartz, 2000). Research shows that logical reasoning skills gradually increase between the ages of 11 and 16. The formal intellectual abilities of a person do not notably increase after his 16th or 17th birthday. Before the age of 16 the intellectual abilities of an adolescent are similar to those of a child and do not yet resemble the abilities of adults. Although the formal intellectual abilities do not notably change after the age of 16, the reasoning skills of adolescents do not yet function at the same level as those of adults. Adolescents have less life experience and therefore have less knowledge to draw on when taking decisions. Besides, adolescents differ in their ability to make judgments, as a consequence of less matured emotional and social skills (Scott & Steinberg, 2008; Steinberg & Schwartz, 2000).

In adolescence formal operational thinking skills develop markedly. Typical for young people in early adolescence is the fact that they start to think in more abstract ways about all sorts of problems. From approximately their 12th birthday young people acquire the ability to reflect on more abstract cases. Matters such as poverty, justice, fairness and love attract much attention from young adolescents around the age of 12. Step by step they start to reflect on relationships and on themselves as persons with a past, present and future. They also start to think experimentally and are fascinated by hypothetical thoughts; (endlessly) considering all sorts of possibilities and solutions to a problem. Abstract thinking develops gradually over the course of adolescence until around the age of 17 or 18 when this ability no longer notably improves (Delfos, 2005; Steinberg, 1999; Steinberg & Cauffman, 1996).

Adolescent development also involves such characteristics as idealism, expressed by an increasing sense of justice. Adolescents can be very passionate about reaching certain athletic, scholarly or political goals (Steinberg, 2011). As a downside, feelings of idealism can cause a lack of realism, more rigid views, a lack of flexibility and more difficulty in putting things into perspective (Delfos, 2005).

As is shown the cognitive capacities of adolescents grow markedly and by mid-adolescence these formal capacities resemble those of adults (at least as is shown in laboratory studies in the Western world) (Lansdown, 2005; Steinberg & Scott, 2003). The manner in which adolescents reach decisions differs, however, from adult decision-making. This is due to the psychosocial immaturity of adolescents. Research indicates that the psychosocial development takes place more slowly than the cognitive development. The psychosocial immaturity of adolescents influences the manner in which decisions are taken (which differs from adults who are fully matured). This contributes to the not fully matured decision-making of adolescents (i.e. the maturity of judgment), although formally their cognitive capacities are matured (Scott & Steinberg, 2008; Steinberg & Scott, 2003).

To act without thinking about the consequences of one's behaviour is typical for adolescents. Adolescents' development of maturity of judgment is of significant importance with regard to this study. Immaturity of judgment implies that procedures have to be adapted to the cognitive level of maturity of juveniles, in order to enable them to

understand and participate in the justice process. As was explained in the previous section, this in turn will lead to an increased feeling of being treated in a fair manner by the authorities. In the following, two psychosocial factors will be outlined that can explain the lacking maturity of judgment in adolescence: risk proneness and peer pressure.

Risk proneness

A first characteristic of adolescence is that young people engage much more than adults in risky behaviour. Adolescents are more prone to risk-taking behaviour, such as drug use, violence, risky sexual behaviour and risk taking while engaging in road traffic (Steinberg, 1999). Typical for young adolescents is their tendency to underestimate risks and to do things they generally know are wrong. Especially when the young person finds himself in an exciting situation and experiences peer pressure, his ability to assess the situation diminishes (Steinberg & Cauffman, 1996). Gardner and Steinberg (2005) demonstrated in their research that especially males weigh the benefits of risky behaviour over the costs thereof. This is connected to adolescents' lacking ability to reflect on the future and to see things in a long-term perspective (Cauffman & Steinberg, 2000). The capacity to oversee the short and long-term consequences of behaviour increases gradually between childhood and young adulthood (Steinberg & Cauffman, 1996).

On the one hand, substantial research evidence suggests that adolescents do not take more risks because they do not perceive the risks, but that young people invariably underestimate the risks attached to certain behaviour, particularly the long-term risks. Older adolescents are better able to assess risks and to look ahead to see the likely consequences of different behavioural choices (Greene, Krmar, Walters, Rubin & Hale, 2000; Schmidt, Reppucci & Woolard, 2003; Steinberg & Cauffman, 1996; Steinberg & Scott, 2003). Adolescents are usually much more willing to take risks, because of the excitement and new experiences the risky behaviour brings with it. Moreover, it is suggested that sensation seeking is higher during adolescence (Steinberg, 1999). As a consequence, adolescents consider the negative effects of their behaviour to a much lesser extent or underestimate the negative consequences of their acts. Adolescents attach less weight to the negative effects of their behaviour, but they also attach less weight to the long-term consequences of

particular behaviour. The short-term consequences are of more importance in reaching a decision than the long-term consequences of certain acts (Scott & Steinberg, 2008). In other words, adolescents attach different weight to the perceived consequences of their behaviour and they value the rewards of risk-taking behaviour higher than adults do (Benthin, Slovic & Severson 1993; Scott & Steinberg, 2008; Steinberg & Cauffman, 1996).

On the other hand, adolescents display more egocentrism. Adolescents assume that others think about the same things or think about those things in the same way as they do and that their behaviour is the focus of attention of everyone else as well. This has been called *imaginary audience* by Elkind (1967). Research results suggest that egocentrism can have as a result that adolescents lack the recognition that a decision has to be taken on how to act in certain situations and that they fail to recognise risks. This is called non-deliberative risk-taking. Adolescents can be blinded by their feelings of uniqueness and invulnerability, as a result of which they judge situations differently from adults and do not perceive them as risky situations (Greene et al., 2000). Elkind (1967) called the belief that one's experiences are unique *personal fable*.

Several more arguments have been fashioned to explain the more risk proneness of adolescents. One of these arguments considers the lack of impulse control that adolescents display (Steinberg & Cauffman, 1996). Up until the age of 30 impulsivity gradually declines. Sensation seeking increases between the ages of 10 and 15 (Steinberg, 2011). Results emanating from brain research are of importance in explaining the incompletely developed impulse control of adolescents. When puberty starts crucial changes take place in the human brain. Particularly the development of the prefrontal cortex, which is responsible for the executive control functions, continues well into adulthood (Spear, 2000; Steinberg, 2011). Research outcomes suggest that impulsivity is stable during childhood and mid-adolescence, increases between the ages of 16 and 19, and declines thereafter. The slowly maturing frontal cortical brain has long been seen as an explanation for the dangerous and impulsive behaviour adolescents tend to display to a larger extent, compared to children and adults. However, few studies have shown the specific hormonal changes in puberty that influence the tendency of adolescents towards sensation seeking. Most recently, it has been argued that the

relationship between changes in the brain and risk taking is mediated by social factors, such as acquiring social status and peer admiration (Crone & Dahl, 2012). Therefore, hormonal and physiological changes taking place in the second half of adolescence partly explain the inadequate impulse control and the lack of systemic behaviour among adolescents and young adults (Steinberg & Cauffman, 1996; Steinberg & Scott, 2003).⁴

Another argument to explain the risk-taking behaviour of adolescents is related to the extent to which adolescents possess knowledge from which they can make mature judgments. Adolescents lack life experience and therefore lack wisdom-related knowledge and judgment (Steinberg & Scott, 2003). Research shows, however, that wisdom increases significantly in adolescence and develops to adult levels in early adulthood (the early 20s). This may have to do with the fact that in adolescence complex reasoning skills, planning, decision-making and judgment skills mature (Pasupathi, Staudinger & Baltes, 2001). These explanations for risk-taking behaviour can be considered as stemming from the developmental perspective on risk-taking.⁵ From this perspective, risk-taking is seen as being a result of developmental immaturity, which leads to errors in judgment when decisions are taken (Greene et al., 2000).

Peer pressure

A second characteristic of adolescent development is susceptibility to peer pressure. In adolescence people show an increased interest in socialising with their peers (Steinberg, 2011).⁶ Moreover, compared to young children and adults, adolescents are more vulnerable to the pressure exerted by the peer group (Steinberg & Scott, 2003). Acceptance from peers is of great importance for adolescents (Crone & Dahl, 2012). Although parents still influence the decision-making of their children, they have an influence on different subjects in life compared to peers.

⁴ However, research indicates that a link exists between anger and delinquency only when levels of impulsivity are high (Eisenberg, 2000). This indicates that a lower level of impulse control – as a characteristic of adolescence – does not automatically lead to delinquent behaviour.

⁵ The other perspectives on risk-taking which Greene and colleagues (2000) describe are risk-taking as a personality characteristic and risk-taking as learned behaviour.

⁶ It is thought that socialising with peers might be adaptive because it helps to develop social skills, skills people will need as adults and it helps to prepare the individual to live without protection from his parents (Steinberg, 2011).

Peers exert more influence on daily matters, such as one's taste in clothing, music, mobile phones, etc. Parents have more influence on issues that have a deeper impact on the life of the young person, such as educational and occupational choices and religion (Steinberg, 1999). From around the age of 8 children aim more at associating with peers instead of making contact with adults. During this period in life, making friends is of crucial importance to children and there seems to be little motivation to associate with adults (Delfos, 2004). Susceptibility to peer pressure peaks around the age of 14 and declines thereafter. This implies that sometime between the ages of 12 and 16 peer pressure is highest and it declines gradually thereafter (Scott & Steinberg, 2008; Steinberg & Cauffman, 1996).

Conformity to peers is at its highest during early and mid-adolescence and declines thereafter. Research shows that this is especially true with regard to antisocial behaviour and for boys (Steinberg, 1999). In early adolescence, peer pressure blocks adolescents' recently acquired ability (and interest) in hypothetical reflection. Typical for the majority of juvenile offenders,⁷ especially when they commit offences together with peers,⁸ is their lack of reflection on what their behaviour means to others (Cauffman & Steinberg, 2000). Between childhood and adolescence egocentrism gradually declines in individuals. In early adolescence individuals are more egocentric than in late adolescence. In late adolescence the level of egocentrism is not believed to be significantly different from that of adults (Steinberg & Cauffman, 1996). Feelings of specialness and uniqueness which adolescents experience stem from their newly acquired ability to think about their own thoughts and the fascination with their own thoughts. As was shown before, adolescents generally feel invulnerable and as a result they construct *personal fables* such as that they will never be caught by the police (Elkind, 1967). This fascination with themselves has as another consequence that adolescents assume that others must be thinking in the same way as they do. Therefore, adolescents are to a lesser extent able to differentiate between their own

⁷ See Moffitt (1993) on the distinction between adolescent-limited and life-course persistent delinquency. The first being delinquency that is highly prevalent during adolescence and taking place as a social phenomenon amongst groups of peers. The second being delinquency as a form of psychopathology that is not limited to adolescence, but occurs across one's lifespan.

⁸ The majority of young people display delinquent behaviour together with one or more others, whereas adults usually commit crimes alone (Erickson & Jensen, 1977 in Gardner & Steinberg, 2005; Zimring, 1998).

preferences and those of others and are not yet able to understand the consequences of their behaviour for others, as opposed to how they perceive those consequences (Greene et al., 2000).

Peer pressure can also be related to risk-taking behaviour. Adolescents are more likely, when in the presence of peers, to take risks and to make risky decisions than children and adults (Steinberg, 2011). Research shows that psychosocial skills that enable individuals to resist pressure from their peers continue to develop throughout late adolescence and into early adulthood. It has been suggested that the fact that adolescents take more risks in groups of peers is due to the fact that adolescents simply spend more time with their peers, compared to adults. When being more in the company of peers, more pressure is exerted on adolescents to conform to the behaviour of those peers and as a consequence more delinquent behaviour is displayed (even when friends are not delinquents themselves) (Haynie & Osgood, 2005; Steinberg & Scott, 2003). However, from research results regarding the intellectual and emotional development of individuals it can be concluded that the tendency to take risks is not only a consequence of spending more time with friends, but is also a consequence of the inability to resist peer pressure and the sensitivity to rewards such as peer approval (Gardner & Steinberg, 2005; Steinberg, 2011).

Indirect peer pressure arises from the approval adolescents desire from their peers. The fear of rejection and the desire for approval influence the decisions adolescents take in the company of peers. The cost of disapproval weighs heavily in the experience of adolescents and therefore has a substantial influence on their behaviour (Scott & Steinberg, 2008). Warr shows in his book *Companions of crime* (2002) that one of the mechanisms influencing adolescent behaviour is the fear of ridicule.⁹ Adolescents conform to their peers' behaviour in order to avoid ridicule and rejection. According to Warr (2002) the proneness to conformity with peers stems from the development of a coherent identity in adolescence. Conformity to peers leads to the avoidance of rejection by peers and a higher status among peers and this in turn shapes the identity of the young person (see for more concerning identity development section 3.3.2).

⁹ The other two mechanisms influencing adolescent behaviour are loyalty to friends and acquiring status in the peer group (Warr, 2002).

3.3.2 Emotional development

As was explained in the previous section, adolescents often do not oversee the consequences of their acts. Egocentrism is one of the aspects that influence the ability to look ahead and to put oneself in someone else's position. There are, however, other aspects of emotional development that contribute to explaining adolescents' typical behaviour.

During adolescence changes occur in the manner in which individuals look at themselves. Children and young adolescents have difficulties in reflecting on their own personality and explaining their choices and behaviour. Adolescents are increasingly able to take the perspective of others into account. Other-oriented thoughts become more dominant, compared to self-oriented thoughts that are dominant in childhood and early adolescence (Crone & Dahl, 2012). Although adolescents experience peer pressure and fear being rejected by peers, research suggests that the level of self-esteem remains fairly stable from the age of 13 onwards. Self-esteem even increases from middle to late adolescence and even into young adulthood. This development does not differ between delinquent and non-delinquent youths. The most marked fluctuations in self-esteem and the most intense feelings of self-consciousness occur in early adolescence and these feelings are consolidated in the second half of adolescence (Steinberg & Cauffman, 1996; Steinberg & Schwartz, 2000).

Moreover, adolescents can experience more fluctuating mood states; emotional states can be more extreme, more variable and less predictable. Volatility of mood (i.e. mood swings or moodiness) is considered to be a characteristic of adolescence. Adolescents report more extremes in both positive and negative emotional states (Steinberg & Scott, 2003). Research suggests that a positive mood can increase risk-taking behaviour, but only up to a certain extent. When risks are low, they are taken more easily when in a positive mood. But when risks are perceived to be high, individuals do not want to have their good mood destroyed by taking risks and tend to be more conservative in decision-making (Steinberg & Cauffman, 1996). When negative emotionality is part of the temperament of a child, it is associated with higher levels of aggression and externalising problems. Besides, these children tend to deal less constructively with perceived feelings of anger. Anger, in

combination with lower levels of impulse control, can lead to delinquent behaviour (Eisenberg, 2000)

Autonomy and identity development

An important developmental task in adolescence is establishing a sense of autonomy or independence (Steinberg & Schwartz, 2000). During childhood the attachment to parents and the approval of parents mainly guide the behaviour of children. Until the age of 10 or 11 children would like to please parents and other adults with their behaviour. In early adolescence individuals start to oppose their parents actively and start to seek separation from parents. They start to individuate from their parents. The emerging sense of autonomy is expressed by opposing the wishes and advice of parents and other adults, as a way of proving their independence. The decisions adolescents take are not taken reasonably, but are the opposite consequence of their parents' wishes. They may even value the opinion of parents, but the tendency to show and prove their new status can be stronger than the tendency to obey to the wishes of their parents. This may involve engaging in risky behaviour and a stronger orientation towards peers (as is shown in section 3.2.1).

Emotional autonomy increases throughout adolescence and is certainly not finished halfway through adolescence. Adolescents are directed at their peers and distance themselves from their parents. By late adolescence the process of individuation is largely accomplished and adolescents are more autonomous from both parents and peers (Scott & Steinberg, 2008; Steinberg & Cauffman, 1996; Steinberg & Schwartz, 2000). During adolescence individuals also develop a greater self-awareness and they are increasingly able to have more reciprocal interpersonal relationships with others. Regarding ego functioning research suggests that most adolescents function at the same level as the majority of adults when they have reached the age of 17. Egocentrism gradually decreases and as a result adolescents are better able to see the (long-term) consequences of their behaviour for themselves and for others (Steinberg & Cauffman, 1996).

Identity development takes place later in adolescence, during the late teens and early twenties. Whereas self-esteem is a more stable aspect of the emotional development, a coherent self-image and identity do not arise until the end of adolescence. Adolescents, who have reached a sense

of identity, show more ability in moral reasoning, show more reflectiveness and are better able to make deliberate choices concerning their educational or occupational career. Adolescents who are still in the midst of their identity development have more conflicts with respect to issues of authority and show higher levels of anxiety (Steinberg & Cauffman, 1996; Steinberg & Schwartz, 2000). This may have to do with the fact that identity development involves exploratory and experimental behaviour. Experimentation, as part of the normal identity development, often involves risk-taking, such as delinquent or unlawful behaviour (Steinberg & Scott, 2003). This period of experimentation passes when the individuals' identity becomes more settled, so this delinquent behaviour is in the case of most adolescents of a passing nature. Therefore, problem behaviour in adolescence is a weak predictor of persistent problematic and/or criminal behaviour in adulthood (Scott & Steinberg, 2008; Steinberg & Scott, 2003).

This argument can be underlined by research conducted by Moffitt (1993), who concludes that delinquent behaviour in adolescence is normal, flexible and adaptable (rather than abnormal, rigid and stable). The majority of adolescent delinquents fall within Moffitt's (1993) adolescent-limited delinquency category, whereas only a small minority of adolescents display persistent antisocial and delinquent behaviour throughout their lifespan. For this study this implies that for most young people who have to appear in the youth court, delinquent behaviour is a one-off incident and not a persistent way of life. This may have consequences for the way in which juvenile defendants are treated in the youth court by the judge and other professionals, because most juvenile defendants age out of delinquent behaviour and do not display severe personality disorders (Moffitt, 1993; see also Steinberg & Scott, 2003).

Empathy

As has been shown, skills associated with a developed sense of identity are the ability to form interpersonal relationships, to reflect on one's own behaviour and to be able to morally reason on a higher level. These skills are also associated with the ability to take perspective. Perspective taking gradually increases until the age of 16. After 16 variations in perspective taking are most probably due to individual differences, such as intelligence and the level of education, and are not the result of

developmental changes. Perspective taking enables the young person to understand how decisions or actions are viewed by other persons, even if that is not the persons' own view (Steinberg & Cauffman, 1996).

Perspective taking is closely related to being able to have feelings of empathy towards others. Eisenberg (2000, p. 671) has defined empathy as 'an affective response that stems from the apprehension or comprehension of another's emotional state or condition and is similar to what the other person is feeling or would be expected to feel'. A completed sense of empathy is the result of emotional as well as cognitive processes. On the one hand, the emotional state of another person has to be understood by the adolescent. On the other hand, the adolescent must be able to share in the emotional state of the other (Jolliffe & Farrington, 2004). According to Eisenberg (2000) empathic feelings generally turn into sympathy, personal distress or a combination of both. Sympathy consists of feelings of sorrow or concern for the other, because one understands the emotional state the other is in, but is not the same as feeling the same way as the other. Personal distress is a 'self-focused, aversive, affective reaction' when understanding the other's emotional state (Eisenberg, 2000, p. 672). Sympathy is viewed as a moral emotion inducing altruism in people. Personal distress is viewed as inducing egoistically motivated behaviour to alleviate one's own negative emotional state (Eisenberg, 2000). To be able to share in the feelings of others, the adolescent must be able to adequately regulate his own emotions. Empirical findings suggest that when people are better able to regulate their emotions, they are more likely to experience sympathy rather than personal distress (Eisenberg, 2000).

The extent to which people can feel and show empathy is thought to vary between individuals and is, therefore, viewed as a trait that differs among individuals. Moreover, it is believed that empathy has an influence on individual behaviour. Persons with higher levels of empathy (i.e. sympathy and not personal distress) act in more responsive ways to the feelings of others (Jolliffe & Farrington, 2004). A well-developed ability to put oneself in someone else's position relates to a series of prosocial behaviours. This prosocial behaviour is other-oriented, such as sharing behaviour. Empathy incites prosocial behaviour even when one has not caused the distress of the other person. Furthermore, a normally developed sense of empathy withholds people from antisocial and

aggressive behaviour. The ability to sympathise with the fear and the sorrow of others is associated with low levels of externalizing problems (such as destructive, harmful and delinquent behaviour) in adolescence. Personal distress is, however, negatively related or unrelated to prosocial behaviour (Eisenberg, 2000). Young people who persistently commit crimes – mainly crimes that cause personal injury and harm – appear to have less well-developed empathic abilities. Empathy prevents people from committing crimes, because it is against the nature of the empathic/sympathetic person to cause harm or to violate other persons. Empathy decreases the probability of certain types of criminal behaviour, while a lack of empathy is assumed to have a facilitating influence on offending (Jolliffe & Farrington, 2004).¹⁰

Guilt and shame

Emotions which are related to empathy are feelings of guilt and shame. These feelings develop when children are around three years old, when they are able to recognise the self from other people (Eisenberg, 2000). In our everyday speaking usually no distinction is made between the notions of *guilt* and *shame*, and both terms are often used as synonyms (Eisenberg, 2000). However, both types of emotions function in very distinct ways and have remarkably distinct effects, especially on young people. Moreover, adolescents can experience feelings of shame very easily in daily life (Reimer, 1996). Guilt and shame are considered to be self-conscious emotions, because in order to be able to experience these emotions a person must be able to understand and evaluate the self.¹¹ However, the degree of focus on the self differs between the two emotions (Eisenberg, 2000).

The experience of shame always applies to *who we are*, whereas feelings of guilt apply to *what we have done*. Guilt usually refers to regret

¹⁰ Although the extent to which individuals display feelings of empathy differs, research suggests that parents can have an influence on the development of empathy. Parents who show high levels of sympathy and low levels of hostility and those who help their children to cope with negative emotions and let their children express these emotions without harming others have children who develop higher levels of sympathy (Eisenberg, 2000).

¹¹ Embarrassment is also considered a self-conscious emotion, although research indicates that this emotion is less negative, less serious and more fleeting compared to guilt and shame. Moreover, embarrassment is less related to moral implications and transgressions and to making amends, because it tends to involve surprising and accidental events and people feel less responsible for the embarrassing act (Eisenberg, 2000).

over things that a person has done wrong. Feelings of guilt do not threaten the person's core identity, because it allows the guilty person to distinguish between the morally wrong act and the generally worthy self (Moore, 1993). Guilt is associated with a particular act and not so much with the self and induces feelings of tension, remorse and regret (Eisenberg, 2000). The main advantage of addressing adolescents' feelings of guilt, compared to paying attention to feelings of shame, is the fact that feelings of guilt appeal much more to what has been done wrong, to the consequences for others, to feelings of empathy and remorse and to possibilities to restore what have been done wrong (Weijers, 2000). Feelings of guilt result from thinking that one has been involved in causing a moral wrong. From this point of view guilt can be seen as an adaptive response when a person has caused harm to someone else, because it incites people to restore the harm they have caused. Besides, guilt results from feelings of empathy towards the victim and to relief in that with the feeling of guilt a person can make up for what he has done (i.e. to pay off the guilt) (Olthof, 2002). When a person accepts that he has done something wrong, that he is guilty of the act, he accepts to take responsibility for the harm done (Taylor, 2002). Guilt, therefore, seems to motivate people to confess what has been done wrong, to apologise and to provide for restitution (Eisenberg, 2000). This can be important points of departure for a dialogue during a youth court hearing between the judge and the juvenile defendant.

Feelings of shame apply directly to our own identity and make people feel that they are not able to do anything right. When a person experiences feelings of shame, he feels that nothing can make up for the unfortunate deed. The ashamed person only wants to hide and be no longer seen by the critical eyes of others and so to be protected from them (Taylor, 2002).¹² Children often experience feelings of shame and guilt at the same time and both feelings can induce emotions such as fear, hostility, anxiety and sadness in children and adults (Eisenberg, 2000).

Compared to what is often thought about shame, appeals to feelings of shame mostly have a counterproductive effect. Experiencing

¹² Braithwaite (2000) states that all societies use forms of shaming in either stigmatising or reintegrative ways. By contrast, Braithwaite (2000) states that shame prevents us from committing serious offences because we do not like to be confronted with feelings of shame generated by our loved ones. We care about the opinion of people who are close to us and therefore we do not continue to commit crimes after being ashamed by them.

shame has a totalising effect on people and is more painful and intense than experiencing guilt (Eisenberg, 2000; Weijers, 2000). Shame always applies to a person's identity and this makes it very difficult to define the problem and to keep the problem manageable, without casting doubt on one's own identity. Shame evokes images such as 'wanting to sink through the floor' and 'wanting to be somewhere else' and blaming others for the wrongdoing (Reimer, 1996). By blaming others the ashamed person regains a feeling of control. The other has done something wrong and is the object of anger, which gives the ashamed person more control over the situation. Feelings of shame are hardly ever accompanied by a motivation to change, but more often by feelings of anger and aggression. Therefore, shame, more so than guilt, is often associated with externalising problems and (in)direct and displaced aggression (Reimer, 1996; Tangney, Wagner & Gramzow, 1992 in Eisenberg, 2000).¹³ Moreover, research indicates that feelings of anger and other negative emotions (e.g. sadness) are linked with the perception of injustice and immorality. Feelings of injustice, on the other hand, also elicit anger, reinforcing the potentially existing feelings of anger (Eisenberg, 2000).¹⁴

As is the case with empathy, shame can be experienced more easily and/or more frequently as a result of maladaptive rearing practices. Shame is namely associated with negative parenting, such as parental anger, the absence of discipline and parental induction, love withdrawal, power assertion and not responding positively to the child's appropriate behaviour (Eisenberg, 2000).

Conclusion

As has been shown in this section, young people mature significantly during adolescence, both cognitively and emotionally. However, the increasing cognitive abilities are hampered by typical characteristics of adolescent development. This means that adolescents' understanding of situations and their ability to make mature judgments is by far on the same level as the understanding of an average adult. Adolescents consistently

¹³ Direct and pervasive experiences of shame are also associated with other psychopathological problems such as negative evaluations of the self, feelings of hopelessness, decreases in self-esteem and depression (Reimer, 1996).

¹⁴ When a person's emotion regulation is well developed it is assumed, however, that negative emotionality has less negative effects on behaviour and therefore feelings of injustice and immorality are less easily experienced (Eisenberg, 2000) (see also chapter 4, section 4.2.1).

underestimate risks, they are more susceptible to peer pressure and they do not take into account the long-term consequences of their behaviour.

The emotional development in adolescence entails several developmental changes. Important developmental tasks are establishing a sense of autonomy and developing a coherent self-image and identity. Emotional autonomy and a sense of identity are only completed at the end of adolescence or in early adulthood.

In the following section the implications of the immaturity – both cognitively and emotionally – of adolescents will be outlined with regard to their understanding of the juvenile justice process, i.e. the adjudicative capacities of juvenile defendants. Subsequently, the role lawyers and parents can play in assisting the young person in understanding the procedures and participating in the process will be considered.

3.4 Understanding the juvenile justice process

Before the turn of this century little attention was paid to the capacities of adolescents as defendants in court (Scott & Steinberg, 2008). Since then, the capacity of juveniles to participate in the court process has, however, gained more attention from legal and clinical professionals and in scientific research. This capacity of juveniles is associated with the idea that certain rights must assure fundamental procedural justice for juvenile defendants. These rights ensure that defendants possess the capacity to defend themselves; the nature of the proceedings must be understood by the defendant, he must be able to assist counsel in his defence and make decisions regarding issues he encounters during the criminal process. In short, defendants should have the capacity to defend themselves in order to be prosecuted and convicted by the state (Grisso & Schwartz, 2000). To be able to defend oneself in court is closely related to concepts such as neutrality and impartiality and being able to participate in court; i.e. elements which contribute to procedural justice.

Juveniles' capacity to defend themselves depends on the developmental stage they find themselves in: their emerging cognitive and emotional capacities influence their maturity of judgment, their understanding of the criminal proceedings and their ability to assist counsel. As was shown in the previous section, adolescents are not fully

mature and therefore they can be considered to be less culpable compared to adult offenders. Steinberg and Scott (2003) argue that this justifies more lenient punishment for adolescent offenders. In this section it will be argued that the immaturity of adolescents (and therewith their mitigated culpability) has as a consequence as well that they are less competent to stand trial. This does not only justify more lenient punishments, but also special procedures to be followed in court in order to ensure procedural justice for juveniles.

3.4.1 *Adjudicative capacities of juvenile defendants*

As was shown in chapter 2 juvenile defendants are provided at least the same rights and protection as adults in the justice system, in order to guarantee a fair trial. Moreover, defendants have to be *competent* to be brought before a court for adjudication. The legal concept of competence to stand trial (or the capacity to defend oneself as described above) is defined in the USA as a ‘sufficient ability to consult with his attorney with a reasonable degree of rational understanding as well as factual understanding of the proceedings against him’.¹⁵ In other words, the defendant must have sufficient ability to understand and to recognise the importance of criminal proceedings and the defendant must be able to assist his lawyer in his defence (Bonnie & Grisso, 2000; Grisso, 2000). The concept of competence to stand trial is further substantiated by the fact that states that have ratified the CRC must establish a minimum age of criminal responsibility (art. 40 (3)(a) CRC). Below this minimum age children are not deemed to be sufficiently competent to participate in and understand juvenile justice proceedings. Furthermore, the CRC Committee (2007) states that when a juvenile is brought before a court because he has allegedly committed an offence, he should also be capable of participating in criminal proceedings. When the young person is not capable of participating in and understanding the proceedings, he should not be criminally charged and prosecuted (para. 46).

According to Bonnie and Grisso (2000) two abilities are required to be competent to stand trial: the *competence to assist counsel* and *decisional competence*. The first ability – competence to assist counsel – includes the fact that the defendant understands the charges, recognises

¹⁵ U.S. Supreme Court, 18 April 1960, 362 U.S. 402 (Case of Dusky v. United States).

that he is a defendant in a criminal process and gives all the relevant information concerning the case to his lawyer. In short, this term refers to the competence of adolescents to understand the meaning of the criminal procedure and to participate therein with the assistance of a lawyer. The second ability – decisional competence – includes the fact that the defendant understands the information that is provided in order to reach a decision, recognising his position as a defendant confronted with certain legal decisions and that he can suggest alternative decisions and choose between alternatives. The defendant must engage in cognitive and judgment processes in order to reach these decisions (Bonnie & Grisso, 2000; Grisso, 2000).

Grisso (2000) notes that notwithstanding the competence to stand trial (which is in effect a juridical decision to be made in court) juveniles can differ markedly in their individual ability to participate in their defence during the criminal process. This has been termed ‘effective participation’ by Grisso (2000, p. 141). This term refers to juveniles’ capacities to contribute to one’s defence and, moreover, the criminal process. Central to effective participation is the juveniles’ understanding of the nature of the criminal proceedings, the roles of the individuals who play a part in the process and their own rights (Buss, 2000). Effective participation can therefore be seen as an overarching term, comprising of competence to stand trial (consisting of the competence to assist counsel and decisional competence) and the individual capacities of juveniles to understand the criminal proceedings. Effective participation can in turn contribute to procedural justice for the juvenile defendant.

The concept of effective participation can also be found in international children’s rights law and standards as outlined in chapter 2. Participation is on the one hand ensured by the fair trial requirements as laid down in article 40 CRC and on the other hand it is further substantiated in the right to be heard as laid down in article 12 CRC. The fair trial requirements ensure that only those who are competent to stand trial are prosecuted in a criminal court.¹⁶ The establishment of a minimum

¹⁶ See also the case law generated by the European Court of Human Rights in the following cases: ECHR, 16 December 1999, Appl. no. 24724/94 (Case of T. v. the United Kingdom); ECHR, 16 December 1999, Appl. no. 24888/94 (Case of V. v. the United Kingdom); ECHR, 15 June 2004, Appl. no. 60958/00 (Case of S.C. v. the United Kingdom).

age of criminal responsibility is a first and minimal guarantee to ensure the adjudicative competence of a juvenile defendant. The right to be heard ensures that those who are competent to stand trial have the right to express their views. Moreover, when the child is not able to express his views properly because the procedures are not adapted to his age and level of maturity, his right to be heard is violated (Cipriani, 2009). In the following, empirical research results will be presented regarding the adjudicative capacities of juvenile defendants, exploring to what extent they are capable of participating effectively in court.

Juvenile defendants' understanding

Developmental psychological research has shown that children around 12 or 13 years of age do not perceive themselves as citizens who can be called to account for their behaviour by the state (Grisso, 2000). This mainly has to do with the fact that they are barely able to think in abstract terms and still see themselves as children who are accountable to their immediate environment only: their parents, grandparents, teachers and sometimes neighbours. As is shown in section 3.4 they do not have the ability to perform abstract-reasoning tasks, so their understanding of notions such as law, the state and citizenship are still immature. Furthermore, they lack experience with the law and the government. Children are unable to see the legitimacy of laws and legal procedures, which are in place to control the social order, and they do not see themselves as being part of that social system (Buss, 2000).

In the last 20 years several studies have been conducted on adolescents' understanding of the nature of criminal proceedings. These studies included samples of delinquent and non-delinquent youths, used different methods of measurement and sometimes compared the scores of adolescents to those of adults. From these studies it can be concluded that juveniles below the age of 14 are less likely to be familiar with trial-related information than older adolescents (Grisso, 2000). More recent results suggest that young people aged 15 and younger are more likely than older adolescents and young adults to be impaired in their ability to understand criminal proceedings (Weijers & Grisso, 2009). The capacities of 16 and 17 year olds are more similar to those of young adults (18 to 24 year olds) (Grisso et al., 2003). Driver and Brank (2009) show in their research concerning the knowledge of the court process among a

subsample of detained youth that older juveniles have significantly more trial-related knowledge than younger adolescents (see also Cooper, 1997). Generally, it can be concluded that adolescents are only capable of understanding what it means to appear before a judge when they are around 14 years of age.

It should be acknowledged, however, that large differences between the developmental maturity of individual children can be observed. Some children are behind or ahead in their development, physically, cognitively, emotionally or morally. The pace at which young people between the ages of 14 and 18 tend to develop differs substantially between individuals and therefore age is a poor indicator of the capacities that young people possess to effectively participate in a trial. Trial-related knowledge of individual juveniles increases with age, though some evidence suggests that intelligence may have a stronger effect on their understanding than age. Moreover, young people who suffer from intellectual and emotional problems generally have a less well-developed understanding of legal proceedings (Grisso, 2000; Grisso et al., 2003; Lansdown, 2005). Besides, delinquent youths have a higher risk of experiencing a range of problems, certainly those who commit crimes persistently (Weijers & Grisso, 2009). On the individual level developmental delays, intellectual deficits, learning disabilities and emotional disorders are prevalent, but problems at the wider environmental level, such as street violence, victimisation, domestic problems and out of home placements, truancy and substance abuse, are also more prevalent (Ten Brummelaar & Kalverboer, 2011; Van Domburgh, Vermeiren, Blokland & Doreleijers, 2009; Grisso, 2000). This accumulation of problems can hamper the overall understanding of juvenile defendants of what is happening in the youth court. It must be stressed, however, that adolescents who commit an offence as part of exploration and experimentation towards a stable identity and who are often pressured by their peers do not usually experience such an accumulation of problems (Moffitt, 1993).

Grisso (2000) concludes that the understanding of youths who are 15 years and older on average approaches the understanding of adult defendants. As stated before, generally, young people around 14 years of age are able to form an adequate conception of what it means to appear before a judge in court. However, many young people between the ages of

14 and 16 who have to appear in court are not yet capable of forming accurate ideas about what they can expect or what is expected of them, partly because of individual differences in maturity and partly because of the range of problems they may experience (Schuytvlot, 1999; Scott & Steinberg, 2008). Furthermore, the stress of having to appear before a judge and being sentenced in court can hamper their understanding of the youth court hearing even more so (Grisso, 2000).

Hearing the views of juvenile defendants

In order to participate in the decision-making in the youth court, children do not have to function on an adult level of reasoning. Children and adolescents can nonetheless be competent to stand trial and their competence can be enhanced by employing special procedures for juvenile defendants. In spite of the limited knowledge of children and adolescents of the law and of court proceedings, several studies indicate that children value being heard in cases that affect them (see for example Kilkelly, 2010; De Winter, 2000). Cashmore and Parkinson (2007) found that children and adolescents involved in family law cases (such as parental separation) prefer to be heard directly by the judge, because they value being heard by the decision-maker in their case. They also indicate that they would like to be recognised by the judge and find it important that the judge knows who he or she is taking decisions about. Children value being heard directly by the judge, because in that case they are sure that their views are not misinterpreted. Moreover, children feel that better decisions can be reached when judges have a better and more complete understanding of what is happening in the life of the child and this can be accomplished by hearing the child directly. Kilkelly and Donnelly (2011) have found similar results with regard to children's involvement in healthcare decisions. The children involved in this study also indicated that they preferred that health care professionals spoke directly to them and that they wanted to be involved in the decision-making. Saywitz, Camparo and Romanoff (2010) conclude from their review of studies concerning child interviews that children value being an active participant in the decision-making process.¹⁷

¹⁷ Children also indicate that they do not want to be responsible for the final decision or the outcome of the case (Saywitz et al., 2010). In criminal cases this point is less relevant, however, because judges are responsible for the final decision and the juvenile defendant is responsible for executing the sentence properly.

Besides the value that children themselves attach to being heard in court, researchers also highlight the importance of hearing the views of children, because this can have several positive effects. First, active participation in decision-making processes may help children understand and accept the final decision. The judges' decision is better accepted when the reasons for taking the decision are explained and consequently understood by the child (Cashmore & Parkinson, 2007; Saywitz et al., 2010). Furthermore, participation can help children to develop certain adaptive coping strategies, such as 'open parent-child communication about family conflict, clarify issues rather than leaving them to children's fears and imaginations, make children more aware of the difficulties their families face, and help children feel valued as the subject of a contest' (Saywitz et al., 2010, p. 545).¹⁸ Participation can have a positive effect on children because it facilitates them to grow up as responsible adults (Saywitz et al., 2010). Lansdown (2005) argues that giving children the autonomy to participate in procedures that affect them gives them the confidence that their contribution is taken seriously and is valued. Limiting the autonomy of children has as a consequence that 'a self-fulfilling cycle of learned helplessness' is promoted and children can react against adults out of frustration of not being taken seriously by those adults (Lansdown, 2005, p. 24). On the contrary, when children learn to participate in decision-making, their skills in reasoning and expressing their views increase (Fitzgerald et al., 2009; Freeman, 1997).

As is shown, the effective participation of juvenile defendants in court can have important positive effects on juveniles' perception of the youth court hearing as being fair. Moreover, participation contributes to their understanding of the process and acceptance of the final decision that is taken by the judge.

3.4.2 The lawyer's role in juvenile justice proceedings

From research concerning procedural justice it can be concluded that neutrality is an important feature of a fair trial. Neutrality means among other things that the hearing is chaired by an impartial judge, who shows openness concerning the steps that are taken in the decision-making

¹⁸ These issues are raised in custody disputes in court; however, it can be argued that these issues are also relevant to juvenile defendants and their families.

process (see also article 40 (2)(b)(iii) CRC). The neutrality and transparency of the process can be attained by providing explanations concerning the procedures that are followed. Because of the limited understanding of adolescents concerning the youth court process it can be concluded that special assistance is needed in order to facilitate effective participation in the youth court. To ensure the impartial role of the judge other actors in the juvenile justice system can play an important role in providing explanations to juveniles. In the following sections this notion will be further explained by focusing on the role of legal assistance and the role of parents in the juvenile justice process.

The child's right to legal counsel is *inter alia* enshrined in article 40 (2)(b)(ii-iii) CRC (see also Beijing Rules 7.1; 15.1). However, in both provisions it is stated that 'other appropriate assistance' can also be provided to the young person, for example by a social worker instead of a lawyer. Van Bueren (1995; 2006) stresses that the quality of legal representation is of special importance to children. As was shown in chapter 2 (section 2.5.1) a juvenile defendant does not have to understand every legal detail of a criminal case. This implies that the lawyer has the crucial task, first of all, to explain the essential elements of the charge and its implications, to discuss the defence strategy before the hearing, to make clear after the hearing what has happened in court and to advise the minor with regard to the decisions that have to be taken.¹⁹ Secondly, the lawyer has to inform the young person before the hearing about the procedural rules, what will probably happen during the trial and which actors will be present, i.e. who is who. The child must have the confidence that he is represented by a well informed and trained professional, who can advise him properly (see Beijing Rule 22.1; CRC Committee, 2007, para. 49). Whether youth court hearings are more informal or on the contrary more formal does not alter the fact that legal representation is a necessary requirement for a fair trial. Either way the child has the right to a fair trial, which includes due process rights such as the right to be assisted by a lawyer and to receive adequate information concerning his case (see chapter 2).

As was shown before effective participation means among other things that the young person is competent to assist his lawyer. This means

¹⁹ See ECHR, 15 June 2004, Appl. no. 60958/00 (Case of S.C. v. the United Kingdom), para. 29.

that the defendant can make his own choices with the assistance and guidance of his lawyer. To be able to make the right choices – informed decisions about the waiver of certain rights for example – a juvenile defendant needs assistance in the juvenile justice process. Young persons can only make their own well-informed decisions in the process when they understand that their lawyer only has their interest in mind when giving advice and taking certain decisions. This is underpinned by the CRC Committee (2007) as well, which states that the right to legal (or other appropriate) assistance is vital to the right of the young person to participate in the juvenile justice process (paras. 44, 49, 50). Research shows that sometimes juveniles have incorrect perceptions about the role of the lawyer, thinking for example that they will only be represented if they are not guilty or that it is best not to tell the truth and deny involvement in the crime (Driver & Brank, 2009; Schmidt et al., 2003). If the young person does not understand the role of the lawyer, he will perceive the lawyer as an adult who decides for him, instead of understanding that he has the legal capacity to act independently and to direct his lawyer. Consequently, a constructive lawyer-client relationship enhances the participation of juvenile defendants in court (Buss, 2000). Moreover, Tobey, Grisso and Schwartz (2000) show in their research that young people have more trust in a lawyer who spends more time with them. However, recent research in the Netherlands shows that juvenile defendants perceive that their lawyer does not have enough time to prepare them adequately for the court hearing. In many cases, they do not receive information from their lawyer before the hearing, or only very briefly before the hearing starts or by telephone (Ten Brummelaar & Kalverboer, 2011).²⁰

Explanation

There is little doubt about the idea that the lawyer can support the young person in preparing him for the hearing(s) and can assist him during the trial (Buss, 2000). A young person can hardly participate adequately in the youth court if the lawyer does not prepare him in advance for the various aspects of a hearing. He needs to be prepared for what the allegations are,

²⁰ Important to note regarding the results of this study by Ten Brummelaar and Kalverboer (2011) is the fact that data was collected by means of a focus group with eight males in a juvenile offenders' institution, which means that the study consists of a rather small and selective sample size.

what his rights are, what will be expected of him, the procedures, who will be present and what their role will be, where he is supposed to sit in the courtroom, that he should pay careful attention and that he is not obliged to answer immediately because he has the right to remain silent (Melton, 1989). The lawyer has to explain the proceedings and judicial terminology to the young person (as well as to the parents) in a language that he understands and in an atmosphere that encourages the young person to ask questions. Therefore, lawyers should be knowledgeable about what juveniles usually know and do not know (Melton, 1989). During the hearing the lawyer should be alert to the fact that the young person might not comprehend important statements or questions posed by the judge or prosecutor. Moreover, the lawyer can facilitate the involvement of the young person in the proceedings (Buss, 2000). After the hearing has taken place, the lawyer has to fulfil the important task of explaining the judgment and sentence to the young person and his parents.²¹ During the hearing the lawyer is generally not in a position to talk to the young person and his parents. Both before as well as after the hearing is completed the lawyer can play a crucial role in providing advice (concerning the attitude that is expected of the young person during the court hearings), explaining the procedures and the (expected) sentence (Buss, 2000). It is important to recognise that the lawyer can dispel the young person's and the parents' worst fears and uncertainties, by explaining beforehand which sanctions could potentially be imposed (Ten Brummelaar & Kalverboer, 2011; Eggermont, 1993; Oude Breuil, 2005).

In the first place, the lawyer is focused on defending his young client to the best of his ability. He is therefore primarily focused on the legal interests that are at stake in the case. These legal interests are mostly perceived by lawyers and their clients as 'getting out of custody as soon as possible' and receiving 'a sentence that is as short or as lenient as possible'. The question whether the lawyer should also take into account the best interests of the child (i.e. the upbringing and development of the child) remains a topic of heated debate among lawyers (Ten Brummelaar & Kalverboer, 2011; Enkelaar & Van Zutphen, 2010; De Jonge, 2011). Especially when the strategy and tactics are determined for the youth court trial, tension can grow between the lawyer and the juvenile

²¹ See also the guidelines on child-friendly justice, para. IV, art. 75.

defendant, on the one hand, and the parents of the young person on the other (Tobey et al., 2000). Lawyers have the legal interests of their clients as their main point of departure, whereas parents are chiefly concerned with the educational and developmental interests of their child and these can conflict with the interests of the young person and/or his lawyer. For example, in the Netherlands the ability of the lawyer to decide on an appeal in the name of his client who is below 16 years of age (art. 503 Ccp) can lead to tensions between the lawyer and parents, regarding the need for and the purpose of an appeal.²²

Despite the above-mentioned tension in the work of lawyers, enhancing the juvenile defendants' understanding of the procedures in the youth court can be considered to be in the best interest of the young person. Tobey and colleagues (2000, p. 241) state that 'youths who pass through this process without an adequate understanding of its meaning, as passive and uncomprehending observers, learn nothing about the law and acquire no reason to respect it'. This implies that when the young person understands the legal process in which he is involved and can participate therein, he learns that it is a fair process in which laws are not applied arbitrarily and as a consequence learns to respect the law and the human rights of others (see also article 40 (1) CRC). By providing the young person with age-appropriate information to increase his understanding of the process and by applying child-friendly procedures to enable the young person to participate, he will perceive the process as neutral and fair and this in turn will increase his acceptance of the court as authority and its decisions.

3.4.3 The parents' role in juvenile justice proceedings

The Beijing Rules (rule 7.1) and the CRC (art. 40 (2)(b)(iii)) point out that both the right to counsel and the right to the presence of a parent or guardian are basic procedural safeguards for juvenile defendants. Moreover, the responsibilities and rights of parents have to be acknowledged and parents should provide the child with 'appropriate direction and guidance' in such a manner that the child is able to exercise

²² Peterson-Badali and Broeking (2010) note as well that lawyers can be concerned about parents who push their child into a decision they do not want to take; i.e. either pleading guilty or denying the offence and going to trial.

his rights (art. 5 CRC).²³ Parents can be seen as the first appropriate persons to support the juvenile defendant in the youth court (unless the participation of parents conflicts with the best interests of the child (art. 40 (2)(b)(iii) CRC)). Basically, minors are still under parental supervision and parents are the first to be held responsible for the upbringing and development of their child (art. 18 CRC). The responsibility for the upbringing of the child does not cease when the minor is suspected of having committed an offence or when he is convicted. In principle, parents are and continue to be the primary persons to support the child in his upbringing, even when he has to appear in the youth court (Hepping & Weijers, 2011). The CRC Committee states that the presence of parents at youth court hearings mainly implies that they can provide the child with psychological and emotional support and it does not imply that parents can defend their child or take part in the decision-making in court. Besides, according to the CRC Committee (2007) the participation of parents can contribute to an effective judicial reaction to the delinquent behaviour of minors (paras. 53, 54; see also Beijing Rules 7.1, 15.1).

An important question here is how the participation of parents in juvenile justice proceedings can contribute to the effective participation of juveniles in the youth court and to an effective response to their delinquent behaviour. In so far as parents are not contributing to or maintaining some crucial aspects of the child's antisocial or delinquent behaviour, there are strong arguments for their involvement in the juvenile justice process. Hepping and Weijers (2011) have indicated several arguments for the involvement of parents in juvenile justice proceedings. These can be categorised under the headings *source of information* and *source of support*. With regard to the role of parents as a source of information it can be stated that they can act as a source of additional information for the court (supplementary to the social work reports that are usually prepared for the youth court in the continental tradition) regarding the young person, the social situation at home and the general family circumstances. The parents as a source of support implies supporting the young person at the hearing, in accepting the sentence, when the sentence is being carried out and thereafter (see also Peterson-Badali & Broeking, 2009, 2010).

²³ See also the guidelines on child-friendly justice, para. IV, art. 30, 58.

Hepping and Weijers (2011) argue that parents are the first obvious persons to support the young person when he is involved in the juvenile justice system. The juvenile defendant should be considered as a child that is part of a family. An adolescent must still obey his parents and can be held accountable for his behaviour towards his parents, but he is also responsible for his behaviour outside the home and can be held accountable by the state. As is shown in section 3.4.1, the older an adolescent becomes, the more able he is to perceive himself as a member of society who can be held accountable for his acts by the state and society at large. Parents therefore play a crucial role in providing information concerning the behaviour of their child at home, on the one hand, and, on the other, in giving their views on the delinquent behaviour, their perception of the seriousness of that behaviour and what their reaction has been to their child's delinquency (Hepping & Weijers, 2011).

Parental control and monitoring

The general circumstances in which a family finds itself are important to the youth court as well, because parents still play a very important role in the lives of adolescents (see section 3.3.1). It is often assumed that parents mean hardly anything to their adolescent children and that adolescents are mainly influenced by their peers. It is true that peers are important when it comes to adolescents' choice of clothes, music, mobile phones, etc. However, when genuinely important and ethical questions arise – how to conduct one's life, what kind of person one should be, and other important decisions in life – parents are considered to be very important to adolescents and young adults (Clarke-Stewart & Dunn, 2006; Van der Valk, 2004).

When the role of parents is considered regarding the development and persistence of (serious) delinquent behaviour the emphasis is usually on controlling and monitoring by parents. When monitoring is lacking, it is often only one of the many problems occurring in the life of the young person. Research in the Netherlands shows that persistent youthful offenders experience an accumulation of child-related problems, ranging from low IQ scores and behavioural problems, to a lacking sense of responsibility and a distorted school record (Weijers, Hepping & Kampijon, 2010). In short, these are problems that make great demands upon the skills of parents in controlling and monitoring their children.

However, only focusing on control exerted by parents assumes a one-sided causality. Research has shown that the direction of influence in parent-child relationships is two-sided (i.e. bi-directional). Parents influence their child's behaviour, but the child also influences the behaviour of parents. Especially children who display difficult behaviour, suffer from psychosocial disorders and are extremely boisterous or rebellious demand a great deal of attention and have a large influence on the parenting style (Dekovic & Prinzie, 2008). Furthermore, an accumulation of family-related problems is also observed in relation to persistent youth offenders. These problems range from child abuse, severe psychiatric problems and war traumas experienced by parents, to problematic divorces, often combined with domestic violence, alcohol and/or drug abuse, financial difficulties and evictions (Weijers et al., 2010). Following on from the results of this study it can be concluded that a lack of control and monitoring is only one of the many problems that tend to go together with persistent and/or serious delinquent behaviour by adolescents. Therefore, the general life circumstance of parents and children interact with the socialisation of the child at home. These circumstances can hamper the capacities of parents to control their children.

This is also shown in other recent studies (Keijsers, 2010; Keijsers, Frijns, Branje & Meeus, 2011). These studies show that a strong focus on controlling adolescents' behaviour has a counterproductive effect when they are already engaged in criminal behaviour. Without doubt, knowledge about what a young person does in his spare time, where he is and with whom, is crucial information for parents. However, this information is only provided by children to their parents on a voluntary basis and cannot be demanded. Keeping control and increasing control over adolescents increases the possibility that the young person engages in delinquent behaviour rather than decreasing that possibility. It is hardly possible to follow 15 to 17 year olds in all their daily activities. Young people who are already on the wrong track, who have delinquent peers and who persistently offend have often developed a routine to dismiss themselves from parental control. To keep informed about adolescents' activities outside the home and to be able to exert some influence on them is only possible when the young person speaks with his parents voluntarily and in confidence. What is needed in cases when the young

person withdraws from parental supervision is the restoration of mutual trust in the relationship between parent and child (Keijsers, 2010; Keijsers et al., 2011).

Active role of parents

When parents provide information to the court, this implies a rather passive role for parents during the youth court hearing. They answer any questions put to them by the judge or other court professionals and usually give specific information with regard to their child, his upbringing and the family situation. However, they generally cannot actively engage in the discussions taking place during the youth court hearing (see also Hillian & Reitsma-Street, 2003; Peterson-Badali & Broeking, 2010; Varma, 2007). The role of parents as a source of support to the child implies a more active involvement in the juvenile justice process. Parents who provide support to their child can help the young person to participate in the court hearing. Furthermore, they can help their child to accept the sentence and they can help their child in the execution of that sentence. Supporting the child at a youth court hearing can only take place properly when parents understand the youth court procedures and understand what is expected of them and their child during the hearing. As has been argued in section 3.4.2, lawyers can play an important role in informing both parents and children about the procedures and their role in the youth court (see also Broeking & Peterson-Badali, 2010; Peterson-Badali & Broeking, 2010).

It is clear that when parents have contributed to the criminal behaviour of their child (and/or are fellow suspects) or when the relationship between the parents and the adolescent can be characterised as poor and lacking trust, parents are incapable of providing the support the child needs (Hepping & Weijers, 2011; Peterson-Badali & Broeking, 2010). When parents are available to the young person and they understand the court procedures, they are a resource for their child in helping him understand what is happening to him during the juvenile justice process (Tobey et al., 2000). Moreover, recent research by Kilkelly (2010) indicates that children who are involved in the justice system (either civil or criminal) state that they value receiving information and explanations from their parents above other adults such as lawyers or court officials. Broeking and Peterson-Badali (2010) found that young people value the presence of their parents in court, because they believe

that this provides them with a legal advantage as well as emotional support. Court professionals, however, hold the view that parents should not be the persons to provide legal advice to their child (see also Peterson-Badali & Broeking, 2009).

The parents' opinion concerning the delinquent behaviour of their child and the way they have reacted to that particular behaviour has an important impact on the young person as well. When parents speak during the hearing about what they think of what their child has done, and thereby rejecting their child's behaviour, adolescents start to realise what they have done and what the impact of their behaviour is on others who are close to them (Hepping & Weijers, 2011). As is explained in section 3.3, adolescents acquire the ability to reflect on their behaviour and how their behaviour affects others. Adolescents are still vulnerable to pressure from peers (and in the presence of peers the long-term consequences of certain behaviour are not overseen), but when confronted with the views of their parents (in the absence of their peers) they can start to reflect on their actions.

The chance that parents accept the sentence that is imposed on their child increases when they feel that they are treated with respect and are taken seriously by court professionals (Schuytvlot, 1999). This implies procedural justice for parents as well. When parents are asked in court to contribute to the decision-making process concerning the sort of disposition that would be appropriate for their child, this will contribute to the parents and the young person accepting the sentence (Hepping & Weijers, 2011). Adolescents whose parents respect and accept the decision of the judge will be assisted in accepting the sentence and in cooperating in its execution. This in turn might contribute to reducing the risk of recidivism. Besides, empirical research in a Canadian youth court has shown that parents who have plans for their children have more influence on the final decision made by the judge (in bail and sentencing hearings) compared to parents who do not come to court with possible solutions or do not talk about the level of support available to the child at home (Varma, 2007). Moreover, bail is more often granted when parents are present at the youth court hearing and parents can also influence the bail conditions set by the judge (Peterson-Badali & Broeking, 2010). This illustrates the importance of informing parents before the hearing about how and in which way they can contribute to the hearing and to the

possible sentence (see also Peterson-Badali & Broeking, 2010; Varma, 2007).

Conclusion

Around the age of 15 the cognitive development of adolescents starts to finalise and as a consequence they are increasingly skilled in logical reasoning and abstract thinking. From this age, adolescents become aware of the fact that they can be held accountable for their behaviour by the state and therefore can be tried in court. However, adolescents still lack trial-related knowledge, due to individual developmental delays, other problems in life, a lack of life experience and in particular a lack of experience with the justice system.

Therefore, it has been argued that juveniles need special assistance in order to ensure that they receive a fair trial. Two actors play an important role in providing the juvenile with assistance: lawyers and parents. First, lawyers play an important role in preparing juvenile defendants before the start of the youth court hearing. They can explain what will happen, who will be present and what is expected of them and their parents. These explanations can contribute to the young person's understanding of the procedures and therewith his perception of the process as being fair.

As opposed to lawyers, parents are in the position to provide emotional support to the young person. To enhance the participation of juvenile defendants in court it is of importance to hear the parents as well. On the one hand, hearing parents can contribute to the awareness of the young person of the impact his behaviour has had on others. On the other hand, it can contribute to the acceptance of the sentence and the appropriate execution of that sentence by the young person. The participation of parents can enhance the perception of parents and children that both the procedures in court and the decision-making are fair.

3.5 Conclusion

In this chapter two psychological perspectives have been outlined. First, the concept of procedural justice and its requirements, in order to ensure that a criminal trial is perceived to be fair by defendants, are explained.

Second, the understanding of juveniles of the juvenile justice process is discussed from a developmental psychological perspective. Tyler (2003, 2006a) has added a psychological dimension to the concept of fair trial by indicating elements that contribute not only judicially but also psychologically to the perception of being treated in a fair manner. In this study, it is argued that the fair trial requirements indicated by Tyler (2003) are of extra importance to juvenile defendants, because of their immaturity and inexperience in dealing with the authorities. Participation is referred to as an important contributor to procedural justice.

It can be concluded that juveniles, because of their ongoing cognitive and emotional development, are not yet able to fully understand the juvenile justice process. Adolescents have just acquired the reasoning abilities to understand that they are responsible for their actions, but they lack the (life) experience and knowledge to independently participate in the justice process. Therefore, it has been argued that juveniles need additional assistance. Assistance will lead to a better understanding of the process, which in turn will increase the perception of the young person that the process and the decision-making are fair.

Several actors in the juvenile justice process can contribute to procedural justice. In particular the role of the lawyer and that of parents have been highlighted. To ensure the neutral and impartial role of the judge, lawyers and parents can provide the young person with explanations and support. The lawyer and parents can compliment each other's roles with regard to providing information and emotional support to the young person during the youth court hearing and the execution phase of the sentence. Moreover, it is assumed that procedural justice for parents positively influences juveniles' perception of the justice system.

It can be stated that it is equally important that both adult and juvenile defendants abide by the requirements for procedural justice. However, to fulfil these requirements special attention should be paid and legal professionals and parents should put more effort into ensuring the understanding and participation of juvenile defendants. In chapter 4 concrete guidelines will be given as to how to put this into practice.

Chapter 4

Requirements for the effective participation of juvenile defendants

4.1 Introduction

In the previous chapter it has been shown that adolescents are cognitively and emotionally not yet fully mature. To guarantee a fair trial for juvenile defendants it has been argued that the requirements for a fair trial stemming from procedural justice research are of even greater importance to juveniles (compared to adult defendants), in order for them to perceive the procedures as fair. The immaturity of adolescents with regard to their understanding of the procedures and decision-making in court requires adapted procedures and additional assistance and support for juvenile defendants. Only by employing specialised youth court procedures and providing additional help are juvenile defendants able to participate effectively in the juvenile justice process.

The aim of this chapter is to provide requirements for specialised youth court procedures for juvenile defendants to be able to effectively participate in the youth court, on the basis of the notion of procedural justice and the developmental characteristics of adolescents, but also international children's rights law and standards. These requirements are specifically geared towards the participation of juvenile defendants in the youth court at the pre-trial, trial and sentencing phase of the juvenile justice process. It must be stressed here that the requirements can be met by different actors in the youth court. Some requirements might be more applicable to the judge (or other authority chairing the hearing) and others more to the defence lawyer. As has been shown in chapter 2, no consensus has been reached in international children's rights law and standards concerning the professional who is best suited to assist the young person in participating in the youth court. In chapter 3, the important role of lawyers and parents in the process has been highlighted. In this chapter an attempt will be made to give specific guidelines as to how the

requirements for effective participation can be fulfilled by the different actors in the youth court.

In order to participate effectively assistance should be provided to juvenile defendants in two respects: first, juvenile defendants should be assisted in expressing their views to the judge; that is they should be heard in court (section 4.2). Second, they should be assisted in understanding the youth court process in which they are involved (section 4.3). In both sections, requirements are presented as to how to enhance the participation of juvenile defendants in court. Practical tools will be given that help in enabling professionals to fulfil the requirements. In section 4.4 a synthesis will be made of the juridical and theoretical framework as it is sketched in chapters 2, 3 and 4.

4.2 Hearing the views of juvenile defendants

At first sight a (youth) court can be seen as an unfavourable setting to successfully interact with adolescents. Adolescents often perceive their visit to the youth court as stressful. The UN Committee on the Rights of the Child (2009) has argued that a hearing should ‘be enabling and encouraging, so that the child can be sure that the adult who is responsible for the hearing is willing to listen and seriously consider what the child has decided to communicate’ (para. 42). When examining the participation of juvenile defendants a notable tension can be observed between the imposing setting of a court and the task of helping the young person to participate in the proceedings as much as possible (see also Griffiths & Kandel, 2000). This is what might be called a pedagogical challenge for the youth court.

However, on taking a closer look, a formal setting in court is not as negative as it might seem in the first place. The impressive building and the fixed and formal rituals contribute to making clear that one is not in court for fun and that it should be considered as a serious event by the young person and his parents. This is underlined by the commentary given by Beijing Rule 10.3,¹ which states that the initial contact of juveniles

¹ Rule 10.3 Beijing Rules states: ‘Contacts between the law enforcement agencies and a juvenile offender shall be managed in such a way as to respect the legal status of the juvenile, promote the well-being of the juvenile and avoid harm to her or him, with due regard to the circumstances of the case’.

with law enforcement agencies or other authorities should be accompanied by ‘compassion and kind firmness’. The apparent antithesis of the term ‘kind firmness’ can be interpreted as meaning to be firm with a juvenile defendant, but not in a harsh way.

To enable the young person to participate effectively at a youth court hearing, several requirements for communicating with juvenile defendants should be met. Five requirements will be elaborated upon in the following sections. The first two requirements – the youth court setting and using certain conversation techniques – can be seen as conditions for the latter three requirements – hearing the views of juvenile defendants, reacting seriously to their views and hearing the views of parents.

4.2.1 The setting of the youth court

Appearing before the youth court judge is a serious matter for a young person. It is an important event, because the young person will be addressed concerning his alleged offending behaviour. Moreover, in most cases the hearing will result in a formal court sentence. The majority of juvenile defendants experience emotions such as nervous tension, insecurity and self-consciousness during a youth court hearing (see for example Griffiths & Kandel, 2000; Oude Breuil, 2005; Plotnikoff & Woolfson, 2002). Moreover, the court ambiance is often perceived as serious and distant. A stern and aloof ambiance in court is anything but easy to combine with direct and smooth contact with the juvenile defendant and his family, who are usually in awe of the impressive building as they step into the courtroom. At this juncture lies the pedagogical challenge of making professional contact with the young person (and his parents) in the youth court.

As is argued above, from a pedagogical and a children’s rights perspective, the contextual setting within which the youth court judge operates should be stern but accessible. On the one hand, to be held accountable for an offence is a serious matter, involving fixed rituals and procedures that guarantee a fair trial (as defined by international human rights law). On the other hand, the procedures should be accessible in a way that juveniles can participate in the decision-making process and that they are able to understand what is happening (see Beijing Rule 14.2;

Article 12, CRC). Stern but accessible, at a distance but not too cool; this is how the double task of the judge and the prosecutor can be characterised in increasing the level of participation of juvenile defendants in the youth court.

An important requirement for communicating with the young person and his parents in court is that everyone is seated within hearing distance of each other and that everyone is able to see each other.² From research on face-to-face communication it can be concluded that seeing and hearing each other directly, from being in the same surroundings (*copresence*), contributes to mutual understanding between the conversation partners about what is being discussed (Clark & Brennan, 1991). When everyone can hear each other properly, i.e. everyone is able to look each other in the eye and no microphones are needed to hear each other, there is greater potential for a personal dialogue between the parties. Making eye contact, for example, encourages the young person to be at ease and to feel free to tell his side of what has happened (Saywitz et al., 2010). Moreover, timing in speech, intonation and signs of making a turn are easier for conversation partners to read when one can see each other (Clark & Brennan, 1991). Non-verbal signs of the other person's current knowledge and understanding of the topic that is being discussed, such as facial expressions, head nods and brief vocal expressions, are also of importance to effectively communicate with each other (Krauss & Fussell, 1991).

At the same time, a certain physical distance between the judge and the defendant underlines the neutrality and impartiality of the judge, which contributes to procedural justice. This can be achieved by a slightly raised bench. Moreover, a too relaxed, loose and friendly atmosphere in court is not appropriate. Authorities should not act in a fashion which is too familiar with the young person, because that leads to confusion. Authorities – such as judges and prosecutors – should denote a resonance of peace and power and should act in accordance with those qualities (Kaldenbach, 2009).

Besides the small physical distance between the parties, an important feature of an atmosphere contributing to participation is that juveniles are addressed in a positive manner. Research shows that court

² See also ECtHR, 23 February 1994, Appl. no. 16757/90 (Case of Stanford v. the United Kingdom), para. 26.

hearings held in a disorganised way³ and court professionals acting in a less than professional manner (both verbally and non-verbally)⁴ contribute to a negative atmosphere in court. This negative atmosphere in turn relates to juvenile defendants' less positive perceptions of the juvenile justice system in general (Greene et al., 2010). A negative atmosphere can also make the young person feel intimidated by the circumstances. Archard and Skivenes (2009) state that feeling intimidated hampers children in giving their own view on the case (i.e. the child's authentic voice).⁵ Furthermore, adolescents are extremely prone to general disapproval shown by adults. They interpret such attitude as criticism directed towards their personality and thereby their identity, and not towards their behaviour (Eggermont, 1993). Adolescents tend to cut themselves off when they are approached in an angry or negative manner. As has been explained in chapter 3 (section 3.3.2), adolescents are in the midst of their identity development and as a consequence they have more conflicts with adults regarding authority (Steinberg & Schwartz, 2000). Disapproval and negative reactions towards their persona and behaviour can provoke anger and recalcitrance. Research has also indicated that feelings of anger positively relate to feelings of injustice and immorality (Eisenberg, 2000). Showing respect for the young person means that his (delinquent) behaviour should be condemned but not his personality (Delfos, 2005). As will be shown in section 4.3.4 disapproval can be shown with regard to the offence, thereby addressing the moral emotions of a juvenile defendant. However, addressing juveniles in an angry and disapproving manner, instead of in a more neutral and understanding manner, frustrates

³ Disorganisation in court is defined in Greene and colleagues' study as delays in the start of hearings, delays caused by the absence of court staff, missing or misplaced files and paperwork and confusion in the calling of cases (Greene et al., 2010).

⁴ Unprofessional conduct by court personnel is defined in Greene and colleagues' study as: humiliating comments made about the attire worn by the juvenile defendant, eye rolling and sighing when the defendant tries to explain something, snapping at the defendant and his parents when asking for more information, and prosecutors who criticise and embarrass less experienced lawyers about the manner in which things should be done in court (Greene et al., 2010).

⁵ Feelings of intimidation can however be perceived differently across cultures. Making eye contact with adults, for example, is valued among Western young people. Young people with a non-Western ethnic background, however, experience looking someone straight in the eye as imprudent or provoking and not respectful towards the adult (Van Rossum, 2007).

their participation in court and, moreover, their perceived fairness of the trial.

The social and cultural distance between the different actors in court is another aspect that plays a role in the manner in which the young person experiences the court hearing. Often, a gap exists between the social position (and cultural or ethnic background) of the professionals in the youth court and the juvenile defendant and his family (Van Rossum, 2007). The lawyer can play a role in bridging the social and cultural gap between the young person and the other court professionals (De Jonge, 2011). With regard to the differences in social background, the lawyer has the advantage of being able to meet with the young person and his parents once or twice before the hearing in a more informal setting in which he can make clear to the young person that he will act in the best interest of his client. The judge is situated in a rather different position, which brings with it more distance between him and the juvenile defendant. During the youth court hearing it is more difficult to bridge the differences between the legal professionals, on the one hand, and the juvenile defendant and his family on the other. Social and cultural distance between judges and defendants is probably a notable obstacle to the effective participation of the young person. This obstacle can be overcome partly by making the youth court procedures accessible to the juvenile defendant and his parents; that is, by creating a positive and respectful atmosphere and by diminishing the physical distance between the parties.

To conclude, the setting of the youth court is important both with regard to the extent to which a young person can participate during his own court hearing and with regard to the experiences the young person takes home with him of the juvenile justice system. It can be argued that a negative atmosphere in court affects the perception of the fairness of the trial. Furthermore, the manner in which the young person is addressed should be adapted to his age and level of maturity (i.e. the procedures should be accessible and child-appropriate). By doing so, a certain sternness in court remains in place, but at the same time the young person is assisted in understanding that he is in court due to a serious matter.

4.2.2 Conversation techniques

Besides the court setting, using certain conversation techniques in court can be considered as a requirement for effective participation. The effective participation of a juvenile defendant requires conversation techniques that incite the young person rather than stop him from telling his own story. A court can be characterised as a formal institutional setting, which influences the interaction that takes place between participants. Hutchby (2007) argues that for example turn-taking in a formal setting such as a court is generally restricted to question-answer sequences. This implies that interaction in a formal setting is far different from those in non-formal institutional settings, such as in, for example, counselling sessions (Hutchby, 2007). A youth court judge is neither a therapist nor a social worker. However, in order to contribute to the participation of the juvenile defendant (and to contribute to the reflection of the young person on his own behaviour) the judge should use conversation techniques that are geared towards adolescents. For the young person to be able to give his own views and the judge to react to the story of the young person earnestly, this presupposes that a dialogue takes place between them. The CRC Committee (2009) has recommended that hearing a child in court should take place by means of a dialogue, instead of a one-sided examination (paras. 43, 134 (g)). Moreover, it is recommended by the Committee (and in the guidelines on child-friendly justice, para. IV, art. 9, 14, 15) that professionals in court are trained in communicating with adolescents (para. 134 (g)).

First, to have a conversation with a young person implies that the amount of time the young person receives to tell his side of the story and the amount of time the judge takes to speak should be kept in balance. An economic use of words by the judge is of importance. To enable the young person to participate effectively implies that the judge himself must not talk too much, but should ask short and clear questions that prompt the young person to engage in the dialogue. The expectation must be created that the young person does most of the talking and that the judge will listen. The young person is the expert with regard to knowing what is going on in his own life and the judge should try, by asking questions, to make the young person aware of the knowledge and insights he possesses about his life and the behaviour he displays (Delfos, 2005). It is important

to give the young person enough time to respond, because he needs time to process the content of the question and to formulate an answer. Asking several questions at once does not leave room for the young person to answer all of them. When the young person has responded to the question, the judge can summarise the response to make sure that his views are understood correctly. For adolescents it is of importance that conclusions are summarised concisely, so that they know where they stand (Delfos, 2005; Saywitz et al., 2010).

Second, when the judge or the prosecutor asks the juvenile defendant questions it is of the utmost importance that these questions are short, direct and preferably semi-open and that they ask for explanations and clarifications. It is advisable to ask a couple of closed-ended questions⁶ to start the conversation with the young person. These questions are neutral and easy to respond to. Next, it is advisable to continue with open-ended questions⁷ to enable the young person to give his own views on the case (Delfos, 2005). Research has indicated that open-ended questions encourage adolescents to give longer, more detailed, more accurate and less self-contradictory responses (Saywitz et al., 2010). Again, it is of importance to ask questions in a pace that is not too rapid. By asking a question in a rather slow manner gives the young person the opportunity to process the question and it gives him the feeling that he is in a position to react on the question (Delfos, 2005).

The judge should also take into account the cultural background of the young person. Sometimes, asking questions too directly is seen as impolite and results in a person clamming up. So the judge should have the ability to pose certain questions carefully when dealing with young people from different cultural backgrounds (Van Rossum, 2007).

The limited amount of time that is often available at a youth court hearing forces the judge to get to the point quickly, which can hamper his opportunities to engage in a true dialogue with the juvenile defendant. Anyhow, the judge should avoid the situation in which he is speaking too much and the young person is not able to contribute to the hearing.

⁶ Questions that limit responses to a single word, such as 'yes' or 'no'.

⁷ Questions starting with 'what', 'who', 'where', 'when', 'why' or 'how' that elicit multi-word responses.

4.2.3 Hearing juvenile defendants' views

In order to ensure the effective participation of juvenile defendants a first important task for professionals working in the youth court, such as the judge and the prosecutor, is to invite the young person to tell his side of what has happened. The most obvious and appropriate way of enabling the young person to participate in a youth court hearing is to invite him to give his own account of what has happened and to show a willingness to listen to the young person (Delfos, 2005). Adolescents find it very important to be heard and to be able to explain what, according to them, is the actual reason for and the background of their case. Kilkelly (2010) found that children explicitly state that they prefer to be heard directly in all matters concerning them.⁸ Moreover, children prefer to be heard by the person who takes the decisions about them (see also Ten Brummelaar & Kalverboer, 2011).

Enabling the young person to tell his own side of the story is considered to be a crucial factor in the potentially positive effect – in terms of experiencing procedural justice – of coming to court and being confronted with his own behaviour by the judge and other actors in court (Fagan & Tyler, 2005). When people are able to participate in the procedure, they are more satisfied with the procedure and its outcome (Tyler, 2003). Moreover, it is assumed that talking with the young person about what has happened, as a result of hearing his own story, promotes the young person's reflection on his own behaviour. Describing what has happened can make the young person aware of his own behaviour, which in turn can increase the probability that the young person is better able to direct his behaviour in the future. Starting to understand his behaviour, by means of talking about what has happened, can help direct actual behaviour (Delfos, 2005).

Within the inquisitorial legal system, hearing defendants in person is in general standard practice in court. The manner in which juvenile defendants are heard is of importance when trying to engage in a dialogue with the young person, instead of a one-sided interrogation, but at the same time remaining neutral and impartial. In the adversarial legal tradition the hearing revolves largely around the interaction between the

⁸ The CRC Committee (2009) also recommends that children should be given the opportunity to be heard directly in any proceedings (para. 35).

legal defender and the public prosecutor and the defendant is heard as a witness in his own process (see chapter 5, section 5.4.1). The judge has a neutral stance in the process and the young person is not able to give his own views on the case. It is argued here that in both the adversarial and inquisitorial systems room should be created to hear the juvenile defendant personally. The judge should at the same time be careful to convey a position of neutrality and impartiality. The conversation techniques explained in section 4.2.2 are especially important with regard to giving the juvenile defendant enough room to give his views, while at the same time taking a neutral stance.

4.2.4 Showing a genuine interest

Effective participation asks for genuine interest and respect. The CRC Committee (2009) has stated that ‘The right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention’ (para. 2). Showing a genuine interest, therefore, can be seen as an important element of effective participation.

With regard to a youth court hearing, showing a genuine interest means showing interest in the offence and everything the young person would like to share about it, as well as showing interest in the personal background of the young person, such as his leisure time activities and personal interests. For adolescents, being treated with respect implies that they are taken seriously (Delfos, 2005). It is clear that the judge is better able to connect with the young person when he is informed about his personal background, for example about earlier social work support, behavioural problems and/or problems at home or at school (Vlaardingerbroek, 2011).

Enabling the juvenile defendant to participate asks for the engagement of the judge in the account given of the alleged offences by the young person and the young person’s life story and requires a serious response from the judge (see also CRC Committee, 2009, para. 28). Showing a genuine interest implies that the young person is encouraged to give his views and that the judge continues to ask questions regarding subjects he would like to know more about. By asking more questions, the judge can show that he finds the contribution of the young person to the hearing to be of importance (Delfos, 2005). Social support, consisting of

eye contact, smiling, warm intonation patterns, relaxed body posture and complimentary remarks, gives young people the confidence that their story is being heard and taken seriously (Saywitz et al., 2010). Moreover, adolescents prefer to be addressed on their own level of understanding and maturity. Professionals have to check whether the young person understands what is being discussed in court (see section 4.4.1), but they also have to check whether they understand the young person correctly in order for the young person to feel that he is being taken seriously and understood by the judge. Young Dutch people value being addressed by their first name, because that gives them the feeling of being taken seriously by the professionals in court (Ten Brummelaar & Kalverboer, 2011). However, in other countries this might be different. Calling people by their first names depends largely on the etiquette of a country. In certain countries, using the more formal second person pronoun version of 'you' and addressing people by their last name is more common.

Showing an interest in the story and the views of the young person, by not merely taking note of it but by asking one or more questions and going into detail, is at least as important for his participation as enabling the young person to tell his side of the story. In this way the judge shows respect for the young person's story and can show that he is a benevolent listener (Tyler, 2003, 2006a). Moreover, merely listening to the views of the young person is not enough. His views should be considered seriously in determining what should be decided. This ensures that the young person is actually able to participate and that his contribution carries weight in the decision-making process, as prescribed by article 12 (1) CRC (see also Archard & Skivenes, 2009).

Also of importance is that lawyers take the views of their juvenile clients seriously. When the lawyer does so, he can encourage the other actors in court to do so as well and it is more likely that the views of the young person are most adequately put forward by the lawyer (Enkelaar & Van Zutphen, 2010). The extent to which the views of the young person are taken into account should be communicated to him when pronouncing the judgment and sentence, to ensure even more so that the contribution of the young person to the hearing is not only a formality, but that his views are actually given weight (CRC Committee, 2009, para. 45; see also section 4.3.3).

4.2.5 *Hearing parents' views*

Involving a young person in the youth court hearing does not only imply giving consideration to his views, but also involving the young person indirectly in everything that is being discussed through dialogue with his parents. A purpose of actively engaging parents in the youth court is to increase the level of participation of the young person as well. Children and adolescents show strong feelings of loyalty towards their parents. These feelings are rooted in the idea that for children it is of imminent importance that parents (literally) stand behind them and appreciate them unconditionally (Delfos, 2005). Hearing parents in court and taking their views seriously reinforces the feeling of the young person that his case matters and that he (and his primary carers) are being taken seriously by the judge. As has been explained in chapter 3 (section 3.4.3) the contribution of parents in court and their acceptance of a sentence can have a positive influence on the juvenile's acceptance of the sentence. Moreover, adolescents can even better realise what they have done when they see the reaction of their parents (Heppling & Weijers, 2011).⁹

A crucial matter is the fact that parents should not find themselves lost in the anonymity of the courtroom. They should have a place near the front of the courtroom, clearly within sight of the judge. For parents and their child it is of importance that they feel that they are in the picture from the start of the hearing and that the judge is able to address them directly. Moreover, it is of importance that parents are welcomed at the start of the hearing and that the judge points them to their seats. Research indicates that parents feel generally more satisfied about a court hearing when they feel that the judge has listened to their views and has taken their contribution seriously (Schuytplot, 1999). Therefore, it is of importance that the judge asks parents to give their views on the case at a certain moment during the hearing. The judge can ask parents, for example, how they reacted when they first heard about the offence or the arrest of their child; how they discussed the events with their child at home; whether they are worried about specific matters in the life of their child; whether they recognise the issues that are raised in court (e.g. by

⁹ Ten Brummelaar and Kalverboer (2011) point out that the participation of parents is also of importance for the reintegration of the juvenile defendant. When an intervention is ordered the cooperation of parents is of importance in helping to allow the intervention to succeed.

social workers) about their child; and whether they agree with the sanction or measure that is proposed by the prosecutor.

Research conducted in the adversarial court tradition (in Canada) indicates that parents are often uncertain about their position in the procedures. Moreover, their role generally concerns that of a passive observer or bystander in the court proceedings involving their children, because the structure and organisation of the hearings does not leave room for parental involvement (Hillian & Reitsma-Street, 2003; Peterson-Badali & Broeking, 2010; Varma, 2007). In the continental European youth court tradition it is common practice for the judge to address parents at a certain point in time during the hearing and to ask them a few questions regarding their child and the situation at home. The question remains, however, to what extent parents in these courts are addressed and are able to participate in a systematic way, according to a certain protocol or plan (Hepping & Weijers, 2011).

Conclusion

To ensure effective participation for juvenile defendants, in this section five requirements have been explained to effectively hear juveniles in court. The first requirement is concerned with the setting of the youth court; it should be stern but accessible. The overall attitude, body language and the use of conversation techniques that are geared towards adolescents is a second requirement for effective participation. The most fundamental condition for hearing the views of the juvenile defendant is to give him the opportunity to tell his side of what has happened. Furthermore, it is of importance to show genuine interest in the story of the young person; the views of the young person should be seriously considered. This means showing interest in the offence, as well as showing interest in the personal background of the young person. Finally, an important requirement for participation is to involve parents in the hearing. This means that not only the young person should be heard, but that parents should also have a role in the youth court process.

4.3 Juvenile defendants' understanding

To be able to participate in the youth court it is not only essential for the juvenile defendant that he is given the opportunity to express his views, but in order to do so it is essential that he understands what happens in court, what is discussed during the hearing and what the consequences are of what is decided. Understanding what will, can and/or is happening can therefore be seen as an important component of effective participation. Moreover, international children's rights standards and case law from the European Court of Human Rights prescribe (case of T. against the United Kingdom, para. 85¹⁰) that understanding what is happening in court and what the implications are of certain decisions, are conditions for a trial to be fair. Understanding the procedures is also indicated as one of the requirements for experiencing procedural justice. However, in order to achieve a proper understanding juveniles need to be provided with extra assistance from legal professionals, taking into account their age and level of maturity.

The European Court has ruled in the case of S.C. against the United Kingdom that a general explanation of the discussions in court should be provided to the young person. Moreover, according to the Court lawyers play an important role in informing and guiding the juvenile defendant through the trial (para. 29).¹¹ It will be argued here that judges, lawyers and other court professionals can contribute to the understanding of the juvenile defendant to a large extent. In the following sections, four requirements for reaching a sufficient understanding of youth court procedures by juvenile defendants will be outlined.

4.3.1 Giving explanations

It can be argued that adolescents lack sufficient knowledge of the juvenile justice system as a whole, its authorities and the procedures that are employed in court (chapter 3, section 3.4.1). The knowledge gap that adolescents experience makes them feel as though they have no grip on the developments in their criminal case, which makes them feel insecure (Oude Breuil, 2005). Moreover, research among children (aged 4 to 15)

¹⁰ ECtHR, 16 December 1999, Appl. no. 24724/94.

¹¹ ECtHR, 15 June 2004, Appl. no. 60958/00.

who are involved in family court hearings shows that those children who have more legal knowledge report less negative feelings and distress about attending their hearing (Quas, Wallin, Horwitz, Davis & Lyon, 2009). Griffiths and Kandel (2000) report the same finding for children who are more familiar with the children's hearings system in Scotland, because of previous experiences with the system.¹²

First, it is of importance that the young person understands what the goal of the hearing is. Second, the intentions of the judge should be made clear to the defendant. When the topic under discussion is difficult or emotionally laden, adolescents tend to expect a negative intention of the adult he is speaking to. When the judge makes his intentions clear, the young person better understands the goal of the hearing and the viewpoint of the judge (Delfos, 2005). Moreover, giving explanations is necessary for the young person to give his (informed) views. It should be clear to the young person what is asked of him, i.e. when and where is he expected to give his views. He should have enough knowledge to be able to give his views on a certain matter, such as for example the proposed measure or sanction.

To optimise the understanding of the young person requires that it is constantly made sure that he follows what is being discussed or that additional explanations are given regarding legal discussions between the court professionals (see also Griffiths & Kandel, 2000). It must be noted in this regard that several scholars indicate that young people often say that they understand everything, because they are reluctant to acknowledge any difficulties in understanding what happens in court. Therefore, relying on the young person to indicate verbally when he does not understand anything that is being discussed cannot be considered to suffice. Professionals should therefore also be aware of non-verbal cues of misunderstanding on the part of the young person (Delfos, 2005; Plotnikoff & Woolfson, 2002; see also Kilkelly & Donnelly, 2011).

Komter (1990) showed in her research that improving the communication between the judge and the defendant could increase defendants' acceptance of the criminal court procedures and the final judgment (i.e. experiencing procedural justice). Research among Dutch

¹² Kilkelly and Donnelly (2011) report as well that children involved in the healthcare system who have more knowledge before a procedure indicate that they are less fearful of what will happen.

criminal court judges shows that they are also of the opinion that *ordinary* communication during the hearing, explaining what is happening and why a certain decision is made, is of importance in improving the defendant's understanding of the court procedures (Van de Bunt, De Keijser & Elffers, 2004).

Lawyers play an important role in preparing the young person before his court appearance (chapter 3, section 3.4.2). The lawyer can explain the procedures, the different actors – their physical place in the courtroom and their role in the process – and the judgment and sentence the young person can most likely expect. Moreover, the lawyer can also prepare the young person as to what is expected from him during the hearing, what the judge will ask of him and whether he will be morally addressed concerning his offending behaviour (Enkelaar & Van Zutphen, 2010). However, judges should not solely rely on the preparation of the lawyer. It is possible that the young person has forgotten certain aspects of the explanation of his lawyer, the preparation can have been incomplete or the lawyer has moved over it too quickly (or in the worst case did not give any explanations at all, see Ten Brummelaar & Kalverboer, 2011; Oude Breuil & Post, 2002). Therefore, it is no luxury for the judge to explain the purpose of the hearing, the order of the procedures that will be followed during the hearing, to introduce the different persons in court and to explain their roles briefly (Saywitz et al., 2010).¹³

4.3.2 *Avoiding judicial jargon*

The second requirement for improving the understanding of juvenile defendants in the youth court is by avoiding the use of legal jargon to the largest extent possible (Griffiths & Kandel, 2000; Saywitz et al., 2010). However, when it is inevitable to use certain terms, explaining those terms is necessary. The CRC Committee (2007) recommends that juvenile defendants must (at least) understand the charges that are brought against them and this might mean that the language used to explain the charges should be adapted to the level of understanding of adolescents (para, 47).

¹³ Explanations are also important for children involved in other judicial procedures, such as in the family court. See for example the studies of Van Triest (2004) and Cashmore and Parkinson (2007), regarding the hearing of children in family court procedures.

Research by Hazel and colleagues (2002) and Plotnikoff and Woolfson (2002) shows that young people indicate that they certainly do not understand everything that is discussed at an English youth court hearing. As a consequence, they feel anxious and insecure during the hearing, because of their limited understanding of what is discussed. Therefore, legal jargon can be considered to be a barrier to constructive communication in the youth court. What seems to be common language for judicial professionals is not so common for the majority of young persons and their parents (Crawford & Bull, 2006; Grisso et al., 2003; Oude Breuil & Post, 2002; compare also to Kilkelly & Donnelly, 2011). The less legal terminology is used, the better the chance that the young person will be able to take part in the process actively. When discussions are held between the professionals in court, which the young person does not understand, his attention will probably be distracted and he will give up trying to be involved in the hearing. Not only using judicial jargon, but also using complex and lengthy sentences and difficult words in general has these negative effects on adolescents' understanding of the youth court process. It is therefore advisable to use short sentences and simple grammatical constructions when talking to children and adolescents (Saywitz et al., 2010).¹⁴ It should be clear, however, that avoiding judicial jargon and complicated and lengthy sentences does not alter the fact that a youth court hearing is a serious event, during which important matters are discussed.

4.3.3 Clarifying the judgment and sentence

When a decision is taken against the wishes of a young person – which is often the case in criminal proceedings – it is important that he understands how the decision has been reached, to what extent his own views have played a role in the considerations and what the decision means for him in its entirety (Archard & Skivenes, 2009). To explain the sentence is pedagogically of great importance, because it might help young people to understand what the consequences are of their behaviour. Explaining the judgment or outcome of a case in a language that the young person

¹⁴ It is also recommended to avoid compound utterances, embedded and relative clauses, double negatives, subjunctives, conditionals, multi-word verbs, pronouns and a passive voice (see Saywitz et al., 2010).

understands is also considered to be one of the elements of child-friendly justice as formulated by the Council of Europe.¹⁵ Furthermore, to explain the sentence or judgment also means that one should have regard for the views the juvenile defendant has expressed during the hearing and to explain to which extent these views have influenced the final decision, i.e. indicating the weight that has been given to the views of the child (art. 12 (1), CRC; CRC Committee, 2009, para. 45). This can be seen as part of showing a genuine interest in the views of the young person (see section 4.2.4). However, in order for the juvenile to be able to express his opinion, he should be properly ‘informed not only of the charges, but also of the juvenile justice process as such and of the possible measures’ (CRC Committee, 2007, para. 44). It is therefore not only of importance to clarify the final judgment, but also to give the young person beforehand an idea about the possible sanctions that can be imposed against him and the implications those sanctions might have.¹⁶

Explaining the reasons behind a certain sentence and the concrete content of that sentence should take place in a manner and language that is comprehensible for the young person. Besides an often existing lack of understanding about what the sentence will entail, young people do not generally understand how the length of the sentence (the number of hours of community service or the length of a custodial sentence) is calculated (Eggermont, 1997; Plotnikoff & Woolfson, 2002). When the judge or the prosecutor is aware of an existing lack of understanding on the part of the young person relating to, for example, the claims of the prosecutor or the final judgment, a more suitable and child-friendly clarification should be added by the judge (or the prosecutor). It is therefore advisable to allow extra time during the hearing to explain the grounds of the sentence. However, it should be noted here that the judgment is not always provided orally to the young person. The judgment can be pronounced at a later hearing (e.g. in the case of a serious offence). In that case the presence of the young person is not always compulsory and/or the judgment is sent by post (see chapter 8, section 8.2.3). As a consequence, an important opportunity to contribute to the young person’s understanding of the judgment and sentence may not be utilised.

¹⁵ Council of Europe, Committee of Ministers, 17 November 2010, 1098th meeting, IV, D, art. 49, 75.

¹⁶ This has also been confirmed by the Dutch Supreme Court (HR 28 August 2012, LJN BX3807, NJ 2012, 506).

Research shows that the degree of acceptance of the sentence is higher when the young person understands the reasons behind the decision that has been taken (Cashmore & Parkinson, 2007; Schuytplot, 1999; Tyler, 2006a). A comprehensible explanation of the reasons behind a certain sentence leads to more reflection on and a better insight of the young person into his delinquent behaviour. This element of effective participation shows a strong relationship with showing a genuine interest in the views of the young person. Clarifying the judgment and sentence can be seen as part of showing a genuine interest, because by doing so the influence that the views of the young person have had on the final decision is explained. Moreover, it leads to a higher level of acceptance of the sentence (Tyler, 2003).

4.3.4 Contributing to the understanding of the consequences

The final requirement for effective participation has to do with the understanding of the juvenile defendant of the delinquent behaviour he has displayed and the consequences his behaviour has had. Contributing to the understanding of the young person concerning what he has done means that attention is paid by the judge to questions such as; which consequences did the offence have for a victim; which consequences did it have for other persons who are significant to the young person, such as his parents, siblings, grandparents or neighbours; to what extent the young person feels responsible for what he has done; and what opportunities exist to repair the harm and/or restore the wrongdoing? This final requirement can also be seen as part of an atmosphere that is stern and serious and in which the young person can be held responsible for his actions (see section 4.2.1).

From a pedagogical perspective, paying attention to the moral side of delinquent behaviour means that the young person is assisted in taking responsibility for what he has done. This can be done most adequately by confronting the young person with the consequences of his behaviour (Weijers, 2000). In chapter 3 (section 3.3.2) it was argued that when the young person is confronted with the consequences of his behaviour he might start to feel guilty about what he has done to others. Addressing the emotion of shame, on the other hand, does not have an effect on understanding the consequences of one's behaviour. The natural

reaction to shame is to feel so embarrassed as to want to sink through the floor. Adolescents shut themselves off from what is being said, they wait until it is over and they no longer want to be in that position (Reimer, 1996; Taylor, 2002). As a consequence their participation in the youth court hearing is completely disabled. Moreover, people who are ashamed tend to blame others for the harm they have caused, because by doing so the uncomfortable feeling of being ashamed eases. When feeling guilty a person tends to accept that he has done something wrong, takes responsibility for it and, in order to ease the feeling of guilt, he can make up for what he has done. Therefore, understanding the consequences of one's behaviour and feeling guilty about what one has done to others provide important points of departure for the prevention of reoffending.

Discussing the consequences of the act does not only relate to the consequences that have affected (or still affect) the victim, but also the people who care about the young person, society as a whole and eventually the young person himself and his future. Juveniles who have committed an offence are mostly not aware of or do not reflect on the consequences of their behaviour (Grisso, 2000). Confronting the young person with the concrete consequences of his behaviour is the crux of the matter in addressing the moral emotions of the young person. Reading fragments from letters by victims, parents, grandparents or other important persons can be very constructive in this regard. In addition, the presence of a victim at the hearing and the involvement of parents in discussing the responsibility of the young person can both have a positive influence on the young person. Parents can be asked to tell how they reacted when they first heard about the offence their child is accused of, what they were thinking and how they felt at that moment (see also section 4.2.5). A victim can tell how the offence has affected him. This may incite self-reflection on the part of the young person, because he is confronted with the consequences of his own behaviour by people he cares about (Delfos, 2005).

When discussing the moral side of the case, the offence should always remain the centre of attention. A series of critical questions or remarks concerning the educational career, employment or leisure time of the young person, which are not directly linked to the delinquent behaviour of the young person, are unsuitable in opening his eyes to the consequences of his behaviour. The personal circumstances of the young

person should preferably be spoken about in a neutral way. Asking critical questions or making critical remarks on the attitude to life of the young person or the choices he makes in life generally has a counterproductive effect on the young person. In doing so young people feel belittled; they feel that they are being treated as a child. Moreover, the criticism is seen as a threat to their personality and newly formed identity (Eggermont, 1993). Instead, the young person should be guided towards self-reflection and not be treated paternalistically. The young person should be thoroughly involved in discussing what he has done wrong. It is very well possible to talk to adolescents about the meaning and consequences of what they have done wrong, but also about what can be done to prevent further delinquent behaviour and to rectify the harm that has been caused (Delfos, 2005).

It is often contemplated whether judges should engage in talking with juvenile defendants about guilt, responsibility and the consequences of delinquent behaviour. On the one hand, a judge should adopt a neutral stance during the entire youth court hearing. On the other hand, it is possible to give the young person a message to take home with him. The question that follows from this notion is *when* (i.e. at which moment during the hearings) to discuss the moral aspects of the case? It is clear that discussing the responsibility and feelings of guilt of the young person is easiest when he has confessed to the act of which he is accused or when his guilt is established by trial. This opens up the discussion and provides the judge with starting points for discussing the young person's understanding of the consequences of his behaviour, how to make up for what he has done wrong and how to prevent any future reoffending. This last subject requires higher levels of reasoning from the young person and the ability to reflect on one's (future) behaviour, so that this can mostly be discussed with older adolescents.

In general, the most appropriate part of the hearing to discuss these topics is at the end of the hearing or in the adversarial context during a sentencing hearing. The juvenile defendant has either confessed or the evidence is strong enough to hold the young person responsible for the offence.¹⁷ At this point, a *take-home message* can be given to the young person with regard to his responsibility and future (delinquent) behaviour. When the court hearing and its outcome are perceived as fair by the

¹⁷ If the young person is acquitted, this discussion naturally does not have to take place.

juvenile, the greater will be the possibility that he will listen to and remember the moral message given by the judge. In order for the discussion of the consequences of the delinquent behaviour to be effective, it is of importance that the other requirements for participation are met. When the young person does not view the youth court as legitimate and does not perceive his treatment as fair, then addressing the consequences of his act will not have much effect. Moreover, it has to be stressed that the judge can only give the initial impetus with regard to the prevention of reoffending. During the execution of the sentence or measure social workers can build upon the basis the judge has laid with regard to accepting responsibility and understanding the consequences of one's behaviour.

Conclusion

In this section four requirements have been discussed with regard to improving the understanding of juvenile defendants. First, it has been argued that it is of importance that the young person is provided with explanations of what happens during the hearing. Before the hearing starts the judge should explain the purpose of the hearing, the order of the procedures that will be followed during the hearing and introduce the different persons in court and explain their roles. Second, during the hearing judicial jargon and complicated and lengthy sentences should be avoided. Third, it is of importance to explain the sentence. By explaining why a certain sentence has been chosen, the judge can acknowledge the views the young person has given earlier. Fourth, at the end of the youth court hearing attention can be paid to the moral side of the case; that is the understanding of the consequences of what the young person has done and the responsibility he has to take to avoid further offending. The judge can provide the first incentive for the young person to change his behaviour.

4.4 Conclusion

This chapter will finish with a general synthesis of the normative framework as it has been laid down in chapters 2, 3 and 4. The main conclusions will be summarised and directions will be given for the empirical part of this study, which will be outlined in the coming chapters.

In chapter 2 key human rights conventions, standards and case law were reviewed with regard to children's rights in juvenile justice and more specifically the participatory rights of juvenile defendants. Of importance to this study is the right to be heard in juvenile justice proceedings, which was first laid down in rule 14.2 of the Beijing Rules. Moreover, the Beijing Rules contain procedural safeguards to be respected in juvenile justice proceedings, which served as a basis for several rights later laid down in article 40 CRC. With the adoption of article 40 CRC the right to a fair trial for minors has been accepted in a legally binding international human rights Convention. The right to a fair trial has been further defined and completed by the European Court of Human Rights. The Court has concluded that a fair trial (as guaranteed by art. 6 ECHR) implies that defendants should be able to participate effectively in court. Effective participation does not only mean that the defendant is present at his own trial, but also that he can hear, follow and understand the general nature of the trial and the consequences it entails for him. Lawyers play an important role in explaining the purpose and nature of the process and the topics that are discussed during the court hearing. The Court recommends, in accordance with article 40 (3) CRC, that juveniles should be tried in specialised youth courts. It can be concluded that adapted procedures and specialised treatment of juvenile defendants are necessary to make true participation possible and to take into account the age, developmental stage and evolving capacities of the juvenile defendant.

In chapter 3, the concept of fair trial was considered from a psychological perspective, instead of a juridical perspective. Requirements for a fair trial are derived from research findings concerning procedural justice. Several conditions can be referred to that contribute to the perceived fairness of a trial, such as the neutrality and consistency of the court procedure, to be treated with dignity and respect by the authorities and to have the opportunity to participate in the procedure. These requirements for a fair trial are equally important for adult and juvenile defendants. However, in order to fulfil these requirements juveniles need special attention and assistance. Adolescents mature significantly during adolescence, both cognitively and emotionally. The ongoing and not yet complete cognitive and emotional development in adolescence has as a consequence that juvenile defendants cannot

participate in a court hearing on the same level as adult defendants. The average young person starts only from around the age of 14 to understand what it means to be criminally tried in court, because he has a limited understanding of the meaning of the juvenile justice process and of the attitude that is expected of him in court. The limited understanding of juveniles requires specialised youth courts that employ adapted procedures, in order for juveniles to be able to participate effectively.

From chapter 3 it can be concluded that juvenile defendants need special assistance in the court process in order to ensure that they can avail themselves of procedural justice. First, a lawyer can support the young person in preparing him before the hearing(s) and assist him during the trial. Second, parents are important providers of social support, before, during and after the hearing. To enhance the participation of juveniles in the youth court it is of importance to hear the voice of parents as well.

In chapter 4 international children's rights law and standards and developmental psychological research are taken as a starting point in formulating specific requirements to enhance the effective participation of juvenile defendants. This first research question of this study is thereby fulfilled: *Which requirements for the effective participation of juvenile defendants in the youth court or other competent administrative body can be formulated on the basis of international children's rights law and standards and developmental psychological theory and research?*

The requirements are classified under the notions *hearing the views of juvenile defendants* and the *juvenile defendants' understanding* (see Table 4.1). With regard to the first requirement, it is of importance to create an appropriate setting for hearing juvenile defendants. Subsequently, it is of importance that the judge is trained in conversational techniques that are suitable for communicating with adolescents. The most fundamental requirement for participation is the possibility for the young person to express his opinion concerning the alleged offence. Moreover, the story of the young person should be considered seriously and the judge should be able to encourage the young person to tell his side of the story. Furthermore, parents should be actively involved in the youth court as well, because young people feel that they are taken seriously when their parents are also heard.

Concerning the young person's understanding of the juvenile justice process, the most fundamental requirement is the fact that

professionals are conscious of the fact that adolescents have a limited understanding of what is happening during the youth court hearing. Additional explanations and clarifications with regard to the purpose of the hearing, the order of the proceedings and the persons who are present and the roles they fulfil during the hearing are needed. Moreover, it is of importance to avoid judicial jargon (or to explain jargon, when its use is inevitable) and to justify the sentence that is imposed. Furthermore, an appeal can be made to the moral aspects of the case. The concrete consequences of the offence for victims and others who are significant for the juvenile defendant and the responsibility of the young person for his deeds can be discussed. This may help the young person to reflect on his acts and give him directives for future behaviour.

Table 4.1
Requirements for effective participation

<i>Hearing the views of juvenile defendants</i>	<i>Juvenile defendants' understanding</i>
Setting	Explanation
Conversation techniques	Jargon
Own views	Judgment
Genuine interest	Consequences
Parental participation	

The requirements for effective participation in the youth court will be taken as points of departure in analysing the youth court practice in the 11 European countries involved in this study. Because the youth courts in these countries function within different national criminal justice systems, with their own historical background and legal tradition, three general characteristics and the main actors involved in these systems will first be outlined in chapters 5 and 6. Subsequently, in chapters 7 and 8 the empirical findings of this study will be presented following the requirements outlined in this chapter and taking into account the distinct features of the different national juvenile justice systems. On the basis of the empirical results of this study an assessment will be made concerning

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the extent to which and manner in which juvenile defendants are enabled to effectively participate in the youth court in the 11 European countries.

Part II

The juvenile justice systems

Chapter 5

General characteristics of the juvenile justice process

5.1 Introduction

In this chapter three general characteristics of juvenile justice systems will be discussed. It is presumed that the manner in which juvenile defendants are able to participate is influenced by these characteristics. First, the age from which minors are regarded as criminally responsible for their acts will be discussed (section 5.2). The lower and upper age limits of the juvenile justice system define the ages of young people who are involved in this study. The second feature is the relationship between the juvenile justice system and the child protection system in a country (section 5.3). This relationship influences which young people are dealt with within the juvenile justice system and which young people are transferred to the child protection system. The third general feature that will be discussed is the difference between the inquisitorial and adversarial legal tradition (section 5.4). It is presumed that the legal tradition in which a juvenile justice system operates has an important influence on the manner in which and the extent to which juveniles can participate in the youth court.

5.2 Age limits

In each country involved in this study a minimum and a maximum age for dealing with young people in the juvenile justice system can be distinguished. However, the existence of a minimum and maximum age does not automatically imply that every young person falling within this age range is prosecuted and tried in a youth court. Exceptions are made for very young children, minors who are above a certain age and for young adults. These different practices will be further explored in the following sections, on the basis of national law and policies.

5.2.1 The minimum age of criminal responsibility

The UN CRC posits that the states parties must establish ‘a minimum age below which children shall be presumed not to have the capacity to infringe the penal law’ (art. 40 (3) (a) CRC). This article is formulated weakly with regard to the establishment of a minimum age of criminal responsibility [MACR], because it does not give directions on a specific minimum age. The UN Committee on the Rights of the Child (2007) has stated that 12 years should be the absolute minimum age of criminal responsibility. The Committee encourages states parties that have their MACR set at below 12 to raise the age of criminal responsibility to at least 12 years, which is considered to be an internationally acceptable level (para. 32). States that already have their MACR set above 12 years are urged to leave it as it is and not to lower the minimum age (para. 33; see also chapter 2, section 2.3). The current trend in Europe is to raise the MACR. In recent years *Switzerland* has raised the MACR from 7 to 10 years (in 2007) (Hebeisen, 2010), *Ireland* has raised it from 7 to 12 years in 2001 (Walsh, 2010) and *Spain* from 12 to 14 years in 2000 (De la Cuesta, Giménez-Salinas, Castany & Blanco, 2010).¹

When taking a look outside of Europe, contrasts between the minimum ages of criminal responsibility are larger. Some states do not have a MACR, such as the majority of states of the United States of America [USA] and several African and Asian states (Cipriani, 2009). Substantial differences exist between continents as well. The average minimum age in Africa is 9 years and in respectively Australia/Oceania and Asia 10 years. In Europe the overall average minimum age of criminal responsibility is 13 years (Weijers & Grisso, 2009). Some of the European countries involved in this study have a MACR that is below the age of 12. *Greece* and *Scotland* have the lowest age level, set at 8 years. These countries are followed by *England and Wales*, *France* and *Switzerland*, which have the MACR set at 10 years, and *Ireland*, and *the Netherlands* where the MACR is 12 years. The other four countries have a MACR that lies above the age of 12 (see Table 5.1). It can be concluded that most European countries have a MACR that lies above the lower limits that are employed in most countries around the world.

¹ Cyprus raised its MACR from 7 to 10 years in 1999 and in 2006 from 10 to 14 years (Kyprianou, 2010).

Table 5.1*Minimum age of criminal responsibility*

8	10	12	14	18
Greece	England & Wales	Ireland	Germany	Belgium
Scotland	France	Netherlands	Italy	
	Switzerland		Spain	

5.2.2 Criminal prosecution of minors

When considering the very young age from which children can be prosecuted in certain countries, some nuances should be highlighted. In *the Netherlands*, for example, children can be prosecuted in the youth court when at the time of the offence the child was 12 years or older (art. 77 (a) Cc). Employing a strict age limit, however, is not standard practice everywhere. In some countries the lower age limit heralds a period in which the young person is potentially criminally responsible. In these countries the classical premise of *doli incapax* (literally ‘incapable of evil’) rules. This premise holds that children under a certain age are not capable of committing a crime, until proven otherwise. As a consequence, most children will not be prosecuted until they have reached a certain age at which they are deemed to be able to be criminally responsible, some years after the official MACR (Hollingsworth, 2007; Weijers & Grisso, 2009).

The *doli incapax* presumption was in place for a long time in Ireland and England and Wales. It was abolished in *England and Wales* by the introduction of the Crime and Disorder Act 1998. Nowadays, every child from 10 years and onwards can be prosecuted in court (Bottoms & Dignan, 2004; see s. 50 Children and Young Persons Act 1933). In *Ireland* the MACR was 7 years until 2001. However, the *doli incapax* criterion applied to children until they were 14 years of age. This means that most children in Ireland were only prosecuted when they were at least 14 years of age when they committed the offence. Today, the MACR has been raised to 12 years (s. 52 Children Act 2001), and the presumption of *doli incapax* has been abolished by the Criminal Justice Act 2006 (s. 129). The minimum age of criminal responsibility can drop to 10 years if a child

has committed a serious offence, such as murder, manslaughter or rape (s. 129). Indictable offences committed by minors from 10 to 18 can be dealt with by a judge and jury in the adult court (Walsh, 2010).

In *Scotland* a different practice can be observed. Children from 8 to 16 years can be referred to the children's hearings system on offence grounds. Children between 0 and 18 years of age can be referred to the system on other grounds, such as being beyond the control of parents, failing to attend school or misusing alcohol or drugs (ss. 199 (1) and 67 Children's Hearings (Scotland) Act 2011). Children of 12 years of age can be transferred to the adult court in case of a serious offence (s. 41A Criminal Procedure (Scotland) Act 1995). From the age of 16 children are in principle prosecuted in the adult court (s. 42 (1)). When referred to the children's hearings system the child and his parents have to appear before the *children's panel* (s. 4 Children's Hearings (Scotland) Act 2011), a welfare tribunal led by trained volunteers, which decides on the best appropriate care or protection measure that should be in place for the child. The child can only be given welfare measures (e.g. social work assistance) and no sanctions (s. 83 (2)).

Greece has a fairly low MACR; it is 8 years. Children can commit offences, but until the age of 13 they are not criminally responsible for their behaviour. Between 8 and 13 years of age only educational measures can be imposed on children (art. 126(1) Cc). From 13 years of age a child can be sanctioned by the court (art. 127 Cc).² The MACR in *Switzerland* is 10 years (art. 3 Jcc). Between 10 and 18 minors can receive an educational measure and/or sanction. With regard to sanctioning a two-tiered model is in place. Children between 10 and 15 years old can only receive an admonition or a community sentence and between 15 and 18 also a fine or imprisonment can be ordered (art. 22-25 Jcc).

As we see in Switzerland and Greece, in several other European countries particular criminal sanctions are not applicable to children under a certain age (but above the MACR). In *France*, children can only be held criminally responsible from the age of 10. Below the age of 10 children can be found capable of discernment when they have committed an offence, but only protective and educational measures can be imposed (art.

² Pre-trial detention can only be imposed on children from 13 years and older and only in those cases where a crime has been committed that carries a minimum sanction of 10 years imprisonment (art. 127 Cc; see Spinellis, 2007).

122-8 Cc). With regard to sentencing a multi-staged system exists: children between 10 and 13 years of age can only receive an educational measure or educational sanction (art. 2 Jci). Criminal sanctions can be imposed on children from the age of 13, with the exception of community service, which can only be imposed from the age of 16 (art. 20-5 Jci; art. 122-8 Cc). In other countries the MACR lies at a higher level. In *Germany* (art. 1 (2) Jcc), *Italy* (art. 97 Cc) and *Spain* (art. 4 Jcc) at 14 years. In *Belgium* formally no minimum age of criminal responsibility exists. In the juvenile protection code it is stated that the youth court is competent in cases of minors below the age of 18 who are accused of having committed ‘an act defined as an offence’³ (art. 36 (4) Jpc).⁴

To conclude, the average age of the actual prosecution of minors lies above the average minimum age of criminal responsibility in Europe. Children under the age of 14 are usually dealt with by the welfare system or they receive a welfare measure, instead of a sanction, in response to delinquent behaviour. A few exceptions exist, such as *England and Wales* and *the Netherlands*, where children can be prosecuted in the youth court from 10 or 12 years, respectively.

5.2.3 The upper age limit of the juvenile justice system

The CRC Committee (2007) holds the opinion that a special juvenile justice system must be in place for young persons until the age of 18 (paras. 36, 37). Moreover, the Committee advises states parties that have a lower upper age limit to extend the application of juvenile justice provisions to young persons up to 18 years of age and to abolish rules that allow for the prosecution of young persons under the age of 18 in the adult criminal court (para. 38). In the following sections, two models for the prosecution of minors will be explained (Weijers, Nuytiens & Christiaens, 2009).

Flexible model

Several European countries do not live up to the recommendations of the Committee and they have laws or policies that allow for the transfer of

³ *Een als misdrijf omschreven feit* (MOF). Protection cases are categorised under the heading *Problematische opvoedingssituatie* (POS).

⁴ In de Belgian criminal code it is stated that minors are those who have not yet reached the age of 18 (art. 100 (ter) Cc).

juvenile defendants to the adult criminal justice system. This is the case when a minor is accused of committing a serious offence. In these cases, usually procedures and/or sanctions from the adult criminal code are applied (see Cavadino & Dignan, 2006, p. 211). In *England and Wales*, every child can be prosecuted on indictment in the *Crown court*.⁵ Indictment can take place when the young person has committed a certain specified serious offence (s. 224 Criminal Justice Act 2003; s. 91 Powers of Criminal Courts (Sentencing) Act 2000), such as a crime for which a person aged 21 can receive a minimum sanction of 14 years imprisonment, or when the crime has been committed together with adult co-offenders (s. 51 (5)(b) Crime and Disorder Act 1998). In the *Crown court*, young persons are exposed to the adult criminal court procedures, including a public jury trial and formal procedures (Dignan, 2010). In Ireland minors between 10 and 18 years of age can be transferred to the adult court in the case of certain serious offences (s. 75 Children Act 2001).

In *Belgium* a juvenile welfare system exists, rather than a juvenile justice system. This means that young people up to the age of 18 are not considered to be criminally responsible for their delinquent acts. However, in case of a serious offence, 16 and 17 year olds can be prosecuted in the adult criminal court, by means of an indictment in the criminal court (*uithandengeving*, art. 57 (bis) Jpc). A first general requirement for a transfer to the adult criminal court is the fact that an educational measure is no longer considered to be the most appropriate response to the criminal behaviour of the young person. Moreover, an educational measure or restorative justice initiative must have been imposed before, or the offence is of a very serious nature (e.g. murder, rape, certain violent offences) (art. 57 (bis) (1) Jpc). The decision to transfer the young person to the adult criminal court can only be taken when social and medical-psychological investigations have taken place (art. 57 (bis) (2) Jpc). The special chamber of the youth court applies the procedures and the sanctions from the adult criminal justice system (art. 57 (bis) (1) Jpc). The maximum sentence is 30 years imprisonment (art. 9 (4) Cc; see Christiaens, Dumortier & Nuytiens, 2010; Van Dijk, Dumortier & Eliaerts, 2006). The transfer of

⁵ Most interestingly, according to the English Police and Criminal Evidence Act 1984 [PACE] young people up to the age of 17 are treated as minors by the police. 17 year olds are treated as adults, although the upper age of the juvenile justice system is 18 since the enactment of the Criminal Justice Act 1991. When the young person is sent to court, he will appear as a minor in the youth court (Arthur, 2010).

minors to the adult court is employed with much reservation in Belgium, so it rarely occurs (Van Dijk et al., 2006).⁶

In *the Netherlands* and *France*, prosecuting 16 and 17 year olds in the adult criminal justice system is possible as well. In the Netherlands this is possible on the basis of either the seriousness of the offence, the personality of the defendant or the circumstances under which the offence has been committed (art. 77 (b)(1) Cc).⁷ In the Netherlands and France, however, the case remains in the juvenile justice system; a youth court judge tries the case and youth court procedures are followed during the trial. When the young person is found guilty, the youth court judge can order an adult criminal court sentence. Research in the Netherlands shows, however, that custodial sanctions imposed on minors hardly ever exceed the maximum youth detention sentence of two years (for 16 and 17 year olds) and at the top end the sentence is hardly ever more than eight years imprisonment (Weijers, 2006). Moreover, the number of juvenile defendants that are transferred is very low.⁸

As has been shown before, when a 16 year old commits a crime in *Scotland* he is, as a rule, prosecuted in the adult criminal justice system.⁹ Moreover, young persons below the age of 16 can be prosecuted in the adult court as well when they have committed a serious offence, but only on the instruction of the Lord Advocate (s. 42 (1) Criminal Procedure (Scotland) Act 1995). It is possible to send the young person back to the children's hearings system for sentencing when he has been found guilty in the criminal court (s. 49 Criminal Procedure (Scotland) Act 1995; s. 71 Children's Hearings (Scotland) Act 2011). However, the prosecution of

⁶ Moreover, research shows that the number of minors tried in the adult court does not seem to increase (Weijers, Nuytiens & Christiaens, 2009). When a minor, who has once been convicted in the adult criminal justice system, reoffends, he has to be prosecuted in the adult court again as well and can no longer be handled in the juvenile welfare system (Van Dijk et al., 2006).

⁷ With regard to article 37 (c) CRC the Netherlands has entered a reservation which made it possible to apply adult penal law to children of 16 years and older.

⁸ In 2005, a juvenile defendant received a prison sentence according to adult criminal law in 197 cases. However, in 2011 this number decreased to only 67 cases (Van Rosmalen, Kalidien & de Heer-de Lange, 2012, p. 552).

⁹ This means that the same procedures are employed in court, as is the case with adult defendants (who are 18 years or older). Moreover, the same sanctions apply, as is the case for adult defendants. Custodial sentences are generally executed in young offenders' institutions for young people between 16 and 21 years old (Francoz-Terminal, 2011).

under-16 year olds in the adult court rarely happens (Burman, Johnstone, Fraser & McNeill, 2010; McAra, 2006).

In several European countries juvenile defendants can be prosecuted in the adult criminal justice system or receive a sentence from the adult penal code. These countries employ a flexible upper age limit. This means that the amount of the upper age limit depends mainly on the severity of the alleged offence. In these countries the maximum detention sentence that can be ordered in the juvenile justice system is fairly low (for example two years in the Netherlands (art. 77 (i)(1)(b) Cc) and England and Wales (s. 101 (1) Powers of Criminal Courts (Sentencing) Act 2000) (Weijers et al., 2009)). However, exceptions are made for minors who commit very serious offences. In those cases the upper age limit is lowered and the minor's case is transferred to the adult criminal justice system. According to adult criminal law substantially longer prison sentences can be ordered, based on the severity of the crime.¹⁰

Strict model

In strong contrast, in the remaining European countries it is not possible to prosecute minors in the adult criminal court. In these countries a fixed upper age limit is employed, which means that juveniles are always dealt with within the juvenile justice system. This is called the *strict model* in Europe, in which a fixed upper age limit is linked with longer maximum detention sentences within the juvenile justice system (Weijers et al., 2009). In *Germany, Greece, Italy, Spain* and *Switzerland* it is not possible for juveniles to be transferred to the adult criminal justice system (De la Cuesta et al., 2010; Dünkel, 2010; Hebeisen, 2010; Padovani, Brutto & Ciappi, 2010; Pitsela, 2010). Juvenile defendants who have committed a very serious offence are dealt with in the juvenile justice system. Moreover, they can be given longer juvenile detention sentences, in comparison with the juvenile sentences of the above-described countries. The youth court trial and the execution of the sentence are the responsibility of the juvenile justice authorities.

¹⁰ In Europe the transfer of juvenile defendants to the adult court does not occur as often as in the USA. In eight states 'statutory exclusion' can take place at any age and in two states a 'prosecutorial waiver' can take place at any age. In many more states the transfer of juvenile defendants to the adult criminal court can take place from the age of criminal responsibility (Weijers & Grisso, 2009).

Germany is a remarkable example of the strict model. The German juvenile criminal code contains educational measures, disciplinary measures and sanctions (art. 9-18 Jcc). The maximum detention sentence is five years, which is more than twice as long compared to the maximum juvenile detention sentence in the Netherlands and England and Wales. When a crime is committed which, according to the adult criminal code can be sanctioned with more than 10 years imprisonment, the maximum sentence for minors can be as high as 10 years juvenile detention (art. 18 (1) Jcc). In Greece the maximum detention sentence for minors is even higher: 20 years (art. 54 Cc).

In *Switzerland* the interpretation of this principle is rather different. The maximum detention sentence for minors is 1 year (art. 25 (1) Jcc). Juveniles aged 16 or 17, who have committed a serious offence, can be sentenced to a maximum of 4 years youth detention (art. 25 (2) Jcc). The maximum detention sentences in Switzerland are therefore much lower than in its neighbouring country Germany. In Spain, a similar type of multi-staged sanctioning system exists. In general, placement in an open or closed institution can be ordered for two years. However, in the case of a serious offence, a violent offence or repeated offending 14 and 15 year olds can be sanctioned for 3 years and 16 and 17 year olds for a maximum of 6 years (art. 9-10 Jcc).¹¹

Summarising, the actual maximum detention sentences in both models do not differ markedly. In the flexible model longer adult prison sentences can be ordered. In the strict model the maximum detention sentence in the juvenile justice system is higher compared to the maximum juvenile detention sentence in the countries that employ the flexible model. However, the forum in which the minor defendant is prosecuted (the adult criminal court vs. the youth court) and the execution of the sentence (an adult prison vs. a juvenile detention facility) does differ. In the strict model the juvenile defendant is always prosecuted in the youth court and the sentence involves a youth sentence executed in a specialised youth institution. In the flexible model the young person can

¹¹ More recently provisions have been adopted in a special law regarding the sanctioning of very serious offences and terrorist attacks (LO 7/2000). Under- 16 year olds can receive up to 5 years detention and 16 and 17 year olds up to 8 years in the case of a serious offence. In case of multiple offences the maximum can be respectively 6 years and 10 years imprisonment (art. 10-11 LO 7/2000).

be prosecuted in the adult court or the youth court, but the sentence is imposed according to the adult criminal law.

5.2.4 Young adults

Instead of transferring juvenile defendants to the adult criminal justice system, in several European countries it is possible to keep young adults in the juvenile justice system. In *Germany* the youth court has jurisdiction over young adults between 18 and 21 years old as well (art. 1 (2) Jcc). The procedures in court are the same for young adults as they are for minors, even when the young person is prosecuted under the adult criminal code. The youth court judge can order a sanction according to juvenile criminal law or adult criminal law. In the latter case a maximum of 4 years detention can be imposed (art. 108 Jcc). Moreover, a detention sentence is executed in a juvenile detention facility for every young adult up to 24 years of age who receives a juvenile sentence (art. 114 Jcc). A possible explanation for the higher number of young adults who are dealt with in the juvenile justice system is the fact that in the adult criminal justice system very severe minimum sentences exist for serious offences. For example, life imprisonment must be ordered when an adult has committed an act of murder. When a young adult is prosecuted under juvenile criminal law the judge does not have to order the minimum sentences that apply to adult offenders (Verwers & Bogaerts, 2005).

In other countries different interpretations are given as to how to deal with young adult defendants. In *Greece*, judges can order a less severe sanction in the case of a young adult up to 21 years of age at the time of the offence than the sanction that can be ordered in adult cases (art. 133 Cc). In *Greece* and in *Italy*, detention sentences for young adults are executed in specialized juvenile detention facilities, so young adults are not imprisoned together with adults (Padovani et al., 2010; Spinellis & Tsitsoura, 2006). In *Switzerland* young adults are prosecuted in the adult criminal justice system, but the age of the young person is taken into consideration in sentencing and special institutions for young adults exist (Hebeisen, 2010). For example, young adults, who have committed an offence before the age of 25, can receive a treatment measure in a closed institution for young adults (art. 61 Cc).

In *the Netherlands* it is possible for young adults between 18 and 21 to receive a youth sanction or measure. The procedures in court are according to common law. Either the personality of the young person or the circumstances under which the offence has been committed can be a reason for the judge to sentence the young person as a minor (art. 77 (c) Cc). The transfer of young adults to the juvenile justice system does not happen very often, however. Generally, it concerns young people with mental disabilities (Weijers, 2006). The execution of the juvenile detention sentence can either take place in a juvenile or an adult detention institution (see Liefwaard, 2008, p. 436). In *France*, a young person who is placed in an institution, as part of a protective measure imposed by the youth court judge, can ask for the placement to be prolonged after he has reached the age of 18 (art. 16bis Jci).

Amendments to the *Spanish* juvenile criminal code in 2000 made it possible for 18 to 21 year olds to be prosecuted in the youth court. However, this provision never came into effect because of successive legislative reforms and in 2006 the provision was abolished altogether (De la Cuesta et al., 2010). Other countries, such as England and Wales and Ireland, do not have any provisions concerning the prosecution of young adults in the juvenile justice system (Dignan, 2010; Walsh, 2010).

To conclude, it appears that those countries that have a flexible upper age limit and allow for the transfer of juveniles to the adult criminal justice system, such as *England and Wales*, do not have special provisions for dealing with young adults. On the other hand, a country like *Germany*, which employs a strict model and does not allow for the transfer of juvenile defendants, has more opportunities for young adults to be kept in the juvenile justice system.

Conclusion

The first conclusion that can be drawn regarding the minimum age of criminal responsibility is the fact that in Europe the average MACR is set at a fairly high level in most countries, especially compared to the rest of the world. Five out of the 11 countries involved in this study have a minimum age of 8 or 10 years and six countries have the MACR set at 12 years or older. Only those six countries comply with the recommendation made by the CRC Committee (2007, para. 32) that the MACR should at least be set at 12 years. However, in countries that have a minimum age

limit below the age of 12, the prosecution and sanctioning of very young children is rather exceptional.

In all but one country the upper age limit of the juvenile justice system is 18 years. *Scotland* is an exception to this rule, with 16 years as the upper age limit for the children's hearings system. Some countries, however, allow for the prosecution of juveniles, in serious cases, in the adult criminal justice system. In other countries, young adults can still be dealt with in the juvenile justice system. A flexible model can be distinguished in which juveniles can be tried as adults, and a strict model in which juveniles cannot be transferred to the adult criminal justice system.

With regard to this study it is of importance to bear in mind that age limits within Europe differ markedly. Children as young as 8 years of age can, theoretically, become involved in the juvenile justice system. Moreover, young adults are involved in the system as well. The range of ages that youth court judges and other juvenile justice professionals encounter in their practice might have important consequences for the manner in which one has to adapt the youth court hearing to the young person in accordance with his level of maturity.

5.3 Juvenile justice and child protection

In chapter 2 the general principles of the CRC have been outlined (see section 2.4.2). Article 3 CRC is considered to be one of these general principles and it states in paragraph 1 that the best interests of the child must be a primary consideration in all actions taken concerning the child. Naturally, this also applies to actions taken by the youth court and other authorities within the juvenile justice system. This implies that the traditional goals of the criminal justice system, such as retribution and repression, must give way to goals such as rehabilitation and restoration (CRC Committee, 2007, para. 10). Moreover, the best interests of the child principle implies that juvenile offenders have the right to receive treatment for their personal problems in order to prevent them from reoffending (see also art. 40 (1) and (4) CRC). The CRC Committee (2007) argues that states parties should limit the practice of criminalizing the problem behaviour of children, such as vagrancy, truancy and running

away from home and, as a consequence, dealing with these children in the justice system (para. 8). So, juvenile delinquents do not necessarily have to be dealt with in the justice system, but can also be handled in the civil child protection system.

In some European countries the best interests of the child principle is very apparent in the juvenile justice system. Juvenile defendants can, for example, receive a protective or educational measure on the basis of their (educational) needs when this is considered to be in their best interest. In other countries a clear divide exists between the juvenile justice system and the civil child protection system and delinquent behaviour is always dealt with within the justice system. In the following sections an overview will be given of the relationship that exists between juvenile justice and child protection in the countries involved in this study.

5.3.1 A strong relationship between juvenile justice and child protection

The response to the delinquent behaviour of children and adolescents in *Scotland* is still based on the legacy of Lord Kilbrandon. The Kilbrandon Committee argued in its 1964 report that the distinction between juvenile delinquents and children who are in need of care and protection is not meaningful, because both exhibit similar symptoms of underlying difficulties and both are in need of similar measures of care and protection (Kilbrandon Committee, 1964). The Committee recommended removing young people who are below the age of 16 from adult criminal procedures, which was common practice at that time. These recommendations resulted in the establishment of the *children's hearings system* in 1971; a welfare system in which both children who display delinquent behaviour as well as children who are being threatened in their development because of abuse or neglect or because they display unruly behaviour (that is not punishable by law) are dealt with (Griffiths & Kandel, 2000; Weijers & Grisso, 2009). Delinquent behaviour is seen as a symptom of underlying problems. These problems do not differ markedly from the problems experienced by children who are in need of care and protection. So, children from the age of 12 to 16 can be referred to the *children's panel* on offence grounds and children can be referred from birth to 18 years on care and protection grounds (Burman, Bradshaw, Hutton, McNeill &

Munro, 2006; see s. 67 (2) Children's Hearings (Scotland) Act 2011). The children's hearings system is also based on child welfare law (the Children (Scotland) Act 1995). The panel has the same set of instruments available for every child, irrespective of the grounds for referral. These instruments range from non-residential supervision to residential supervision in an open or closed setting (s. 83 (2) Children's Hearings (Scotland) Act 2011).

Basically no division exists in Scotland between the youth justice and the child welfare system. Cavadino and Dignan (2006, p. 203) call this 'a 'one-track' adjudication procedure for all 'troubled' children'. However, some links exist between the children's hearings system and the formal court system. When a young person between 12 and 16 years old has committed a very serious offence or when a child denies the grounds of the referral he will be sent to the *Sheriff court* (s. 93 (2) (a) Children's Hearings (Scotland) Act 2011). In the latter case, the judge decides whether the young person is guilty or not. The children's panel cannot decide on the culpability of the young person because it is an administrative board and not a court of law (Burman et al., 2010). In any case involving an offence or other care or protection needs a hearing cannot proceed when the child or his family contest the grounds for referral. The panel can decide to discharge the referral (s. 93 (2)(b) Children's Hearings (Scotland) Act 2011), continue the hearing on other grounds that are not contested (s. 91 (1)(b)) or refer the case to court (s. 93 (2)(a)). When the young person is found guilty of the offence, he is in most instances referred back to the children's panel for disposal. When a serious offence has been committed by a young person under the age of 16, the trial can be held in the adult criminal court (the Sheriff court or the High court; s. 42 (1) Criminal Procedure (Scotland) Act 1995). As has been mentioned before, this happens rarely and most young persons are again referred back to the children's panel for appropriate disposal when they are found guilty (Burman et al., 2010; McAra, 2006, see s. 71 Children's Hearings (Scotland) Act 2011).

The relationship between the welfare system and the justice system can to some extent also be observed in cases of 16 and 17-year-old defendants (who have attained the age of majority according to the Scottish criminal code). When a young person of this age, who has earlier been placed under supervision by the children's panel, commits an

offence the prosecutor contacts the *reporter to the children's hearing*.¹² The reporter can provide the prosecutor with additional information and they can decide together what would be the best appropriate step to take in the case. The prosecutor can decide not to prosecute the case or to ask for a referral to the children's panel for a disposition when the young person is found guilty. This happens rarely, however (McAra, 2006). The judge can also ask the panel to advise him on the best appropriate measure or sanction.

The situation in *Belgium* is comparable to the one in Scotland. In Belgium a child welfare system is in place for children up to 18 years of age. Minors cannot be found guilty of a crime. However, they can commit 'an act defined as an offence' (Put & Walgrave, 2006, p. 116). These young persons are dealt with in the same youth court as young people who are in need of protection and find themselves in a problematic educational situation. The youth court judge deals with offences as well as protection cases.¹³ The cases are all handled starting from the assumption that the problems underlying the delinquent behaviour are the same as problems that are experienced by children who are threatened in their development. In the youth court, all disposals are called educational measures, but in practice young people who have committed an offence can be ordered to carry out a community service or a reparatory measure (Christiaens et al., 2010). A supervision measure can be extended until the young person is 20 years old when the young person is still in need of care (art. 37 (3)(1) Jpc). This can even be prolonged until the young person's 23rd birthday when he has committed a very serious offence or has committed the offence while being between 16 and 18 years of age (art. 37 (3)(2) Jpc).

In the past the Belgian protection system has been criticized because measures were imposed for an indeterminate period. Since 2006 the type of measure and its duration have to be in accordance with the severity of the delinquent act (art. 37 (1)(3) Jpc) and the judge has to specify the duration of the measure in his judgment (art. 37 (2)(11) Jpc). In practice the judge still has large discretionary powers; the maximum

¹² The reporter to the children's hearings system is the gatekeeper of the system who assesses the incoming referrals, decides whether to call a hearing and has an overview of all children's hearing cases (Burman et al., 2010)

¹³ Different legislation applies, however, to protection cases. The procedures in court are federally decreed by law, but the execution of measures is the responsibility of the Communities (art. 36 (bis) Jpc)

duration of a measure must be determined, but the actual duration is not fixed. The protection measure must, however, be evaluated by the judge once a year and modifications can be made on the basis of the (changed) circumstances of the young person at any time (art. 60 Jpc).

In *France*, a separate youth justice (art. 1 Jci) and civil youth protection system (art. 375 CCiv) exists, but youth court judges deal with both types of cases. Typical for the French approach, similar to the Belgian practice, is the fact that a judge keeps his cases and supervises the measures he has imposed. A protection measure can be ordered in criminal cases as well for the maximum duration of five years (art. 20-9 Jci). French and Belgian judges supervise and control the measure during its entire duration. When a young person who has been submitted to a civil protection measure commits an offence, he will have to appear before his 'own' judge and the judge will decide on the best appropriate reaction to the delinquent behaviour. This reaction does not necessarily have to be a sanction, but can also entail an educational measure (art. 2 Jci). A measure can be ordered when the young person is between 10 and 18 years of age and it can be ordered by the youth court judge in the preliminary phase of the process in his function as a pre-trial judge (*juge d'instruction*) (art 8 Jci; art. 10 Jci). The social work department supervises the young person until the trial takes place (Blatier, 1998). When the measure is executed successfully, for example a reparatory measure in which the young person has performed a small number of days of community service, the same judge can decide to close the criminal case in chambers; the *chambre du conseil* (art. 8 Jci).

In *Switzerland*, there exists a comparable situation to the one in France and Belgium with the exception that youth court judges only work in one field of law; juvenile criminal law or child protection law. Nevertheless, cases can be transferred easily and judges within both fields of law are in contact with each other about certain cases (see art. 20 Jcc). In Switzerland, when a youth court judge as well as a family court judge handles the case of a certain child at the same time, the judges will discuss the case with each other. Together they decide who will deal with the case (Hebeisen, 2010). It is possible to combine sanctions and measures. When a young person is found guilty of an offence a sanction has to be imposed (art. 11 Jcc). In addition, a protective or treatment measure can be ordered as well. When the young person is found not guilty a measure can still be

imposed when necessary (art. 10 Jcc). Either way the personality of the young person determines the content and length of the measure and not the type or severity of the offence. The maximum duration is not fixed when the measure is ordered, but depends on the development of the youngster. The measure must be reviewed at least once a year (art. 19 (1) Jcc). The measure cannot however be extended past the 22nd birthday of the young person (art. 19 (2) Jcc).

In *Germany*, juvenile justice cases and civil child protection cases are dealt with by different courts and judges (Zwickel, 2011). The German juvenile sanctioning system also contains educational measures (art. 9-12 Jcc). Moreover, the youth court judge has the possibility to send the young person to the family court when he is of the opinion that the personality of the young person needs to be investigated more extensively. In that case, the family court judge decides on the best appropriate measure to be ordered. On the other hand, the prosecutor has to inform the family court regarding the fact that a young person has been charged and the family court has to inform the prosecutor about civil measures, or the adaptation or suspension of a measure (Zwickel, 2011).

As is the case in France, in *Greece* juvenile justice cases and child protection cases are dealt with by the same judge in the youth court (Spinellis, 2007). Comparable to the practice in France, very young juvenile offenders (8 to 13 years old) are not sanctioned, but can only receive educational or treatment measures, such as a supervision requirement or placement in a residential facility (art. 122-123 Cc). Measures can be extended until the young person is 21 years old (art. 125 (1)-(2) Cc) and have to be reviewed by the judge every year (art. 124 Cc).

Another interesting perspective on the division between juvenile justice and child protection exists in *Italy*. Judges as well as prosecutors have criminal as well as civil jurisdiction over a case. The prosecutor decides whether an act is considered to be unlawful and whether the young person is liable to punishment. These decisions are often taken in cases involving minors below the MACR (14 years). In all other cases the prosecutor has to send the case to court (art. 112 Italian Constitution). The police do not have the discretion to deal with a case, but can only decide whether or not to arrest a person (Padovani et al., 2010). The prosecutor can ask the judge to place the young person under social work supervision. This protective measure can be executed immediately, in contrast with

juvenile justice intervention, because in order to start such an intervention a separate hearing has to take place. When the risk of recidivism is expected to be high and the young person displays risky behaviour, he can be held in the juvenile justice system and he is not transferred to the child protection system. During the preliminary investigations the young person can be subjected to protection measures ordered by the pre-trial judge. As is the case in the above-described countries, in Italy protective measures can also be ordered as an alternative to a sanction and it can be combined with a criminal sanction (Field & Nelken, 2007; Gatti & Verde, 2002; Padovani et al., 2010).

To conclude this section the practice in *Ireland* will be highlighted, with which we return to the Anglo-Saxon world. In Ireland, the *children court* has the possibility to send a young person to a *health board* (s. 77 (1)(a) Children Act 2001).¹⁴ This authority organizes *family welfare conferences*, during which the personal circumstances of the young person are investigated and it is decided whether the young person should be placed under supervision (Walsh, 2010). The court can impose an emergency care or supervision order pending the outcome of the family welfare conference (s. 77 (1)(b)). When the health board imposes a protective measure and the judge is of the opinion that the measure is adequate, he can decide to dismiss the criminal case (s. 77 (3)).

To conclude, in many European countries it can be observed that youth justice authorities cooperate with child protection authorities. Young people who are involved in the juvenile justice system can be diverted to the protection system or they can receive additional protective or treatment measures, complementary to a criminal sentence. In other countries no distinction is made at all between child protection and juvenile justice and, accordingly, young people who are accused of committing an offence are dealt with in the same system as children who are in need of care and protection. In the following section three countries will be described that display a stricter division between juvenile justice and child protection.

¹⁴ The police also have the possibility to inform the health board when an under-twelve year old has come to the notice of the police and there are 'reasonable grounds for believing that the child is not receiving adequate care or protection' (s. 53 (2) Children Act 2001).

5.3.2 *A strict divide between youth justice and youth protection*

Until the legislative changes that took place in 1995 in *the Netherlands*, the youth court judge managed all the youth court cases by himself, supported by the Dutch Child Care and Protection Board (*Raad voor de kindbescherming*). The youth court judge handled both civil and criminal youth court cases and supervised all the cases dealing with one child or family. As is the case in France and Belgium, the judge had an overview of all the cases concerning a family and subsequent cases were handled by the same judge. Since 1995 the central and control function has been taken away from the judge and assigned to the Child Care and Protection Board, in order to guarantee an independent role for the judge. The judge no longer supervises every youth justice case falling under his authority (see Junger-Tas, 2004). Nowadays, the Child Care and Protection Board has taken over the directive function the judge had in the past. Depending on the organization of the court, youth court judges are either attached to the criminal law section of the court or the family law section. In the latter case judges are involved with juvenile criminal and civil child protection cases. However, criminal and civil cases involving one person are dealt with separately and not necessarily by the same judge (Vlaardingerbroek, 2011). As a result judges are not always aware of civil child protection measures when a juvenile defendant appears in court. The knowledge of the judge regarding the personal background and circumstances of the young person depends largely on the content of the social work report produced by the Child Care and Protection Board or the juvenile probation service (Verberk & Fuhler, 2006). In theory, the prosecutor can ask the judge to order a supervision measure (art. 1:254(4) CCiv) or to place the young person in care during a youth court trial (art. 1:261(1) CCiv), but prosecutors hardly ever do so (Vlaardingerbroek, 2011). In practice the Child Care and Protection Board is usually the authority that requests the judge to place the young person under supervision (as a result of delinquent behaviour among other things) and a separate civil procedure is commenced in that case (art. 1:254(4) CCiv).

In recent years several efforts have been made in the Netherlands to improve the cooperation between both fields of law. Nowadays, different authorities in the juvenile justice system meet regularly to discuss current cases in their jurisdiction; the so-called judicial case

consultation (*justitieel casus overleg*).¹⁵ In juvenile justice cases parties such as the prosecution service, the police, the Child Care and Protection Board, the social work department and the youth probation service exchange information and decide together what would be the best appropriate sanction and/or measure in specific cases, which will be proposed to the court.¹⁶ Unfortunately, research shows that these juvenile justice partners are very much orientated towards the justice system and civil child protective measures are only considered in a very small proportion of cases¹⁷ (Van Poppel, Pranger, Veenma, Bruinsma & Boekhoorn, 2005). Another initiative that has been developed is to combine the criminal and civil cases of a young person and to deal with these cases in one court hearing before one judge. The judge thereby regains an overview of the different cases and the young person and his parents only have to appear in court once, instead of separately for every single case (Baas & Laemers, 2009).

These initiatives show that the division between the juvenile justice and the child protection system is not as strict as it might seem at first glance. The situation in the Netherlands starts to look more like the situation in, for example, France, but the system does not yet function on the same level of cooperation between the two systems as in the countries described in section 5.3.1.

In *England and Wales* the *family proceedings court* has been separated from the *youth court* since the adoption of the Children Act in 1989 (s. 92). The youth court is a criminal court, established by the Criminal Justice Act 1991 (s. 70), and the family court has civil functions (Gelsthorpe, Nellis, Bruins & Van Vliet, 1995). Moreover, different authorities execute the interventions that can be imposed by either of the two courts. The criminal justice interventions are executed by *Youth Offending Teams* (YOTs; s. 39 Crime and Disorder Act 1998) and the

¹⁵ These meetings take place in the so-called regional Safety homes (*Veiligheidshuizen*). The Safety homes are cooperation initiatives between authorities within the justice and welfare system and other local organisations. Attempts are being made to improve cooperation between authorities, in order to solve complex cases involving youths at risk, repeat offenders, domestic violence and the reintegration of ex-detainees (see Ministerie van Veiligheid en Justitie, 2013).

¹⁶ Aanwijzing effectieve afdoening strafzaken jeugdigen, 1 juli 2011, *Stcrt 2011*, 10941, para. 5 [Policy instruction on the effective disposition of juvenile criminal cases].

¹⁷ Only in 6% of the cases the authorities decide to ask the court for a civil measure and in another 6% a combination of civil and criminal measures and sanctions is asked for.

civil interventions are executed by the local authority social services department (Bottoms & Dignan, 2004). Field and Nelken (2007) suggest that the YOTs operate more efficiently and have more financial resources than the social services. This results in the practice of referring young persons to a YOT when a very minor offence has been committed and the young person is in need of treatment or supervision. According to Field and Nelken (2007) YOTs have become the primary providers of care to children who are in need of care and protection, although the approach of the YOTs is more focused on preventing reoffending. Because judicial interventions receive much more financial resources from the Government, the idea exists that interventions can take place better when imposed by the youth court, instead of by the family proceedings court.

Although in England and Wales no formal bonds exist between the juvenile justice and the child protection system a link exists between youth criminal law and civil law (but not civil child protection law). This concerns the imposition of an *antisocial behaviour order* (ASBO) on children who display unruly behaviour (s. 1 Crime and Disorder Act 1998; s. 85 Anti-Social Behaviour Act 2003).¹⁸ The practice of using ASBOs as a civil measure to control the behaviour of minors (and adults) is not the same as imposing civil protection measures in criminal cases. However, it shows that links are sought between youth criminal law and civil law, although in the opposite direction compared to the above-described practices; not to provide welfare measures for juvenile defendants who are in need of care, but to impose punitive measures on children who have not formally committed an offence.¹⁹

¹⁸ ASBOs were first included in the Crime and Disorder Act 1998 and further intensified in the Anti-Social Behaviour Act 2003 (Pakes, 2005). This civil order is imposed by the adult section of the *magistrates' court*, and contains measures to prevent further delinquent and troublesome behaviour. The ASBO can be imposed on children as young as 10 years of age, and a custodial sentence can be ordered when the child breaches the order (art. 1 (10) Crime and Disorder Act 1998). In the other countries of the British Isles, such as in Ireland (art. 189-166 Criminal Justice Act 2006) and in Scotland (art. 19 Crime and Disorder Act 1998), the courts can also impose ASBOs. In Ireland children still fall under the jurisdiction of the *children court* and not under the jurisdiction of the regular court system (Walsh, 2010). In Scotland an ASBO can only be imposed by the Sheriff court when the child is at least 12 years old and the young person must be known to the children's hearings system. In case of a breach the young person cannot be detained (Francoz-Terminal, 2011; Walters & Woodward, 2007).

¹⁹ Cavadino and Dignan (2006, p. 211) refer to ASBOs as 'quasi-criminal forms of 'civil' penalties'.

To conclude this section, in *Spain* a strict division exists as well between the youth justice and the youth protection system. This division was created in the Post-Franco era, when the criminal justice system gained an increasingly adversarial character (see also section 5.4.1). At the end of the 1980s a special family proceedings court was established, which brought an end to the practice of handling youth protection and youth justice cases by the same judge in the same youth court. When the youth court judge thinks that the young person is in need of civil protection, he can send the case to the family court (Alberola & Molina, 2003, 2006; Pastrana, 2011a).

Conclusion

A division exists between countries in which the relationship between juvenile justice and child protection is fairly strong and countries in which this relationship can be considered to be weak. In Table 5.2 an overview is given of the above-described countries and their position in relation to each other.

When a young person has committed a crime, in the majority of the studied countries the child care and protection system and the juvenile justice system work fairly closely together. In countries such as *Belgium* and *Scotland* minors are formally not able to commit *crimes* and as a rule protective measures are ordered when the young person displays delinquent behaviour. In other countries educational measures and sanctions can be combined to provide the best appropriate response to delinquent behaviour. However, as we have seen, in some countries delinquent behaviour is always responded to with a formal sanction within the juvenile justice system.

The relationship between the juvenile justice system and the child protection system in a country defines, next to the age limits, which young people come before a youth court or other competent administrative authority in the juvenile justice system and which young people are for example handled by a separate child protection system. Moreover, the relationship between both jurisdictions shapes the functioning of the juvenile justice system, e.g. the role the judge plays in the procedures, what is discussed at the hearing and the decisions that can be taken (a measure or only sanctions). It is expected that these notions might influence the participation of juvenile defendants at a hearing.

Table 5.2*The relationship between juvenile justice and child protection*

<i>Strong</i>	<i>Loose</i>	<i>Weak</i>
Belgium	Germany	England & Wales
France	Greece	Spain
Scotland	Ireland	
	Italy	
	Netherlands	
	Switzerland	

5.4 The inquisitorial and adversarial legal tradition in juvenile justice

In the final section of this chapter the countries included in this study will be analysed according to the legal tradition that is apparent in that particular country. First, the main characteristics of the inquisitorial and the adversarial legal tradition will be described. Second, the juvenile justice systems will be analysed from this perspective.

It will be shown that the nature of the juvenile justice system, being either more adversarial or more inquisitorial, influences the role different participants play at a youth court hearing. The characteristics of the procedures shape the role of the judge, the prosecutor, the defence lawyer and the juvenile defendant in court, and they can therefore have an important influence on the extent to and the manner in which juveniles can participate in court.

5.4.1 The main characteristics of the inquisitorial and adversarial legal tradition

Legal systems and the procedural traditions employed within legal systems can be distinguished as being either adversarial or inquisitorial by nature. Adversarial systems belong to the common law countries, where the law originates from English common law. Inquisitorial systems can be found for the most part in the civil law countries of continental Europe (Brants & Franken, 2009). Brants and Franken (2009) state that in practice no purely inquisitorial or adversarial criminal procedure exists, although it

is possible to characterize criminal procedures ‘as being more or less inquisitorial or adversarial’ (Brants & Franken, 2009, p. 21). According to these scholars it is preferable to regard the distinction between both legal traditions as a continuum rather than a dichotomy. On the one hand, the so-called ‘Anglo-American’ procedure differs markedly among the Anglo-Saxon world (for example, procedural rules and the cultural context in the United States is very much different from England and Wales). On the other hand, on the European continent substantial differences exist between neighbouring countries in the manner in which a criminal trial is held and elements from the adversarial legal tradition can be found in the civil law countries as well (Brants, 2011; Nelken, 2010). However, Brants (2011) points out that the dichotomy can be used as an analytical tool, which will be done in this study.

Determining the truth is the overall goal of the criminal trial in both the adversarial as well as the inquisitorial legal tradition (Jörg, Field & Brants, 1995). Truth finding differs between both systems, however, because different conceptions exist of the ideal search for the truth (Brants, 2011; Brants & Franken, 2009). The basic assumption in the inquisitorial tradition is the fact that the state is entrusted with truth finding (Ter Stege, 2009). Before a case is brought to court for trial, extensive investigations are carried out by the prosecutor or investigating judge, in order to ensure that no innocent person is tried in court (Dammer & Fairchild, 2006). During the investigation by the police, the public prosecutor and in some countries the investigating judge, a trial *dossier* is compiled that is presented to the court. In some countries the investigating judge takes the decision to prosecute, on the basis of the dossier, while in others the prosecutor takes this decision (Brants, 2011). In the inquisitorial tradition the dossier plays a central role and it is available to the judge, the prosecutor and the defence. It is not necessary to produce all the evidence in court, because it is included in the dossier (Dammer & Fairchild, 2006; Jörg et al., 1995).²⁰ The pre-trial phase is therefore of great importance because then the agenda setting takes place by the prosecutor (Brants, 2011). At the criminal trial the judge has an active truth finding role by asking questions to the defendant and hearing witnesses. The interaction between the judge and the defendant stands at the heart of the trial. It is the task of the prosecutor or the investigating judge to represent all

²⁰ Both the incriminating and exculpatory evidence is included in the dossier.

interests involved in the case and not only to argue the state's case in court. The public prosecutor takes a predominantly impartial stance and is, next to the judge, responsible for finding the truth (Brants & Franken, 2009). Hobbs (2011) notes that in the inquisitorial tradition the person who questions the defendant in court is also the adjudicator. The judge therefore controls which questions are asked and the weight that will be attached to them.

In the adversarial legal tradition the criminal court process revolves around two equal parties, the prosecution and the defence, who are opposed to each other and prepare and present their own case before a passive and impartial judge. Each party presents evidence of their version of the truth to the court and the interaction between the prosecutor and the defence lawyer dominates the criminal trial (Brants, 2011; Keulen, Elzinga, Kwakman & Nijboer, 2010). The trial does not take place on the basis of a dossier and in principle the evidence is presented in court. The judge (or jury) does not have any prior knowledge of the case (Jörg et al., 1995). Each party calls its own witnesses and experts, who can be examined by both parties, to convince the judge of its version of the truth. The emphasis lies on the oral presentation of evidence in court (Brants, 2011). By means of the examination and cross-examination of witnesses both parties can challenge the presented evidence. It is assumed that when a witness or expert is unreliable or incompetent this will be proved during the cross-examination (Keulen et al., 2010). The task of the judge is to oversee the whole process, to make sure that all the rules are followed and to bring in a verdict of guilty or not guilty.²¹ The judge is not involved in the actual process, but he has to guarantee that the trial is held in a fair manner and that the defendant has the same means at his disposal as the prosecutor (e.g. equality of arms). The prosecutor must disclose every relevant piece of evidence to the defendant and the defence can challenge the evidence in court (Brants & Franken, 2009; Keulen et al., 2010).²²

²¹ In the case of a jury trial the jury gives the verdict.

²² The prosecutor is also obliged to disclose evidence that supports the case of the defendant. This evidence may not be used by the prosecutor, but needs to be disclosed anyhow. This does not hold true for the defence party (Keulen et al., 2010).

5.4.2 *The inquisitorial legal tradition*

The *Scottish* children's hearings system displays many features of the inquisitorial legal tradition due to its characteristic welfare approach, although it is situated in a country with a mixed legal system (based on Roman law with strong common law elements). Until the age of 16, young people who have committed a crime are not handled within the formal criminal justice system. As a consequence, neither a judge nor a prosecutor or lawyer is involved in the process.²³ A laymen's panel decides on the best appropriate protective measure to prevent further delinquent behaviour (s. 39 Children (Scotland) Act 1995; s. 4-6 Children's Hearings (Scotland) Act 2011). During the children's hearing a dialogue takes place between the child and his parents and the lay members of the children's panel. A remarkable feature of the children's hearing is the lack of attention to truth finding. Finding the truth concerning the delinquent act is not the goal of the hearing. The primary goal of the hearing is to determine whether the child needs care and protection and in what form this care and protection should be given (Burman et al., 2010). The reporter to the children's system (s. 40 Children (Scotland) Act 1995) decides whether delinquent behaviour is an official ground for referral to the children's panel and the panel members do not verify the facts and circumstances of the offence (s. 66 Children's Hearings (Scotland) Act 2011). The child or his parents can ask the Sheriff court to assess their case and determine whether the child is guilty or not when they object to the grounds of the referral (s. 93 (2) Children's Hearings (Scotland) Act 2011). Only in this case does an independent judge actively establish the truth in the case.

On the European continent the *Swiss* juvenile justice system has distinct inquisitorial procedures. The case can be dealt with by the prosecutor (*Jugendanwalt model* – common practice in the German-speaking part of Switzerland) or by a youth court judge (*Jugendrichter model* – common practice in the other parts of Switzerland) (Aebersold, 2011). Either way, the hearing as a whole revolves around the interaction between the judge and the young person. In the majority of cases there is

²³ A lawyer is only appointed free of charge in specified cases, such as proceedings in the Sheriff court or when a placement in a closed institution is considered (s. 191 Children's Hearings (Scotland) Act 2011).

neither a prosecutor (when the case is handled by a youth court judge) nor a defence lawyer present at the hearing.²⁴ The judge or prosecutor is involved with truth finding and in many cases the judge performs the task of the prosecutor both in the preliminary and trial phase of the process. During the hearing the personal circumstances of the defendant are considered extensively to determine which sanction and/or measure is in the best interest of the child (Weidkuhn, 2009).

Belgium also shows a strong welfare approach, in accordance with the inquisitorial tradition. In Belgium, as is the case in Scotland, no distinction is made between the causes of delinquency and other educational and developmental problems. Children who offend are therefore dealt with in the same welfare system, as is the case for children with care and protection needs and they can be subjected to the same protective measures. In the pre-trial phase the judge can impose measures on the young person, including placement in a closed institution (art. 52; art. 52 (quarter) Jpc). During the trial truth finding is of primary importance, but the judge has large discretionary powers with regard to the type and length of a measure (Put & Walgrave, 2006). During the preliminary phase the judge and the prosecutor have distinct tasks. The prosecutor is responsible for the criminal investigation and when the investigation is closed he decides whether or not to bring the case before the court (art. 52 (bis)). In the meanwhile, the judge can order a social investigation concerning the personal circumstances of the young person and start a protective measure (art. 50; art. 52 Jpc). When the social investigation is completed, the prosecutor receives the dossier and takes the decision whether to prosecute or not (art. 28 (quarter) Ccp). The grounds for ordering a preliminary closed placement are that a serious indication of guilt must exist, the young person displays dangerous behaviour for himself or for others or that the risk of reoffending or absconding is considered to be significant (art. 52 (quarter) Jpc). During the youth court trial the dossier plays a central role in the process. Witnesses and experts are usually not heard, but have submitted their

²⁴ A lawyer is only appointed in specific circumstances. This is the case when a custodial sentence of more than one month or a placement in an institution is ordered, the young person is found to be unable to defend his own interests, the period of pre-trial detention has exceeded 24 hours, the young person is placed in an institution in the preliminary phase of the process, or when the young person is tried in court in the presence of a prosecutor (art. 40 Jcc; art. 24 Cjcp).

statements in writing. Moreover, when an expert is present the defendant does not have the right to ask him questions directly. The defence lawyer can only do so when he has asked the permission of the judge (Keulen et al., 2010).

In other European countries, such as the Netherlands, Greece, Germany, France and Italy, the inquisitorial tradition dominates as well. In *the Netherlands*, a preliminary investigation led by an investigating judge can take place (art. 170 Ccp), but usually this phase in the process is omitted and the young person is not taken into pre-trial detention when it concerns a less complicated case. However, the prosecutor can order pre-trial detention and he can ask for conditions to be attached to a suspended pre-trial detention or a forensic psychiatric investigation (art. 227 Ccp). Formally the investigating judge should be a specialised youth court judge (art. 492 Ccp). Moreover, the investigating judge cannot take part in the trial (art. 268 (2) Ccp). During the trial the judge occupies a central role; he leads the dialogue with the young person to find out the truth about the alleged offence. The juvenile defendant is in the position to answer the questions posed by the judge by himself, without intervention from the lawyer or his parents (De Jonge & Van der Linden, 2007). A dossier is prepared in the preliminary phase by the prosecutor while the Child Care and Protection Board has conducted a social investigation (art. 494 Ccp). Witnesses can be subpoenaed, but in uncomplicated cases this rarely happens. The prosecutor does not call witnesses very often. The defendant has the explicit right to do so (art. 287 (3)(a) Ccp) and until the young person is 16 years of age the lawyer has the independent power to call witnesses as well (Mols, 2003).

The juvenile justice system in *Greece*, typically, resembles several practices in the Netherlands. The prosecutor has the power to dismiss cases conditionally (art. 45 (a) Ccp) and the judge has an active role in the pre-trial and trial phase, but not at the execution phase. The inquisitorial nature of the Greek system lies in the fact that educational and therapeutic measures can be imposed instead of sanctions (art. 122-123 Cc) and the early involvement of social workers in the process (Pitsela, 2010; Spinellis, 2007).

In *Germany*, the role of the investigating judge has been abolished from the criminal process and nowadays the prosecutor is responsible for pre-trial investigations (Dammer & Fairchild, 2006). The prosecutor can

ask experts to conduct further inquiries during the preliminary phase (art. 161 (a) Ccp) and the judge usually calls these experts to court. The defendant does not have any influence on the choice of experts and it is the prosecutor who mainly determines which experts and/or witnesses are called. During the preliminary phase the adversarial starting point of *equality of arms* is therefore not apparent. The judge is the one who finally decides which experts are called, the number of experts that are called and the deadline for the submission of the written report. However, during the preliminary phase the prosecutor has large discretionary powers in the collection of evidence (Keulen et al., 2010).

In *France*, a division can be observed between the pre-trial and trial phase of the process, as is also the case in Belgium. During the preliminary phase the French *juge d'instruction* plays a central role in the investigations and he is responsible for 'a complete and impartial investigation of the facts' (Dammer & Fairchild, 2006, p. 144). The judge decides whether experts should be consulted or witnesses should be heard, whether or not this has been requested by the prosecutor. Moreover, the expert conducts its investigation under the supervision of the judge and has to inform the judge about the progress of the investigation (Keulen et al., 2010). Every young person is heard by a youth court investigating judge, who questions the defendant concerning the facts and decides whether pre-trial measures should be imposed (*mis en examen*). The investigating judge can bring the case to court for trial or he can decide to close the case when the young person has fulfilled the obligations attached to an educational measure (art. 8 Jci). The manner in which cases are handled by the investigating judge in chambers shows a resemblance to the practice in Switzerland and Belgium. The procedures are far less formal and the prosecutor is not present.

A moderately adversarial tradition dominates in the more formal youth court (*Tribunal pour Enfants*) in France. The public prosecutor has gained more influence in recent years. First, the prosecutor can settle cases, with or without committing the young person to an alternative measure (Castaignède & Pignoux, 2010). Second, in the case of young persons between 13 and 18, the prosecutor can (since 2007) offer the

young person a more elaborate set of measures (*composition pénale*) (art. 7-2 Jci).²⁵

The increased power of the prosecutor can also be observed in the fact that in certain cases the pre-trial phase of the criminal process is left out. When a young person between 13 and 18 years old has reoffended, the preliminary phase can be omitted when the young person, his lawyer and his parents agree with this procedure (*présentation immédiate*). The youth court hearing takes place between 10 days and 1 month after the initial arrest. The case, however, has to be straightforward and the judge needs to have sufficient information about the personal circumstances of the young person (art. 14-2 Jci). This fast-track procedure has as a consequence that the judge cannot start preliminary protective measures during the investigative phase. This procedure shows that in recent years the emphasis is shifting towards the trial in the juvenile justice process, which gives the process a more adversarial character.

It is important to note that in the above-described countries (i.e. Belgium, the Netherlands, Germany, Greece and France) the prosecutor can conditionally divert cases from the youth court (see chapter 6, section 6.2.2). Based on the expediency or opportunity principle, the prosecutor decides whether or not to prosecute and he can, as a consequence, (un)conditionally dismiss cases (Brants & Field, 1995; Gelsthorpe et al., 1995). This means that the prosecutor proposes to the defendant that the case can be settled by means of fulfilling certain conditions, such as community service or a fine. The prosecutor waives his right to prosecute when the defendant fulfils these conditions. The defendant for his part waives his right to trial by an independent court. From a legal perspective, this conditional diversion can be seen as the equivalent of plea bargaining in the adversarial tradition. It merely serves the same purpose: the efficient processing of cases through the system, without having to deal with every case in court (Brants & Field, 1995). However, the role of the juvenile defendants is rather different, because in the continental European practice of conditionally dismissing cases the defendant is actively involved in accepting or declining the offer made by the prosecutor, whereas in the adversarial tradition the prosecutor and the

²⁵ A typical adversarial element that was added to the French criminal procedural code in 2004 is the possibility for adult defendants to enter into a *plea bargain* (*comparution sur reconnaissance préalable de culpabilité*) (art. 495-7-495-16 Ccp).

lawyer negotiate the sentence, without the involvement of the defendant. The implications in practice of both ways of handling criminal cases are therefore rather different. In the Netherlands (and unofficially in Belgium (see Christiaens et al., 2010)), the police are also in a position to settle cases by means of a fine or community service (art. 74 (c) Cc; art. 77 (e) Cc).

Padovani and colleagues (2010) contend that in *Italy* a shift from an inquisitorial to an adversarial model in juvenile justice took place at the end of the 1980s. The 1988 criminal procedural code is modelled on the adversarial system (Caianiello, 2010). The juvenile criminal procedural code of 1988 also has some adversarial features, such as that evidence has to be orally presented in court to the judge and the abolition of the position of the investigating judge (Dammer & Fairchild, 2006; Nelken, 2010; Padovani et al., 2010). The Italian public prosecutor does not have the discretionary power to discharge cases (art. 112 Italian Constitution). However, important inquisitorial characteristics can be observed in the Italian system (this will be further illustrated in chapter 7). For example, the preliminary phase in the juvenile justice process is of substantial importance. The judge can decide to discharge a case, which can be seen as a filter of the obligatory prosecution by the prosecutor (Nelken, 2010). The judge can also decide to suspend the procedure and entrust the young person to the social services (*sospensione del processo e messa alla prova*) for a maximum of three years (art. 28 Cjcp). When the young person demonstrates a positive development during this period, the charge will be dropped and the young person will not be formally prosecuted, even if it concerned a serious offence (Nelken, 2010; Padovani et al., 2010). Plea bargaining is not possible for minors in Italy (art. 25 Cjcp). Finally, at the hearing the judge engages in a direct dialogue with the juvenile defendant (see chapter 7).

5.4.3 *The adversarial legal tradition*

In *Spain* adversarial characteristics are much more apparent compared to Italy. The Spanish youth court judge is not the central actor at the hearing and the public prosecutor has gained an evidently stronger role in the criminal process, compared to the role of the judge. In the post-Franco era (since 1975) modernisations to the criminal justice system were largely

influenced by the adversarial tradition in the common law countries (De la Cuesta, 2006; Pastrana, 2011b). Spain is one of the few European countries in which plea bargaining is possible for juvenile defendants. By means of plea bargaining the case can be solved between the prosecutor and the defence. The judge and by and large the juvenile defendant are not involved in the negotiations between the prosecutor and the lawyer. When a *conformidad* is reached the judge delivers the sentence immediately, without further investigating the case (art. 32/36 Jcc). Another adversarial element that is apparent in Spain is the fact that the judge cannot sentence a minor to a more severe sentence or measure than the one the public prosecutor has demanded (De la Cuesta, 2006).

The adversarial legal tradition can best be observed in the youth courts in *England and Wales, Ireland and Scotland*. The prosecutor and defence lawyer are the active parties in the criminal process. The juvenile defendant can only be heard as a witness by the defence lawyer and the prosecutor by means of examination and cross-examination. As a rule, the young person makes a fairly small contribution to the trial. The judge oversees the presentation of evidence by the defence lawyer and the prosecutor. Moreover, the judge can ask some questions to gain more insight into the case. In *Ireland* the same proceedings are followed in court for minors as for adults in the district court. Plea bargaining is a common practice in the Anglo-Saxon (youth) courts (Bottoms & Dignan, 2004; Cape, 2010). It can be seen as a counterpart of the power of prosecutors on the European continent to handle cases themselves by offering a transaction (an out-of-court settlement) to the defendant. When the defence lawyer and the prosecutor try to settle the case by means of a plea, they discuss with each other how to come to a resolution of the case, but without the involvement of either the judge or the defendant. When they come to a resolution, it is presented to the judge in court and the case will be settled. The juvenile defendant is not part of the deliberations between the prosecutor and the defence lawyer; he is not invited by the other parties to engage in the conversation and the judge does not have to ask additional questions to the young person in court. The defence lawyer represents the young person in court, which means that the lawyer talks on his behalf to the other professionals. The juvenile defendant is not

supposed to contribute to the discussion between the professionals in court (Weijers & Hokwerda, 2003).²⁶

Conclusion

The countries involved in this study are categorised in four categories: inquisitorial, moderately inquisitorial, moderately adversarial and adversarial (see Table 5.3). The Scottish children's hearings system has a typical inquisitorial character, although it is situated in a country with a mixed legal system. Its practices differ markedly from the Scottish (youth) court system, in which adversarial procedures dominate. In Belgium juvenile defendants are also dealt with within a pure welfare system.

A large group of countries considered in this study can be characterised as moderately inquisitorial or moderately adversarial. On the European continent countries such as Germany and the Netherlands can be classified as inquisitorial, although not as strongly welfare-orientated as the countries in the first category. The procedures in court, however, are strongly influenced by the inquisitorial legal tradition, with an active judge in court and a dossier produced before the start of the trial. France still has many elements of the inquisitorial tradition incorporated in the juvenile justice system as well, but in recent years more adversarial procedures have been introduced, prompted by the increased importance of the role of the prosecutor. In Spain the same can be observed to an even larger extent. The youth courts in Scotland, Ireland and England and Wales show the most characteristics of the adversarial legal tradition.

The division of countries along the lines of the legal tradition in which a juvenile justice system operates is useful because it provides some explanations for the manner in which youth court hearings are held (i.e. the procedures in court) and the roles that different parties play. It is presumed that the participation of juvenile defendants in court is largely influenced by the character of a juvenile justice system.

²⁶ There have been, however, some initiatives in England and Wales to engage young people in court (see Allen, Crow & Cavadino, 2000).

Table 5.3

The inquisitorial and adversarial legal tradition

<i>Inquisitorial</i>	<i>Moderately inquisitorial</i>	<i>Moderately adversarial</i>	<i>Adversarial</i>
Belgium	France	Spain	England & Wales
Scotland – children’s hearing	Germany		Ireland
	Greece		Scotland – youth court
	Italy		
	Netherlands		
	Switzerland		

5.5 Conclusion

In this chapter three general characteristics of the juvenile justice process have been outlined. The age limits of criminal responsibility, the relationship between the juvenile justice system and the child care and protection system and the extent to which countries show characteristics of the inquisitorial and adversarial legal tradition are discussed.

Regarding the age limits of criminal responsibility it can be concluded that the minimum age of criminal responsibility is set at a fairly high level in half of the countries involved in this study. In the other half of the countries children can be tried, in principle, in court from an early age, but in practice this is not often the case. The upper age limit is set at 18 years, except for Scotland where it is set at 16 years. On the one hand, it can be concluded that several countries allow for the prosecution of serious cases in the adult criminal justice system or adult sanctioning is allowed for. On the other hand, in several countries young adults can be prosecuted in the juvenile justice system. Of importance is the fact that the age limits of criminal responsibility define which young people appear before a youth court or other competent authority.

In the majority of countries the child care and protection system and the juvenile justice system work together in juvenile justice cases. In the Netherlands, this used to be the case before 1995. Legislative changes were made to ensure a less paternalistic role for the judge, who had to be

independent in all the phases of the process. Recently, initiatives have been employed to draw the two fields of law closer together again. Only in *England and Wales* and *Spain* is there no official relationship between the juvenile justice and the child protection system. It can be concluded that the extent to which child protection and juvenile justice are seen as separate jurisdictions influences the way in which the juvenile justice system operates.

The extent to which procedures can be characterised as being inquisitorial or adversarial influences the participation and understanding of juvenile defendants, therefore it is of importance to acknowledge these structural differences between the systems. The *Scottish* children's hearings system and the *Belgian* child protection system have a typical inquisitorial character. On the other side, we find the *Anglo-Saxon countries*, which predominantly show adversarial characteristics. The other countries on the European continent can be characterised as moderately inquisitorial or moderately adversarial.

Chapter 6

Main actors in the juvenile justice system

6.1 Introduction

To gain a more comprehensive insight into the organisation and operation of a juvenile justice system it is of importance to discuss the competences of the actors operating within that system. First, the legal competences of the police and the prosecution service to deal with juvenile delinquency (section 6.2) and second, the role of legal representation in the juvenile justice system will be explored (section 6.3). Third, the competences of the youth court judge will be discussed (section 6.4). Fourth, the role of social workers will be explored (section 6.5) and, finally, the role parents play in the juvenile justice system will be discussed (section 6.6). Together with chapter 5, this chapter aims to provide a comprehensive picture of the juvenile justice systems in the countries involved in this study. The roles of the different participants are of particular importance, because it is expected that their roles in court influence the participation of juvenile defendants. Moreover, the legal tradition in which the youth court operates, as described in the previous chapter (chapter 5, section 5.4), influences the roles of the different actors as will be described in this chapter.

6.2 The police and the prosecution service

With regard to the role of the police and the prosecution service in the juvenile justice process two themes are of importance to explore. First, the discretionary power of the police in handling juveniles who are suspected of having committed an offence will be discussed. Second, the extent to which the prosecution is able to deal with cases, by means of (un)conditionally discharging cases or investigating and prosecuting them in court will be explored. These two notions are of importance, because they define how juvenile defendants are dealt with within the juvenile justice system and which filtering mechanisms take place in the juvenile

justice system, before young people are sent to the youth court. Moreover, it determines which young people and which types of cases come before a judge in court and which young people are dealt with by other authorities, such as the police or prosecutor.

6.2.1 Discretionary powers of the police

In only three countries included in this study are the police able to deal with misdemeanours and minor offences. This is possible by means of a warning or a conditional dismissal. In *the Netherlands*, the police have official powers to dispose of cases. On the level of the police as well as the prosecution service ‘a great diversity of diversion mechanisms exists’ (Brants & Field, 1995). Basically, the police have broad discretion in handling cases and they determine which cases are referred to the prosecutor (Gelsthorpe et al., 1995). The police can dismiss a case and send the young person to voluntary social support (to the Youth Care Agency (*Bureau Jeugdzorg*)) or they can send the case to the Child Care and Protection Board, to investigate whether the young person is in need of help. The police can also issue a warning and take no further action.¹ Or they can impose a fine (of up to € 390) in case of a misdemeanour, such as a traffic offence (art. 74 (c) Cc). The police can also refer a juvenile who has committed a minor offence (such as vandalism, defacing property with graffiti or shoplifting) to a community service project called Halt.² Halt is an organization that carries out restorative and educational projects of up to 20 hours using juvenile first-time offenders (art. 77(e) Cc). Finally, the police can decide to send the charge to the public prosecutor for further handling (van der Laan, 2006).

In *England and Wales* the police have several ways in which to deal with trivial cases of young offenders as well. First, the police can give an informal warning and take no further action in the case. Second, the police can give a more formal *reprimand* (s. 65 (2) Crime and Disorder Act 1998) to a first offender who admits responsibility for the offence (s. 65 (1)(c-d)). Third, the police can give a *final warning*, if a second minor offence has been committed for which guilt has been

¹ Policy instruction on the effective disposition of juvenile criminal cases, 1 July 2011, *Stert 2011*, 10941, para. 4.1 [Aanwijzing effectieve afdoening strafzaken jeugdigen].

² In Dutch ‘Halt’ is an abbreviation for ‘the alternative’ (Het Alternatief).

admitted (s. 65 (3)). This is a formal, verbal warning, which is usually followed by an assessment and a community intervention programme executed by the *Youth Offending Team* [YOT] (Graham & Moore, 2006; s. 66 (1-2)). A reprimand can only be given once (s. 65 (2)) and a final warning can only be given for the second time when the previous one was given more than two years previously (s. 65 (3)(b)). The prosecutor is also in a position to refer a case back to the police for cautioning and to take no further action (Gelsthorpe et al., 1995). This is rarely done, however (Dignan, 2010). As is the case in the Netherlands, the police in England and Wales have large discretionary powers with regard to which cases are charged and which cases are cautioned and not sent to the prosecutor (Brants & Field, 1995). However, these powers have been diminished somewhat by a *three strikes and you're out* approach, which means that after three minor offences for which a reprimand and two final warnings are imposed, the next offence has to be prosecuted (Dignan, 2010).

In *Ireland* every juvenile case is sent to the National Juvenile Office [NJO], which is part of the *Garda Síochána* (the Irish police), where a decision is taken whether to take no further action in the case, to give an informal or formal warning or to prosecute the case (Seymour, 2006). The informal and formal cautions are given as part of the Juvenile Diversion Programme (s. 17-51 Children Act 2001), which since the 1960s has been managed by the Irish police (s. 20).³ The warning is given by a police officer, who is trained as a Juvenile Liaison Officer, to first offenders who admit the offence (ss. 23-24). Both the informal and formal caution are given to the young person at a police station and in the presence of his parents (s. 25). The formal caution is followed by a supervision period of one year (s. 27). During this period projects can be offered to the young person concerning education, employment, sport, art or music and a restorative conference can be held as part of the programme (s. 39). When the NJO decides that the case should be prosecuted, it is sent to the Director of Public Prosecutions [DPP]. The police investigate the case and in serious or complex cases the DPP decides what the charges are and whether or not to prosecute the young person. In the case of a less serious crime the police prosecute the case in

³ Since 2006 the programme can also be applied to children (from the age of 10 and above) who have behaved anti-socially or have committed an offence, although the MACR in Ireland is 12 years (s. 23 (6) Children Act 2001).

the children court themselves. They do so in the name of the DPP and the DPP has the right to advise the police on how to deal with the case (Arthur, 2010; O’Sullivan, 1998). When the juvenile defendant is below the age of 14, the prosecutor should consider whether there is evidence to show that, at the time of the offence, the young person could distinguish right from wrong (s. 52 (2)). The DPP has to give his consent to prosecute under-fourteen year olds (s. 52 (4)). Serious cases are prosecuted by a private-practice lawyer who is appointed on a case-to-case basis by the DPP. The State prosecution service does not present cases in court itself, but supports the prosecutor in court (Walsh, 2010). As a consequence, the Irish police have several different tasks in juvenile justice cases and have broad powers in deciding how to deal with a case.

6.2.2 Discretionary powers of the prosecutor

In contrast with the power of the police to dispose of cases, it is more common in Europe for the prosecutor to be able to (un)conditionally dismiss cases, instead of the police. One clear exception, however, is the Netherlands, where the police (under the authority of the prosecution service) as well as the prosecutor are legally entitled to dispose of cases.

The public prosecutor in *the Netherlands* has the legal power to initiate court proceedings against a suspect (the monopoly of prosecution) or the prosecutor can decide that it is not expedient to prosecute a case (the principle of opportunity). However, the prosecutor can also conditionally discharge cases, which involve a misdemeanour or an offence punishable by a maximum of six years imprisonment (art. 74; art. 77a Cc). Since 2011, the prosecutor is in the position to establish the guilt of the defendant and order a sanction by means of a so-called *strafbeschikking* (art. 77f Cc) (instead of offering a conditional discharge to the suspect in order to avoid prosecution, which is still possible as well). The defendant is in the position to appeal against the decision of the prosecutor when he does not agree with the decision. The prosecutor can impose 60 hours of community service, a fine or six months’ probation on a juvenile defendant (art. 77(f) Cc). It can be concluded that the prosecutor has a central role in juvenile cases and plays an important role in determining which cases are sent to the youth court (Uit Beijerse & Dubbelman, 2011; Verberk & Fuhler, 2006; Vlaardingerbroek, 2011).

Every prosecution office in the Netherlands has designated youth court prosecutors and a public prosecutor's clerk (*parketsecretaris*) who only deal with juvenile cases (Dronkers & Ten Voorde, 2010).

In *Switzerland* either the prosecutor or the youth court judge handles the bulk of juvenile cases (art. 6 (2) Cjcp). The police do not have the discretionary power to dispose of cases and they report every offence to the prosecution service (Gilliéron & Killias, 2008). The cantons are authorised to determine the organisation of the juvenile justice authorities (art. 8 Cjcp). In the German-speaking part of Switzerland the youth prosecution office (*Jugendanzwaltschaft*) is competent in most cases, except for very serious cases in which a detention sentence is most appropriate. This is also called the *Jugendanwalt* model. In practice, the juvenile prosecutor handles almost every case himself (Gilliéron & Killias, 2008). In the French-speaking part of Switzerland, the youth court judge handles juvenile delinquency cases; however, the judge also fulfils the role of prosecutor (the *Jugendrichter* model) (Aebersold, 2011). In both parts of the country only serious cases are tried in a full court (consisting of a judge and two lay judges (art. 7 (2) Cjcp)). Only in the German-speaking part of Switzerland does the prosecutor participate in the trial in court, in the other part of the country the judge both prosecutes and tries the juvenile defendant. Not every Swiss canton (of which 26 exist) has a specialised juvenile prosecution office, because some cantons are very small in terms of the number of inhabitants. Moreover, in the *Jugendrichter* model an independent prosecutor does not participate in juvenile cases (Aebersold, 2011; Hebeisen, 2010; Weidkuhn, 2009).

In *Belgium*, the police have to report every crime to the public prosecutor and they cannot decide to drop charges.⁴ The public prosecutor can dismiss a case (art. 45 (ter) Jpc), divert the young person or send the case to the youth court. With regard to diversion the prosecutor can give the young person a warning (art. 45 (ter) Jpc), start mediation (art. 45 (quater) Jpc) or a 'parental stage' (*ouderstage*) (art. 45 (bis) Jpc). The prosecutor cannot impose community service or treatment (Christiaens et al., 2010). The prosecution service is the competent authority to bring cases before the court and can ask for preliminary measures in the pre-

⁴ In practice, however, the police do give unofficial warnings. Moreover, the police can demand that the young person takes part in a traffic course or restores small-scale damage. When the police reveal a problematic educational situation, they can refer the young person and his parents to voluntary social support (Van Dijk, Dumortier & Eliaerts, 2006).

trial phase (art. 45 Jpc). The youth court judge can order an assessment of the personal situation of the young person (art. 50 Jpc). The outcome of the social assessment is sent to the prosecutor as well and he has to decide within two months after the preliminary phase is closed whether to prosecute the young person or not (art. 52 (bis) Jpc).

In recent years the public prosecutor in *France* has gained more power with regard to the disposition of cases (Bailleau, 2009).⁵ The prosecutor decides on how to proceed in a case and the police do not have any discretionary powers (Aubusson de Cavarlay, 2006; Gazeau & Peyre, 1998). Besides prosecuting a case in the youth court, the prosecutor can decide to conditionally or unconditionally drop the charge (Wyvekens, 2006). The prosecutor can caution the young person or order him to appear before the public prosecutor's clerk (*rappel à la loi*) (art. 41-1 Ccp; see Castaignède & Pignoux, 2010). The caution is sent to the young person in writing and he does not have to appear before the prosecutor (Bailleau, 2009). The young person can also receive a reparative measure or mediation (art. 41-1 (4-5) Ccp). Concerning young persons between 13 and 18, the prosecutor can (since 2007) offer the young person a more elaborate set of measures for the duration of, at most, one year (*composition pénale*). These measures are for example a drug education programme, commitment to school or work or therapy by a psychiatrist or psychologist. Parents have to give their consent and the judge has to confirm the settlement between the prosecutor and the defendant (art. 7-2 Jci).

In *Greece*, the police can decide to refrain from prosecution in the case of a petty offence. The prosecutor can also decide not to prosecute the case in court, according to the principle of opportunity, or to discharge conditionally. Possible conditions are the payment of up to € 1000 or an educational measure, such as victim-offender mediation or community service (art. 45A Ccp; art. 122 (1) Cc). The conditions have to be fulfilled within a certain amount of time and, if not, the prosecutor prosecutes the case in court (Spinellis, 2007).

⁵ According to Bailleau (2009) the aims of the French Government to increase the powers of the prosecutor are to diminish the paternalistic approach of the youth court and to provide the juvenile defendant with a fair response to his offending behaviour. Moreover, budgetary considerations also play a role, just like responding quickly to juvenile delinquency.

In *Germany*, the police have to refer every offence to the prosecutor (Dammer & Fairchild 2006; Jehle, Lewis & Sobota, 2008). The prosecutor can decide to take no further action or he can decide to dismiss the case when an educational measure is already in place (art. 45 (1) Jcc). The prosecutor only deals with cases in writing and not by means of a personal hearing. The prosecutor can also ask the judge to impose a minor sanction, as part of a warning, such as community service up to 40 hours, a fine or mediation (art. 45 (3) Jcc). The prosecutor works in close cooperation with the youth court judge. The prosecutor will drop the charges when he has received a notification from the judge that the young person has fulfilled the obligations attached to the warning (art. 45 (3) Jcc).

As is the case in France, the public prosecutor in *Spain* has gained many powers within the juvenile criminal procedure (Alberola & Molina, 2006; Molina & Alberola, 2005). The prosecutor is in charge of the preliminary investigations and directs the police.⁶ The prosecutor decides whether to prosecute a case in court, or to unconditionally dismiss the case (art. 16/18-19 Jcc). He has to take note of the initial social report by the social work team (see section 6.5). A dismissal is possible when it concerns a minor offence (without violence or intimidation) committed by a first offender.⁷ The prosecutor can make a proposal to the young person to conditionally dismiss the case, in which case reparation, victim-offender mediation or community service has to be fulfilled by the young person in question. The social work service carries out these measures. The prosecutor has to request the judge to drop the charges when the young person has completed the measure or when the social work service suggests that this should be done (art. 19 Jcc). The prosecutor can also ask the judge to impose preliminary measures (art. 28 (1) Jcc). When the prosecutor decides to prosecute the young person in court (art. 30 (1) Jcc), at the start of the trial the prosecutor and defence lawyer can still settle the case by means of a plea agreement (*juicio de conformidad*). The judge orally confirms the settlement between the two parties in court and both waive their right to appeal (art. 32 Jcc).

⁶ Interestingly the police have the task of controlling sanctions that are imposed on young persons who are conditionally released from imprisonment (Pastrana, 2011).

⁷ In this case the prosecutor can also decide to send the young person to the civil child protection administration, where a child protection measure can be considered (Aebi & Balcells, 2008).

Three other countries in which the prosecutor is able to settle cases by means of *plea bargaining* are England and Wales, Ireland and Scotland. In *England and Wales* the prosecutor is in a position to discontinue proceedings, when prosecution is not in the public interest (Dignan, 2010; Jehle et al., 2008). He is dependent upon the information provided by the police on which to base the discontinuance (Brants & Field, 1995).⁸ Plea bargaining is a common way of dealing with cases in court (Bottoms & Dignan, 2004; Cape, 2010). In *Ireland* cases can also be settled by means of a plea, but in this case the prosecutor is often the same person as the police officer who has investigated the case (Walsh, 2010).

In *Scotland*, the police do not have any powers to dismiss cases. The *Procurator Fiscal*⁹ decides whether to prosecute a case or not (s. 6 (3) Criminal procedure (Scotland) Act 1995). In the case of a 16 or 17 year old the prosecutor liaises with the reporter to the children's hearings system (see chapter 5, section 5.3.1), the police and the local social work authority before making his decision (Barnsdale et al., 2006; Burman et al., 2006). Again, in court many cases are settled by means of a plea agreement between the prosecutor and the defence lawyer. In the children's hearings system, the reporter decides whether a case should be sent to the children's panel (s. 69 Children's Hearings (Scotland) Act 2011). In the majority of cases, the police make a referral to the reporter. The reporter investigates whether the grounds for the referral are legitimate and whether 'compulsory measures of care and supervision' are needed (s. 66 (2)(b)). Reporters are either legally trained or they have a social work background and they are employed by the *Scottish Children's Reporter Administration* of the Scottish Government (Burman et al., 2010).

Finally, in *Italy* the prosecutor does not have the power to dismiss cases (art. 112 Constitution). He has to investigate every case within six months (art. 405 (2) Ccp). After closing the investigation the prosecutor can ask the judge to either dismiss the case or to continue the proceedings. So only the judge can decide whether a case should be tried in court or be

⁸ The English Crown Prosecution Service [CPS] was established in 1986 as an independent Government agency (Prosecution of Offences Act 1985). Before this, the police prosecuted most cases themselves (or with the help of private lawyers), as is still the case in Ireland. Nowadays, the CPS is still largely dependent on the police, who make the decision to caution or to prosecute (Brants & Field, 1995; Dammer & Fairchild, 2006).

⁹ *Procurator fiscal* is the term used for the Scottish public prosecutor.

dismissed (art. 424 Ccp). The prosecutor and the defendant can also negotiate a sentence, but the prosecutor has to submit the negotiated sentence to the judge, who will decide whether the disposal is appropriate in the given case (art. 444 Ccp).¹⁰

Conclusion

The first conclusion that can be drawn from the analysis of the discretionary powers of the police and prosecutor is the fact that in three countries the police are able to settle cases independently (see Table 6.1). This is only officially possible in *England and Wales*, *Ireland* and *the Netherlands*. In continental Europe, with the exception of the Netherlands, this practice does not exist. Second, a division can be observed between countries in which the prosecutor can dismiss cases conditionally or only unconditionally. In several countries, the prosecutor has gained an increasingly important role in the preliminary phase of the juvenile justice process. Third, in *Italy* the youth court judge is the only competent authority in juvenile justice cases. Every case has to be brought before the judge. It has to be stated, however, that in every other country the judge does have discretionary powers as well, but for the purpose of clarity this is not included in Table 6.1.

The discretionary powers of the police and the prosecutor define for a large part which types of cases and which young people are brought before the courts. In the Netherlands, the police or prosecutor deal with first-time minor offences and as a consequence the youth court judge only deals with the more serious and complicated cases. The opposite is true for Italy, for example, where the judge deals with every juvenile defendant. In many other countries the prosecutor has, to a greater or lesser extent, an important filtering function (according to the principle of opportunity) with regard to which cases are prosecuted and brought before the court. The types of cases that come before a youth court judge might have an influence on the participation of juveniles in court. It is expected that in serious and complicated cases it is more difficult for young people to understand the procedures in court and this hampers their opportunities to participate.

¹⁰ For the juvenile defendant important advantages are attached to plea bargaining. He can receive a reduction of up to one-third of the sentence (art. 444 (1) Ccp), he does not have to pay the court costs and security measures cannot be applied (Padovani et al., 2010).

Table 6.1*Discretionary powers*

<i>Police</i>	<i>Prosecutor</i>		<i>Judge exclusively</i>
	<i>Conditional</i>	<i>Unconditional</i>	
England & Wales	Belgium	England & Wales	Italy
Ireland	France	Spain	
Netherlands	Germany	Scotland ¹¹	
	Greece		
	Netherlands		
	Switzerland		

6.3 Legal representation

In every country involved in this study, juvenile defendants have the right to legal representation. The European Court of Human Rights has ruled in the cases of *Salduz against Turkey* and *Panovits against Cyprus* that defendants have the right to consult a lawyer before the first interrogation by the police. Moreover, during the interrogation the defendant should be given the opportunity to speak with his lawyer when he feels the need to do so.¹² A defence lawyer is not only active during the investigations by the police, but also during the preliminary and trial phase in the youth court. In this section, the role of the lawyer in the juvenile justice process will be analysed for the 11 European countries.

Until recently, juvenile defendants in *the Netherlands* were not appointed a lawyer when they were arrested and interrogated by the police. Only when the young person was held in pre-trial detention was a lawyer appointed to represent him (art. 40 Ccp). Following the judgments of the European Court, the Dutch Supreme Court has ruled that juvenile defendants have the right to be assisted by a lawyer or confidant during the first police interrogation and every interrogation following the first.¹³ The presence of a lawyer or confidant during the police interrogations is established by this jurisprudence, but only for juveniles. The public

¹¹ In the case of the children's hearings system the reporter – and not the prosecutor – makes the decision whether the case should be dismissed or sent to the children's panel.

¹² ECtHR, 27 November 2008, Appl. no. 36391/02; ECtHR, 11 December 2008, Appl. no. 4268/04.

¹³ HR 30 June 2009, LJN: BH3079, NJ 2009, 349.

prosecution service has decided that every young person between 12 and 16 years old, who is suspected of an offence for which he could be remanded in custody, should receive assistance from a lawyer before the police interrogation commences. With regard to 16 and 17 year olds, they can waive their right to counsel when they are suspected of certain less serious offences. When the young person waives his right to counsel, he can still ask to be assisted by a representative, although he can also waive this right.¹⁴ When a juvenile is remanded in custody a duty lawyer is always appointed free of charge (art. 40 Ccp). When the case is sent to the court a lawyer is always appointed (art. 489 (1)(c) Ccp). This is also the case when the prosecutor conditionally dismisses with the intention to sentence the young person to carry out more than 20 hours of community service or to pay a fine of more than € 115 (art. 489 (1)(a-b) Ccp). If the juvenile is sanctioned by the police or a more lenient sentence is proposed by the prosecutor, as a diversionary measure, a lawyer is not appointed free of charge. Therefore, the Netherlands has ratified the CRC with the reservation with regard to article 40 that cases involving minor offences may be tried without the presence of legal assistance.¹⁵

In *Belgium*, the appointment of a lawyer, free of charge, from the first police interrogation onwards is also a relatively new phenomenon. The Belgian juvenile protection act states that a young person has the right to be assisted by a lawyer every time he appears before the judge (art. 52 (ter) Jpc). So until recently, a lawyer was appointed when the young person was arraigned before the judge no more than 24 hours after his arrest (Spronken et al., 2009). The youth court in Antwerp has ruled that statements given by a juvenile during a police interrogation, but in the absence of a lawyer, cannot count as evidence in the case.¹⁶ As of 2012, defendants have the right to consult a lawyer (art. 47 (bis)(2)(3) Ccp) for a maximum of 30 minutes before the first interrogation by the police (art. 2 (bis)(1) Law concerning pre-trial detention).¹⁷ During the interview, the lawyer is present and can ask for one intervening moment for consultation

¹⁴ Policy instruction on legal assistance during police interrogation, 1 April 2010, *Stcrt* 2010, 4003 [Aanwijzing rechtsbijstand bij politieverhoor].

¹⁵ *Stb.* 1994, 862.

¹⁶ Youth Court Antwerp, Belgium, 15 February 2010 [Uitspraak Jeugdrechtbank Antwerpen].

¹⁷ When the period on remand is continued by a pre-trial judge, the defendant again has the right to consult with his lawyer for a maximum of 30 minutes before the following interrogation (art. 15 (bis) Law concerning pre-trial detention).

with the defendant for 15 minutes (art. 2 (bis)(2)(3) Law concerning pre-trial detention). Juveniles cannot relinquish this right (art. 47 (bis)(2)(3) Ccp; art. 2 (bis)(1) Law concerning pre-trial detention). In court, a lawyer is always appointed free of charge for juvenile defendants and this also holds true for hearings in chambers (before the youth court judge or a pre-trial judge) as well as in the youth court (art. 49; 54 (bis); 57 Jpc).

In *France*, a lawyer is also involved from an early stage. When a juvenile is arrested his parents and a doctor¹⁸ have to be informed (art. 4 (2-3) Jci). From the first interrogation by the police the young person has the right to be assisted by a lawyer (art. 63-3 (1) Ccp). When the young person refuses to be assisted by a lawyer, his parents have the right to ask for a lawyer (art. 4 (4) Jci). Before the interrogation starts the young person can consult his lawyer for a maximum of 30 minutes (art. 63-4 Ccp). When the young person has to appear before the prosecutor (*rappel à la loi*) a lawyer is not appointed free of charge, but a lawyer is appointed when the prosecutor proposes a more elaborate set of conditions (*composition pénale*) (art. 7-2 Jci). In court the young person is always accompanied by a lawyer (art. 4-1 Jci).

In *Spain* a lawyer is also appointed from the first interrogation by the police. Parents are not able to be present at the interview, but the young person has the right to speak with his lawyer privately before every interview (Pastrana, 2011b). Statements made by defendants, in the absence of a lawyer, cannot be used as evidence in court (Spronken et al., 2009). During the remainder of the criminal process a lawyer is self-evidently present to assist the juvenile defendant (art. 22 (1)(b) Jcc). In *Italy*, defendants cannot be questioned by the police in the absence of a lawyer. However, the presence of a lawyer is not mandatory when the prosecutor conducts an interrogation, but the prosecutor has to inform the defendant about his right to be assisted by a lawyer. In the subsequent parts of the process the defendant is always assisted by a lawyer, who is appointed when he does not have a lawyer of his own choice (Caianiello, 2010).

In *England and Wales*, the right to counsel of a person who is arrested and held in police custody is laid down in the Police and Criminal

¹⁸ Upon arrest, juveniles below the age of 16 have to be examined by a doctor appointed by the prosecutor or investigative judge. When the juvenile is 16 years or older parents are informed about their right to have their child medically examined (art. 4 (3) Jci).

Evidence Act 1984 (PACE). When a young person is arrested, an ‘appropriate adult’¹⁹ must be informed about the arrest and asked to come to the police station. The young person has the right to consult privately with a publicly funded lawyer at any time (s. 58 (1) PACE). Parents are in the position to ask for a lawyer to be present during the interview when it is in the best interest of the child, even when the young person does not believe that the presence of a lawyer is necessary (s. 6.5A PACE Code C). Furthermore, in every phase following the arrest by the police, a lawyer assists the young person.

When a young person is arrested in *Ireland*, the police have to inform him of his right to counsel (s. 57 (b) Children Act 2001) and should contact a lawyer at the request of the child or his parents (s. 60 (1)-(3)). When the young person or his parents have asked for a lawyer, the police should wait for the arrival of a lawyer before the young person is asked to make statements (s. 61 (5)). Every child who is brought before the court is legally represented (Walsh, 2010).

In some of the European countries included in this study, legal assistance for juveniles is not a matter of course. For example, in the children’s hearings system in *Scotland* legal assistance, free of charge, has only been provided for since 2002 (Children’s Hearings (Legal Representation) (Scotland) Rules 2002). A lawyer is appointed free of charge when this appears to be necessary in order to allow the child to participate effectively or when the panel is considering a placement in a closed institution or when the child is involved in proceedings in the Sheriff court (ss. 3 (a-b) and 191 (28C) Children’s Hearings (Scotland) Act 2011). The children’s panel decides whether a lawyer should be appointed and the child cannot request or refuse the service of a lawyer that is appointed by the panel (Burman et al., 2010). The panel can also decide to appoint a *safeguarder* (s. 30). A safeguarder may be appointed when the panel members are not certain about which decision would be in the best interest of the child. The safeguarder investigates independently what is in the best interest of the child and reports his findings to the children’s panel (s. 33). Safeguarders may meet with the child, his parents and professionals involved in order to provide a report to the children’s

¹⁹ By this a parent or guardian, a social worker from a local authority or another responsible adult of at least 18 years of age, who is not employed by the police, is meant (art. 65 (7) Crime and Disorder Act 1998).

panel on the child's views and circumstances and make a recommendation about the child's future care. A safeguarder is not a representative or advocate of the child (Comben et al., 2003). Moreover, the safeguarder has the task of expressing the views of the child (Griffiths & Kandel, 2000). When the police arrest a minor under the age of 16, the police officer must inform the parents (s. 15 (4) Criminal Procedure (Scotland) Act 1995). And the child also has the right to have a private consultation with a solicitor (ss. 17 (2) and 15A (3)). Duty lawyers are available to represent young people who are held in custody. When a young person is 16 or 17 years old (or in the case of a very serious offence committed by a minor between 8 and 15 years) the same procedural rules are followed as in the case of adults (see s. 42 (1)) and in court every young person is represented by a lawyer (Bottoms & Dignan, 2004; Burman et al., 2010).

In *Germany*, a lawyer is appointed when the young person is remanded in custody or placed in an institution on a preliminary basis (art. 68 (4-5) Jcc). In every phase of the process the defendant has the right to be accompanied by a lawyer and, in the case of a minor, parents can independently choose a lawyer for their child (art. 137 Ccp). In court, the legal appointment of a lawyer is only obligatory when, in a similar case, this is obligatory for adult defendants or when the parent or guardian of the young person cannot take part in the hearing (e.g. because of being a co-offender) (art. 68 (1-3) Jcc). Moreover, the judge can appoint a legal representative in other cases as well, if this is deemed necessary (art. 69 (1) Jcc). In practice, this means that in case of a more serious offence, which is handled in a full court, a lawyer is appointed (Brodowski, Burchard, Kotzurek, Rauber & Vogel, 2010).

In *Switzerland*, a lawyer is legally appointed when the young person is remanded in custody for more than 24 hours, when the prosecutor or judge has the intention to impose a detention sentence of more than one month or to place the young person in an institution (in the preliminary or trial phase), the young person is not able to defend his own interests, or when the case is tried in a full court (art. 24 (a-e) Cjcp). The appointment of a lawyer is only free of charge when the parents of the young person do not have the means to defray the cost of a lawyer (art. 25 (1)(c) Cjcp). It can be concluded that in a large amount of less serious cases juveniles are not represented by a lawyer in the proceedings unless the parents hire a lawyer for their child. Until recently, legal

representation for juveniles was seen as unnecessary and counterproductive by professionals working in the juvenile justice system. Since the system is geared towards care and protection and sentences are imposed that are in the best interest of the child, the presence of lawyers was not seen as benefiting the juvenile criminal process. With the adoption of the above-mentioned provisions in the juvenile procedural law, the legal protection of juveniles has at least somewhat increased (Aebersold, 2011; Weidkuhn, 2009).

Defendants in *Greece* have the right to a lawyer during every stage of the criminal proceedings. However, a lawyer is not legally appointed in every case. At the pre-trial stage the investigating judge has to appoint a lawyer when the defendant explicitly asks for legal counsel (art. 100 (3) Ccp). At the trial phase a lawyer is always appointed when the defendant is charged with a felony (art. 340 (1) Ccp). In practice, this means that a large majority of juveniles who appear before a single court judge are not assisted by a lawyer. When the case is tried in a full court of three judges, the appointment of a lawyer is more common (Pitsela, 2010).

Conclusion

As is displayed in Table 6.2, in seven countries the presence of a lawyer is guaranteed in every phase of the juvenile justice process. After the European Court of Human Rights' decisions in the cases of *Salduz* and *Panovits* (2008) the right to legal representation for juvenile defendants has been expanded to the first interviews by the police after arrest. However, the presence of a lawyer is not in every country self-evident. At youth court hearings in *Greece* and *Germany* the young person is not in every case represented free of charge. It has to be noted, however, that it can be expected that in several other countries a lawyer is not provided free of charge when a prosecutor settles the case with the young person, instead of bringing the case before a judge.

The European Court has stated in the case of *Güveç* against Turkey that the presence of a lawyer can help a juvenile defendant to participate at a court hearing.²⁰ Moreover, a lawyer is in the position to inform the young person before and after the hearing about what will happen and what has been decided. So, a lawyer can prepare the young person as to what he can expect to happen and what he can contribute to

²⁰ ECtHR, 20 April 2009, Appl. no. 70337/01.

the hearing. It is expected, in this study, that the presence of a lawyer has a positive influence on the young person’s understanding of the hearing, and therefore on his participation.

Table 6.2

Presence of legal representation²¹

<i>Present - every phase</i>	<i>Present - pre-trial and trial phase</i>	<i>Present - but not guaranteed</i>
Belgium	Scotland – youth court	Germany
England & Wales		Greece
France		Scotland – children’s hearing
Ireland		Switzerland
Italy		
Netherlands		
Spain		

6.4 Youth court judge

In the previous chapter the countries involved in this study are arranged according to the characteristics of the legal tradition in which the juvenile justice system operates; i.e. more inquisitorial or adversarial court procedures (see chapter 5, section 5.4). The characteristics of the juvenile justice system have an important influence on the roles of the different actors in the process, especially the role of the judge. In this section, the role of the youth court judge in the preliminary and trial phase of the youth court process will be discussed. As will be shown, a more active or a more passive role for the judge can be distinguished among countries.

For every country included in this study it can be noted that judges working in the juvenile justice system are to a certain extent specialised in juvenile criminal law. One exception is Scotland, where young people from 16 years old onwards are treated as adults, within the general adult court system. The degree of specialisation differs among countries, though, depending on the length of employment as a youth

²¹ In Table 6.2 the presence of legal representation is not reported for out-of-court settlements by the police or prosecution service.

court judge, the availability of training and courses and the personal experience of judges in the field of juvenile law.

6.4.1 Active role

Belgium has a youth protection system in which both delinquent juveniles as well as endangered children are dealt with. Youth court judges deal with both types of cases within the civil youth court and they supervise their own cases until the measure is terminated. The youth court judge is, as *unus iudex*, involved in every phase of the process; i.e. pre-trial, trial and post-trial (the execution of judgments) (Christiaens et al., 2010).²² The judge does not have competences as an investigating judge.²³ However, he can be regarded as having a key role in the youth court process (Christiaens & Goris, 2012). In the pre-trial phase the judge can impose a preliminary supervision measure to investigate the personal background situation and/or to supervise the young person until the trial (art. 50; art. 52 Jpc). The young person can also be placed provisionally in an institution (art. 52 Jpc) or in pre-trial detention when the young person is at least 14 years of age (art. 53 Jpc). Pre-trial hearings are held in chambers. Quite remarkable is the fact that the same judge who investigates the case pre-trial and imposes preliminary measures is also in charge of the trial in court (Christiaens et al., 2010). In case of an alleged offence, the truth is established in court, although officially no sanction can be imposed, but only educational measures (art. 37 Jpc). Truth finding is, however, of importance in the case of an offence, because victims can make a civil claim concerning damages (art. 61 Jpc), because the young person or his parents are civilly liable (art. 1382; art. 1384 CCiv). The judge should hear every juvenile, who is at least twelve years old, in person before imposing a measure (art. 52 (ter) Jpc). Since the enactment of the juvenile protection act of 2006, the judge must specify the duration of a placement measure in his judgment (art. 37 (2)(11) Jpc). Previously, this was not the case because of the educational nature of the placements. Post-trial, during the execution of the measure, the youth court judge is

²² When the case of the young person is tried according to adult criminal law this is done by a special chamber of the youth court, consisting of one criminal court judge and two youth court judges (art. 57 (bis) Jpc; see Christiaens et al., 2010).

²³ Only in exceptional cases can the prosecutor bring the case before an investigative judge (art. 49 Jpc).

still in charge. He controls the execution of the measure; he receives quarterly reports from the institution where a young person is placed and he can revise a measure at any time (art. 60 Jpc).

Unlike Belgium, *France* has separate legal provisions for juvenile defendants (Ordonnance no. 45-174 relative à l'enfance délinquante) and children in need of care and protection (art. 375 (1-9) CCiv). Moreover, juvenile defendants can be subjected to a sanction when found guilty (art. 2 Jci). However, as is the case in Belgium, the French youth court judge handles both civil child protection (art. 375-1 CCiv) and criminal justice cases (art. 1 Jci) and juvenile defendants can receive educational measures (art. 2 Jci). Until recently, the French judge controlled the case in every phase of the juvenile justice process. The judge in charge of the pre-trial phase, the *juge d'instruction*, also heard the young person during the trial in court when it concerned a minor offence (*contravention* or *délit*). Since January 2013 the trial judge is an independent judge who gives a judgment and controls the execution of the sanction or measure.²⁴ The *juge d'instruction* can no longer take part in the trial as a *juge d'efants*. Before January 2013 this was the case when the offence did not concern a *crime*. Currently, an independent youth court judge should deal with the case of the young person in the youth court. The pre-trial youth court judge hears the young person and his parents in chambers concerning the facts of the case and his personal situation (*mise en examen*). When the young person is in need of supervision, a preliminary educational measure can be determined (art. 8/10 Jci). The task of the youth court judge is to find individualised solutions to problems which the young person encounters and sometimes the pre-trial period can be very extensive (i.e. several years) (Mouhanna & Bastard, 2011). The judge still has the possibility to dismiss a case in the pre-trial phase, when the young person has fulfilled the obligations attached to a measure and the judge deems it not necessary to order a court sanction (*chambre du conseil*) (art. 8 Jci). Pre-trial detention can be ordered (or conditionally suspended) at an arraignment hearing by the *Juge des libertés et détention* (art. 11 Jci). In the youth court (*Tribunal pour enfants*)²⁵ the judge is assisted by two lay

²⁴ Law no. 2011-1940 of 26 December 2011 to establish a citizens' service for juvenile delinquents [Loi no. 2011-1940 du 26 décembre 2011 visant à instaurer un service citoyen pour les mineurs délinquants].

²⁵ A 16 or 17 year old who has committed a *crime* is tried in the *Cour d'assises des mineurs*, which consists of a criminal court judge, two youth court judges and a jury of

judges (*assesseurs*). The lay judges are drawn from a panel of members of the public who have experience in and are interested in working with juveniles (Castaing & Pignoux, 2010). The lay judges have an equal vote regarding the guilt of the young person and they decide together with the youth court judge which sentence should be imposed. During the hearing, the presiding judge gives the lay judges the opportunity to pose questions to the juvenile or other participants in the process, such as experts or witnesses. Both in France and in Belgium, the youth court judge is very closely involved with the cases he handles, because in practice he hears the young person several times and supervises the case when the young person has received a final sentence. Moreover, the French judge visits juvenile institutions to hear about young persons' experiences in the institution in order to decide whether to modify or revoke the measure (Bastard & Mouhanna, 2008; Mouhanna & Bastard, 2011; Terrill, 1997).

In *Germany*, the specialised youth court judge has jurisdiction over juveniles between 14 and 21 years old (art. 1 (2) Jcc). Young adults between 18 and 21 can receive a sentence according to juvenile law or a (mitigated) sentence according to adult criminal law (art. 105-106 Jcc).²⁶ The youth court judge can hear cases in chambers or sit alone in court (*Einzelrichter*). In the case of a more serious offence the prosecutor sends the case to a full youth court (*Jugendhoffengericht*). The local full youth court consists of a judge and two lay judges (art. 33a Jcc). In case of an even more serious offence, such as homicide, the case is sent to the youth chamber in the district court (*Landgericht*). The youth chamber also hears appeal cases (art. 33b Jcc). A distinction is made between a large youth chamber, consisting of three judges and two lay judges, and a small youth chamber, consisting of one judge and two lay judges (art. 33b (1) Jcc). The lay judges are members of the public, who should be 'pedagogically capable' (art. 35 (2) Jcc). In practice, this can also mean that they have children themselves (Wolfe, 1996). Lay judges are not legally trained and they do not have access to the trial dossier. In the youth court one of the

members of the public (art. 20 Jci). A 16 or 17 year old who has reoffended and committed a *délit* (punishable by less than three years imprisonment) is tried in the *Tribunal correctionnel pour mineurs*, which consists of a youth court judge and two assisting judges (art. 24-1 Jci).

²⁶ Generally, young adults are sentenced according to adult criminal law in the case of traffic offences, because these cases can be in writing, by imposing a fine (Dünkel, 2010).

lay judges should be female and the other male (art. 33a (1) Jcc). During the trial they are allowed to ask questions, but the judge can refuse a question when he deems it irrelevant. When deciding about the guilt of the defendant and the sanction, the lay judges have equal voting rights (Wolfe, 1996; Zwickel, 2011). The German youth court judge can take preliminary educational measures (art. 71 Jcc) and he also supervises the execution of sentences (art. 82; art. 84 (1) Jcc).

As is explained in section 6.2, the *Italian* prosecutor has to send all the cases to the youth court judge, after he has investigated the case. This judge is in charge of the pre-trial phase of the process. At the first hearing (*l'udienza preliminare*) the juvenile defendant is heard concerning the facts of the case and the judge can take preliminary measures, such as supervision, a curfew or placement in an institution, or prolonging the pre-trial detention. The most important decision taken by the pre-trial judge in this phase is whether the young person will be officially charged and prosecuted in court (art. 424 Ccp).²⁷ The preliminary hearing takes place before a professional youth court judge and two lay judges (a man and a woman). A full court hearing (a trial) takes place before two professional judges and two lay judges (a man and a woman). The lay judges are educated in the field of social or medical sciences (art. 2 Law no. 1404, establishment and operation of the youth court).²⁸ In practice, however, the role of the lay judges during the hearings appears to be rather small, because they do not tend to ask the juvenile defendant any questions. It has to be noted that the Italian youth court judge has broad discretionary powers. It is for example common practice for the judge to suspend the judgment after the preliminary hearing or the trial (*dibattimento*) during which period the young person is committed to supervision and, if necessary, other forms of intervention, for a period of up to one or in case of a more serious offence three years (*la sospensione del processo con messe alla prova*, art. 28 Cjcp). When the young person does not violate the conditions attached to the measure, the judge will close the case and

²⁷ There are two instances in which the preliminary hearing can be omitted. This is the case when either the prosecutor or the defendant files a request for this in case of conclusive evidence. Or this is possible when the defendant is caught *in flagrante delicto* or when he has confessed his guilt. Moreover, it is also possible for the preliminary judge to give the judgment at the preliminary hearing, at the request of the defendant. In this case the sentence is reduced by one-third (Padovani et al., 2011).

²⁸ In the law the specific fields of education are named, which are biology, psychiatry, criminal anthropology, pedagogy or psychology.

the young person is not convicted. During the probationary period the judge supervises the measure and when the young person violates one of the conditions attached to the measure he has to appear before the judge again, who can then give him a warning or adjust the measure (art. 28 (5) Cjcp). The judge also supervises sentences imposed on the young person by judgment and the judge is in a position to revoke a sentence (art. 40 Cjcp).

In the *Swiss* juvenile criminal procedure a specialised youth court judge is only active in the French and Italian-speaking parts of the country. However, the judge has the same competencies as the prosecutor in the German-speaking cantons in Switzerland (art. 6 (2) Cjcp). In less serious cases the judge is in charge of the preliminary investigations, during which he hears the young person, his parents and, if necessary, witnesses and social workers and he can impose preliminary measures (art. 26 (1) Cjcp). In the case of a serious offence a full court hearing is held and in both parts of the country the judge is accompanied by two lay judges (art. 7 (2) Cjcp). The presiding judge has studied the dossier before the hearing (Gilliéron & Killias, 2008). The judge in court usually handles different types of cases, such as civil law cases or adult criminal cases, because very few juvenile defendants are prosecuted in court. The youth court judge working in the French-speaking cantons is also in charge of the execution of the sentence, as is the prosecutor in the German-speaking cantons (art. 42 (1) Cjcp).

Compared to, for example, Belgium and France, in *the Netherlands* a stricter divide can be observed between the preliminary phase and the trial phase. The prosecutor is in charge of the preliminary investigations and only when the prosecutor orders pre-trial detention (art. 57; art. 63; art. 65 Ccp) or its suspension does a pre-trial youth court judge (*rechter-commissaris*)²⁹ hear the case in chambers and can determine pre-trial interventions (conditions attached to the suspension of pre-trial detention) (art. 493 Ccp). The judge involved in the pre-trial phase is not allowed to hear the case in court as a trial judge (art. 268 Ccp). In court juvenile defendants can be heard by one judge (495 (1) Ccp) or in more serious cases by a panel of three judges, one of whom should be a youth

²⁹ According to the law (art. 492 Ccp) the pre-trial judge should be a specialised youth court judge. In practice, however, this is not always the case because adult criminal law judges are appointed as substitute youth court judges, in order to fulfil the task of a pre-trial judge.

court judge (495 (3) Ccp). Changes to juvenile criminal law, enacted in 1995, changed the role of the youth court judge. The aim of the legal changes was to remove paternalistic and welfare elements from juvenile criminal law and to ensure better procedural safeguards for juvenile defendants (see Junger-Tas, 2004).³⁰ As a consequence, the central role of the youth court judge, as can still be observed for example in the French and Italian juvenile justice system, was shifted towards the public prosecution service and the Child Care and Protection Board, to ensure a more independent role for the judge. Youth court judges before 1995 liaised with the public prosecutor and the Child Care and Protection Board on a regular basis and the prosecutor had to ask the judge's permission to conditionally discharge a case (De Jonge & Van der Linden, 2007). Nowadays, the youth court judge is excluded from these meetings, whilst the police are included.³¹ Moreover, the youth court judge only deals with juvenile criminal cases and not with civil child protection or family matters. When a particular judge does work in civil law as well he does not follow every case concerning one family (Verberk & Fuhler, 2006; Vlaardingerbroek, 2011). The public prosecution service is formally responsible for the execution of sentences (art. 553 Ccp). While other organisations, such as the Child Care and Protection Board and the juvenile probation service, are responsible for the actual execution of sentences, the prosecutor comes into play in case the convicted young person does not carry out the sentence or comply with conditions attached to a sentence. In principle the judge is no longer involved with the young person after the final judgment in the case.³²

In *Greece* the youth court consists of, as is the case in the Netherlands, a sole youth court judge or a bench of three judges, one of whom should be a youth court judge (art. 7 Ccp). Preliminary hearings are

³⁰ One of these safeguards is to ensure an independent judge at trial, who has not been involved in the case in the pre-trial phase of the process. On the contrary, the European Court of Human Rights has ruled in 1993 that the impartiality of a youth court judge is not automatically in jeopardy when he has taken decisions in the pre-trial phase concerning, for example, pre-trial detention. According to the Court, the scope and nature of the decisions influence the impartiality of the judge (ECtHR, 24 August 1993, Appl. no. 13924/88 (Case of Nortier v. the Netherlands)).

³¹ Policy instruction on the effective disposition of juvenile criminal cases, 1 July 2011, *Stcrt 2011*, 10941, para. 5 [Aanwijzing effectieve afdoening strafzaken jeugdigen].

³² One exception concerns the conditional release of young persons from detention (art. 77(j)(4) Cc). The judge who imposed the sentence can at any time release the young person conditionally. In practice, however, this provision is seldom used.

also conducted by specialised youth court judges (art. 305 (1) Ccp). The prosecutor supervises the execution of sanctions and measures (art. 549 (5) Ccp). The judge can, however, at any time replace or revoke measures, when he deems this to be necessary. At least once a year measures have to be reviewed by the judge (art. 124 Cc).

The role of the *Spanish* youth court judge is less profound, compared to that of the judges in the above-described countries. As has been explained before, the prosecutor is in charge of the investigations and the judge has to decide about pre-trial detention and preliminary measures and presides over the youth court hearings. Different judges are competent in the pre-trial and trial phase of the process. During the hearings the prosecutor is always present and the judge does not take decisions in chambers. The Spanish youth court judge can be seen as having an active role in some regard, because he has the responsibility to supervise the execution of the sentence and his decisions can be reviewed or suspended at any point during its execution (at the request of the prosecutor or defence lawyer) (art. 51 Jcc). The judge who sentenced the young person in court is in charge of the execution (art. 44 (1) Jcc). Moreover, the youth court judge visits juvenile institutions to supervise the execution of the detention sentence and to speak to young people in person about their placement (art. 44 (3) Jcc).

In *Scotland*, a children's panel is based in each local authority and it is comprised of members of the local community (s. 4 (2)(b) Children's Hearings (Scotland) Act 2011). People can apply to be a panel member and subsequently they are selected and trained to sit at the hearings (Schedule 2). Training concerns not only legal knowledge, but also social and communicative skills. The panel members work voluntarily (Asquith, 1998; Comben et al., 2003; Griffiths & Kandel, 2000). The reporter is present at the hearings as well to support the panel members in their decision-making (Burman et al., 2010). At the hearing the panel can specify a date on which the order will be reviewed or the order is reviewed at the latest one year after its imposition (s. 83 (7)(a)). The supervision order can be continued, changed or discharged by the panel (s. 138 (3)). The panel members are not involved in the actual execution of measures. The local authorities are responsible for the implementation of the orders made by the children's panel (s. 83 (1)(b)).

6.4.2 *Passive role*

In the adversarial legal tradition of *England and Wales, Ireland and Scotland*, the role of judges and magistrates³³ appears to be the complete opposite of the practice on the European continent. Before the hearing or trial, judges are not informed about the offence or the personal circumstances of the juvenile defendant by means of a dossier. During the hearing the judge does not play a leading role, but oversees the procedures and makes sure that the procedures are followed in a fair manner. The contribution of the judge depends on his personal style. During sentencing or probation review hearings the judge has more opportunity to contribute to the hearing (Kilkelly, 2005, 2008a; Rap & Weijers, 2009; Weijers & Hokwerda, 2003).

In *England and Wales* the youth court is part of the magistrates' court (s. 45 Children and Young Persons Act 1933), which handles the bulk of minor criminal cases. The magistrates are lay members of the public or professional district or stipendiary magistrates (Dammer & Fairchild, 2006). The lay magistrates, who are elected for the youth court, have a specific interest in or experience with young people and they have worked for at least two years in the adult criminal court. The bench consists of three lay magistrates, at least one of whom should be male and one female. The lay judges have received specific training and at the hearings the clerk of the court advises them on legal issues (Arthur, 2010; Lowe, 2011; Terrill, 1997). The district judge is legally trained and is also selected to sit alone in the youth court (s. 26 Courts Act 2003). In *Ireland and Scotland* the hearings are presided over by a professionally trained judge; the Sheriff in Scotland and the children court judge in Ireland. In the Irish Children Act 2001 it is stated that 'a judge of the District Court shall, before transacting business in the Children Court, participate in any relevant course of training or education which may be required by the President of the District Court' (s. 72 (1)). Kilkelly (2005), however, states that judges are generally not specifically trained with regard to juvenile law or the development of children and adolescents. This is

³³ In Scotland a judge is called a *sheriff*, in England and Wales generally the term *magistrate* is used for the lay judges and the term *district judge* for the professional judge and in Ireland the term *judge* is used.

certainly the case in Scotland, where formally no separate youth court exists (Burman et al., 2010).

Conclusion

To conclude this section, the countries involved in this study can be categorised according to the extent to which the youth court judge has an active role in the youth court process. From Table 6.3 it becomes clear that four models are employed within Europe. First, in countries such as *Belgium, France, Germany, Italy* and *Switzerland* the youth court judge plays an important role in every phase of the process. During the preliminary phase and the trial the youth court judge plays an important role. Moreover, the judge supervises the execution of the sentence and is in a position to modify the sentence at all times. In most of these countries, the judge is able to impose a 'civil law style' educational measure in juvenile criminal cases and the judge also deals with civil child protection cases.

At the other extreme the youth court judge plays a marginal and passive role in the youth court process. This is the case in the *Anglo-Saxon countries*. At the hearings judges have the task of overseeing procedures; judges are only committed to the criminal youth court and they are not involved in the execution of a sentence. Some countries, such as the Netherlands, Greece, Spain and the Scottish children's hearings system, however, have adopted a position somewhere in between; the youth court judge is involved in the pre-trial and trial phase, but is not concerned with the execution of the sentence. Or the same judge is involved in the trial and execution phase and not in the pre-trial phase.

It is expected that the role the youth court judge plays at a hearing influences the manner in which and the extent to which juvenile defendants can participate at the hearing. The role of the judge is, moreover, influenced by the legal tradition that is employed within a juvenile justice system and by the relationship with the child protection system (see chapter 5).

Table 6.3

Role of the youth court judge

<i>Active role - every phase</i>	<i>Active role - pre-trial and trial phase</i>	<i>Active role - trial and execution phase</i>	<i>Passive role</i>
Belgium	Greece	Scotland – children’s hearing	England & Wales
France	Netherlands	Spain	Ireland
Germany			Scotland – youth court
Italy			
Switzerland			

6.5 Social services

With the emergence of special juvenile justice systems in Europe, social services have acquired a special role within these systems. In the Beijing Rules it is for example formulated that “In all cases (...) the background and circumstances in which the juvenile is living or the conditions under which the offence has been committed shall be properly investigated so as to facilitate judicious adjudication of the case by the competent authority” (rule 16.1). Moreover, the well-being of the child should be the guiding factor in the course of adjudication and sentencing (rule 17 (1)(d)). This rule requires that adequate social services should be available to deliver information to the youth court. It can be argued that background information regarding the young person and his family is crucial when taking a decision in court that is in line with the best interests of the child. In this section the role of the social services within the juvenile justice system will be analysed. First, the organisation of social services will be outlined. Second, the moment at which social services commence their involvement with the youth court process will be outlined. And third, the actual role of social workers in court will be analysed.

6.5.1 Organisation of social services

The first finding that stands out from this study is the nature of the relation between social services and the youth court. It has become clear that there are typical differences at this point, which lead to the conclusion that two different models may be distinguished concerning the relation between social services and the youth court. Social services are either directly attached to the court, or they constitute a separate and independent organization.

In several countries, such as Belgium, France, Greece, Italy, Spain and Switzerland, social services constitute a part of the youth court and social workers act under the authority of the court. Typical for this model is that the offices of the social workers are located in the court building and social workers work in close cooperation with youth court personnel, such as judges and prosecutors. In these countries social workers have daily contact with the judge about current cases.

For example, in *France* the *Service Éducatif Auprès du Tribunal pour enfants* [SEAT] is part of the court. Before every hearing the social workers from SEAT provide the judge with information about the personal background of the young person. They also advise the judge on the necessity for an educational measure (Raymond, 2006; art. 5-1 Jci). Moreover, the judge is provided with updates about the progress the young person is making with regard to a protective or educational measure that has already been imposed. Besides providing information to the youth court judge and liaising with the prosecutor and lawyer, the social worker also has the task of providing juvenile defendants and their parents with information about the court procedures, before they have to appear in court. Moreover, SEAT also executes measures, such as supervision, community service or reparation measures (Gazeau & Peyre, 1998; Wyvekens, 2006). In *Belgium* the social service of the youth court (*de sociale dienst bij de jeugdrechtbank*) is also part of the court and it has similar functions as the social service in France, such as investigating the background situation of the young person (art. 50 Jpc) and supervising the implementation of measures (see art. 37 Jpc).

A similar situation can be found in *Switzerland*. The Swiss judge or prosecutor works in close cooperation with social workers who are

attached to the court or the prosecution service.³⁴ The social workers have their office in or very close to the court or office of the prosecution service, as is the case in France. In Switzerland the social services that operate within the juvenile justice system have a variety of responsibilities. Besides providing the judge/prosecutor with background information with regard to the young person before the final disposition is rendered, social services also provide for the implementation of protective or educational measures (Aebersold, 2011; Weidkuhn, 2009). Measures can be imposed both pre- and post-trial and in Switzerland these measures can be imposed regardless of whether the juvenile has not yet been found guilty (art. 5; 10 (1) Jcc).

In *Spain*, it is not the judge but the public prosecutor who orders the social workers to start an investigation into the background of the young person (art. 27 (1) Jcc). The Spanish *equipo técnico* is attached to the youth court and it is made up of psychologists, educationalists and social workers, who compile reports together. The prosecutor is obliged to order a social report regarding a juvenile defendant, he determines when the report should be finished and he has the responsibility to send the report to the judge and the lawyer representing the young person (art. 27 (5) Jcc). The social work team investigates the personality of the young person, his school record and his social relations. They also advise about preliminary measures, a final sanction or measure (art. 27 (2-3) Jcc) and the suspension of a sanction or measure (art. 45 Jcc). Besides informing the prosecutor and judge, the social workers conduct victim-offender mediation and they supervise minors (Alberola & Molina, 2003; De la Cuesta et al., 2010; Pastrana, 2011b).

In other European countries the social service that advises the youth court about the social background of the juvenile defendant is not attached to the youth court, but constitutes an independent organization. This is the case in the British Isles, but also in Germany and the Netherlands.

In England and Wales, separate social services deal with child protection and juvenile justice cases (see chapter 5, section 5.3.2). Since the year 2000, every local authority in England and Wales has a Youth Offending Team that operates independently from the youth court (s. 39 Crime and Disorder Act 1998). Representatives from the probation

³⁴ Der Sozialdienst der Jugendanwaltschaft / les éducateurs du Tribunal des mineurs.

service, social work, education, the police and the health services all cooperate within local youth offending teams (s. 39 (5)). The YOTs are responsible for the organisation and provision of the pre-sentence reports to the courts and the delivery of youth justice services (Dignan, 2010). The reports are compiled according to national standards and include an offence analysis, assessment of the (mental) health and welfare of the young person, the need for parenting support, assessment of the reoffending risk and a proposal for sentencing (Youth Justice Board, 2010a). Comparable practice can be found in Scotland and Ireland. In *Scotland* the social enquiry reports for the courts and the children's hearings are prepared by the local authority social work departments (Burman et al., 2010; see s. 203 Criminal Procedure (Scotland) Act 1995; s. 27 (1)(a) Social Work (Scotland) Act 1968; s. 66 (4) Children's Hearings (Scotland) Act 2011). In *Ireland* the reports for the courts are mostly delivered by the probation service, but other organisations such as the health service and welfare organisations provide reports to the courts as well (ss. 99-107 Children Act 2001, see also Carroll & Meehan, 2007; Walsh, 2010).

In *the Netherlands* the Child Care and Protection Board is responsible for the provision of social reports to the youth court judge. When the prosecutor has the intention to try the young person in court, he is legally obliged to ask the Child Care and Protection Board for a social report (art. 494 (1), Ccp). This organisation can also inform the prosecutor of its own accord (art. 494 (3), Ccp). The board undertakes a systematic social investigation with regard to almost every juvenile defendant who has to appear before the prosecutor or judge. The report contains social background information concerning the young person and his family and an advice concerning the best appropriate sanction and/or measure. The actual implementation of measures, such as probation, is executed by the local social service department or other competent authority (art. 77 (aa)(2) Cc). Both organisations function completely independently from the youth court. In practice no close contact is maintained between judges and social workers.

In *Germany*, the local social work service (*Jugendamt*) makes use of the *Jugendgerichtshilfe* (art. 38 Jcc). The prosecutor notifies this

service about the charges (Zwickel, 2011).³⁵ Social workers provide the youth court judge with background information (art. 43 Jcc), give recommendations concerning the best appropriate course of action (art. 38 (2) Jcc) (and in the cases of young adults concerning the application of adult or juvenile criminal law), they should be notified of the time and place of the trial (art. 50 (3) Jcc) to be able to be present and they can be in charge of the supervision measures imposed on the young person (art. 38 (2) Jcc). These provisions apply to juveniles as well as young adults (see art. 107; art. 109 Jcc). As is the case in the Netherlands, the social work department functions independently from the youth court.

6.5.2 *Early or late start of the involvement*

The second finding that stands out from this study concerns the moment at which the social service starts its involvement with the juvenile defendant. Again, a distinction can be made between two clearly different models in Europe. On the one hand, there are countries in which the social worker is in touch with the young person from the beginning of the juvenile justice procedure, shortly after he is arrested and charged. On the other hand, in some countries the social worker comes into play much later, that is, only after the formal trial and judgment.

In *the Netherlands*, when a minor is arrested by the police, the police immediately notify a social worker from the Child Care and Protection Board.³⁶ If the young person is remanded in custody the prosecutor has to inform the board (art. 491 (1) Ccp). A social worker conducts a first assessment of the well-being of the juvenile defendant in pre-trial detention and prepares a report for the prosecutor and pre-trial judge, including advice on releasing the young person on supervision or on prolonging the period on remand (Uit Beijerse & Dubbelman, 2011). The prosecutor must consider this advice before ordering a continuation of the pre-trial detention (art. 491 (2) Ccp).³⁷ When the young person is not taken into custody after his arrest, he will be invited to come to the

³⁵ The family, the school and/or the employer of the young person should also be notified to provide relevant information (art. 43 (1) Jcc).

³⁶ Policy instruction on the effective disposition of juvenile criminal cases, 1 July 2011, *Stcrt 2011*, 10941, para. 8.4 [Aanwijzing effectieve afdoening strafzaken jeugdigen].

³⁷ On the other hand, the pre-trial judge can also ask the Child Care and Protection Board to inform him concerning the situation of the young person, for example after the pre-trial detention has been continued for an additional period of time (art. 494 (4) Ccp).

office of the board, where a standardized assessment is carried out by the social worker. In this case voluntary supervision can be proposed to the young person.³⁸ In the case of the suspension of pre-trial detention, special conditions can be attached to the suspension, such as supervision (art. 80 Ccp). In basically every juvenile criminal case the board prepares a report for the prosecutor (also in case of a conditional dismissal), the pre-trial judge or the youth court judge and gives advice on the best appropriate sanction (Ten Berge, 2011).

This approach is far from typically Dutch. On the contrary, it can be found everywhere on the European continent. This approach typically consists of three aspects. First, the social worker visits the young person who has been taken into pre-trial detention as soon as possible, which in principle is immediately after the police have arrested the minor. Second, the same social worker stays in touch with the young person throughout the course of the trial. In these countries we see that the judge is always in touch with a social worker from the moment that a young person is taken into pre-trial detention. Third, the social worker may start with early interventions, if necessary. In principle, there is quick action to start a kind of supervision when the social worker thinks this is necessary and in the best interests of the child.

For example in *Spain*, a young person is heard by a member of the social work team when he is arrested by the police, in order to advise the judge about the imposition of a preliminary measure (art. 22 (1)(f); art. 28 (1-2) Jcc). At a later stage of the process more extensive investigations are carried out to finalise the report or to provide an update of an existing report, but this has to be completed within 10 days. In *Greece*, a social work report is always prepared for the judge as well (art. 239 (2) Ccp) and the social workers act under the authority of the judge (art. 1 (2) Presidential Decree no. 49/1979, establishment, operation, tasks and responsibilities of youth court aid). In *Switzerland*, advice from social workers plays an important role in the process, because the judge (or the prosecutor) can order preliminary protective measures (art. 5 Jcc). These measures can be ordered regardless of whether the juvenile is found guilty and the measures can continue after the trial (art. 10 Jcc). In *France*, the charges against a young person can be dismissed when he has fulfilled the

³⁸ Policy instruction on the effective disposition of juvenile criminal cases, 1 July 2011, *Stcrt 2011*, 10941, para. 3.2 [Aanwijzing effectieve afdoening strafzaken jeugdigen].

conditions attached to a measure (art. 8 Jci). Social workers play an important role in advising on a measure and supervising the young person. In the *Belgian* juvenile protection system the social work service provides indispensable information to the judge, because the judge decides about the imposition, prolongation and termination of measures on the basis of this information as well (art. 50/60 Jpc; see also Christiaens & Goris, 2012). In *Italy*, the personality of the young person is also investigated in the preliminary phase of the process. The criminal responsibility of the minor and the social, family and personal background of the young person have to be investigated in order to impose the best appropriate measure (art. 9 Cjcp).

In the *Anglo-Saxon countries*, on the contrary, the start of social work involvement is at a later phase in the juvenile justice process. This has to do with the adversarial nature of the juvenile justice process. The absence of a trial dossier and the supposed neutrality of the judge implies, in the dominant interpretation of the adversarial tradition, that the judge may not be informed and advised about the personal situation of the defendant before or during the trial. This is completely opposite to the approach in the inquisitorial tradition, where the dialogue between the judge and the (minor) defendant lies at the heart of the hearing. Moreover, starting pre-trial investigations concerning the personal background of the young person is common practice in the inquisitorial tradition (see chapter 5, section 5.4.2). Within the adversarial approach it is not possible for social workers to play a role in the pre-trial or trial phase. They only come into the picture when the guilt of the juvenile defendant has been established (either by a plea or trial) and the judge would like to obtain further inquiries before passing sentence. In that case, a social worker in England and Wales, Ireland and Scotland is instructed to prepare a *pre-sentence* or *social enquiry report* and to advise the judge on the personal circumstances of the young person (s. 158 Criminal Justice Act 2003; s. 99 Children Act 2001; s. 201 (1) Criminal Procedure (Scotland) Act 1995). Therefore, the hearing must be postponed. In *England and Wales* a pre-sentence report is required by law when a custodial sentence is considered for a juvenile (s. 156 (3)(a) Criminal Justice Act 2003). In *Ireland* this is the case when the judge considers imposing a community sanction or detention (in combination with supervision) (s. 99 (1)(b) Children Act 2001). In *Scotland*, a report is required when the defendant is already

subject to a supervision order imposed by the court, such as probation (s. 203 (1) Criminal Procedure (Scotland) Act 1995). Interventions or supervision only commence after sentencing.

One possible intervention that can be installed prior to the trial is to order bail conditions, such as a curfew or staying away from specific areas or individuals, when releasing the juvenile defendant from pre-trial detention (Burman et al., 2010). However, in this phase of the process the judge only possesses knowledge concerning the offence and not concerning the personal circumstances of the young person. In Ireland the judge can remand the young person in custody or on bail, when a report has to be prepared so that the juvenile is available for the social worker who is instructed to prepare the report (s. 100-101 Children Act 2001).

It should be noted that in the Scottish children's hearings system it is possible for the children's panel to impose an 'interim compulsory supervision order' (s. 86 Children's Hearings (Scotland) Act 2011). This can be done when the panel defers making a decision until a subsequent children's hearing or when the child does not accept the grounds for referral and the case is sent to court. In specific cases it is therefore possible to impose a supervision order when the panel 'considers that the nature of the child's circumstances is such that for the protection, guidance, treatment or control of the child it is necessary as a matter of urgency that an interim compulsory supervision order be made' (ss. 92 (2) and 93 (5)). In England and Wales social workers may play a role in the pre-trial phase as 'appropriate adult'. According to law an appropriate adult must be informed as soon as possible after the arrest of the young person (s. 57 (3) PACE) and is asked to come to the police station (s. 3.15 PACE Code C). This person, who may be a social worker from a local authority, should be present during the police interrogation (s. 11.15) and may advise the young person, ensure that the interview is carried out in a fair manner and facilitates communication between the police officer and the young person (s. 11.17) (see also section 6.6.2).

6.5.3 Role in the youth court

This difference between the two ways of organising the social work services and the moment at which social workers start their involvement

with the juvenile defendant acquires additional significance when taking a closer look at the actual role of the social worker in court.

Active role

As has been shown before social workers play an important role in the youth justice process in continental Europe. However, social workers are not always present at every court hearing, because they have already advised the judge by means of a written report and informal meetings with the judge in chambers. This is for example common practice in *Belgium* and *France*. In *Italy* and *Switzerland*, basically, social workers are present at both the pre-trial hearings and trials to inform the judge or prosecutor about the outcomes of the social investigations or to clarify the written report. As a rule the social worker is assigned a rather active role. He is enabled by the judge to take that role, by giving a detailed and elaborate analysis of the situation of the young person and the steps that, in his view, should be taken. Not only on the European continent do social workers play an important role at the hearing, but also in *Scotland*. At a children's hearing a social worker is always present to inform the lay panel members about the personal circumstances of the child and his family. The social worker engages actively in the round-table discussion at the hearing and expresses his views on the welfare of the child. In the report for the children's panel detailed recommendations are given concerning the measures that ensure the best interests of the child (Griffiths & Kandel, 2009; Rap & Weijers, 2009).

Passive role

On the other hand, the role of the social worker is marginal during the hearing in the youth court in *England and Wales*, *Ireland* and *Scotland*. In the Anglo-Saxon countries input from the social worker is limited to the sentencing hearings and providing the judge with verbal remarks on the report is far from standard, but depends heavily on the personal style of the youth court judge or magistrates. Social workers have to appear at the sentencing hearing, in case the judge has additional questions about the young person and the progress he is making when he is already on probation or supervision. However, social workers can only contribute marginally to the hearing and they do not receive much, if any, time to give their opinion with regard to the situation of the juvenile (Bottoms &

Dignan, 2004). In some courts in England and Wales and Scotland, a representative of the YOT or social work department is always present at the youth court hearings so as to be able to provide the judge instantly with information about the young people and to make arrangements with young persons who plead guilty and are given a community sentence. In England and Wales efforts have been made to enhance the cooperation between the YOT and the court and the YOTs are assigned a number of different tasks. YOT representatives in court are inter alia required to provide young people and their parents with information prior to the hearing, to facilitate the communication between the young person, his parents and the bench during the hearing, to share information with the prosecutor and the defence lawyer, to provide information to the court about young people who are already known to the YOT, to present the pre-sentence report, to prosecute young people who have breached a court order,³⁹ and to facilitate the custodial placement of a young person (Youth Justice Board, 2010b). In Ireland, the social worker who prepared the report for the court can be summoned as a witness by the judge in order to clarify the written report (s. 99 (5) Children Act 2001).

In between

At the same time, social workers in countries such as Germany, Greece, the Netherlands and Spain operate somewhere in the middle between these two extremes. Social workers in these countries are present in the youth court, but their role is not as profound and active during the hearing. For example in *Greece*, a social worker is always present at the hearing (Pitsela, 2010). Before and after the hearing the social worker provides the young person and his parents with information concerning the procedures and the decision that is taken by the judge. The task of the social worker is to prepare the young person before the hearing. However, the report that is compiled concerning the young person is only disclosed to the judge and other social workers. The prosecutor and defence lawyer (and the young person himself) do not know what has been written about the social situation of the young person and the social worker can refuse to give evidence in court (art. 5 (2) Law no. 378/1976). In *Germany* the youth court social worker should always be present at the hearings to explain his

³⁹ This task does not lie with the Crown Prosecution Service, but instead with the YOT (Youth Justice Board, 2010b).

point of view (art. 38 (2) Jcc). In practice, however, a social report is not always submitted and the social worker is not always present (particularly not in less serious cases), because of the heavy workload of the youth court social work department (Dünkel, 2010). A representative of the social service is present at every case dealt with on a particular day (Zwickel, 2011). When a report is submitted, the judge must consider the recommendations and the social worker receives the opportunity to disclose information to the judge (art. 50 (3) Jcc). In *Spain*, a representative of the social work team is always present at the hearing (see also art. 35 (1); 37 (2) Jcc). However, in case of a settlement the report that is written is not always read to the judge. In the *Netherlands*, a representative of the social workers employed by the Child Care and Protection Board can be present at the hearing. This depends, however, on the practice of the specific court and is generally more common in complicated cases and when the young person is being held in pre-trial detention.

Conclusion

Combining the findings as presented in this section results in three variations of social work participation in the juvenile justice system (see Table 6.4). On the one hand, some countries show a strong, classical welfare orientation. A close relation exists between social services and the youth court and these services are from an early moment in the juvenile justice process involved with the young person by implementing preventive measures. Moreover, social workers play an active role at the hearing and advise the judge on the best appropriate sanction or measure.

On the other hand, in some countries the social services are not involved in the justice process at an early stage. Moreover, social services function completely independently from the court; these services are only involved at the pre-sentencing phase, advising the judge on the background of the juvenile and interventions can only start after the judge has determined the sentence.

The remaining four countries appear to adopt a mixed model. In these countries an independent position of the social services with respect to the youth court is combined with the possibility of implementing early interventions soon after the arrest of the young person. Social workers

come into play early in the juvenile justice procedure and they advise the judge on the most appropriate sanction or measure.

Again, it is expected that the involvement of social workers in the youth court has an influence on the participation of juvenile defendants. When social workers are involved by the judge at the hearing an atmosphere can arise in which the different parties are able to give their views to the judge, including the young person himself. Moreover, when social workers participate in court, the welfare needs of the young person are generally addressed instead of only focusing on the judicial side of the case. The participation of social workers in court might contribute to a better understanding on the part of the young person with regard to what is at stake for him and which decisions might be taken by the judge.

Table 6.4

Social work participation

<i>Early involvement & active role</i>	<i>Early involvement</i>	<i>Late involvement</i>
Belgium	Germany	England & Wales
France	Greece	Ireland
Italy	Netherlands	Scotland – youth court
Scotland – children’s hearing	Spain	
Switzerland		

6.6 Parents

The role of parents in the juvenile justice system is laid down in several international children’s rights standards, such as the Beijing Rules and the CRC. In chapter 3 it was concluded that parents can play an important role in providing emotional support to their child during the course of juvenile justice procedures (see chapter 3, section 3.4.3). Moreover, in chapter 4 it was concluded that the participation of juveniles is enhanced when their parents are heard in court as well, as part of effectively hearing juvenile defendants (chapter 4, section 4.2.5). In this section the role of parents in the juvenile justice process, according to law and policies, will be analysed. It is expected that the civil and criminal liability of parents

has an important influence on the role that parents play in court in practice; therefore, this subject will be given special attention.

6.6.1 Civil liability

In *the Netherlands*, when a minor is detained at a police station in order to be interrogated concerning an alleged offence, a family member or a member of his household should be warned by the police as soon as possible.⁴⁰ On the basis of the *Salduz* jurisprudence of the European Court of Human Rights (see section 6.3), parents can be present at the interrogation by the police if the young person so wishes (and he prefers the presence of his parents to the presence of a lawyer).⁴¹ When the young person is remanded in custody and has to appear before a pre-trial judge, his parents do not have the legal right to be present at the hearing (Hepping, 2012). In practice, however, parents are usually notified by the lawyer or prosecutor and their attendance is not denied (De Jonge, Hepping & Weijers, 2011). Since 2011, it is obligatory for parents to attend the youth court hearing of their child (art. 496 (1) Ccp). When parents are not present at the hearing, but the juvenile defendant and his lawyer are, the law prescribes that the case should be adjourned and that the parents should be notified of the new court date. Moreover, the judge can issue an arrest warrant for the parents when he considers their presence at the hearing to be necessary (art. 496 (a)(1)-(2) Sv).⁴² The case can only continue in the absence of parents when it is in the best interests of the child, when parents do not have a fixed home or address or when the case is suspended (art. 496 (a)(3) Sv).⁴³ The reason for laying down by law the presence of parents is to strengthen the position of victims who

⁴⁰ Policy instruction for the police, 1 January 2013, *Stb. 2012*, 458, para. 27 (1) [Ambtsinstructie voor de politie].

⁴¹ Policy instruction on the effective disposition of juvenile criminal cases, 1 April 2010, *Stcrt. 2010*, 4003 [Aanwijzing effectieve afdoening strafzaken jeugdigen].

⁴² An arrest warrant for parents can be issued in the case of crimes and misdemeanours, which implies that it can also be issued by the Dutch sub-district courts (*kantongerechten*) that deal with school attendance cases (art. 496 (a) (2) Sv).

⁴³ Formally the law prescribes that both parents should be present at the youth court hearing. However, this can be considered unrealistic, because permitting both parents to come to the youth court poses a disproportionate burden on their time and resources. Moreover, adjourning the case when one parent is present can be seen as not being in the best interests of the child. In practice, however, adjourning cases seems to happen very rarely. The more so since in a large majority of cases (75%) at least one parent attends the youth court hearing (Hepping, Weijers & Rap, 2011).

would like to claim civil damages. However, parents in the Netherlands only have civil liability for their children up until 14 years of age (art. 6:169 (1) CCiv). When the child is between 14 and 16 years of age parents can only be held liable in case they did not exercise sufficient supervision over their child and could have prevented the child from acting harmfully (art. 6:169 (2) CCiv). At the youth court hearing, parents are generally given the opportunity to say something to the judge. They can comment on everything they have heard during the hearing and according to the law they can raise anything that contributes to the defence of their child (art. 496 (2) Ccp).

In *Scotland*, when a child below the age of 16 is arrested by the police he has the right to have his parents informed about his arrest by the police and parents have the right to be in touch with their child (s. 15 (4) Criminal Procedure (Scotland) Act 1995). Parents are required to attend all court hearings when their child is charged with an offence before the adult court (ss 42 (2)). The parents of children who are involved in the children's hearings system are primarily regarded as educators of their child. Parents play an important role in the upbringing and support of their child who is potentially in danger. Because parents are deemed to play a crucial role in the decision-making at a children's hearing they have the right and duty to attend the hearing (ss. 74(2) and 78(1) Children's Hearings (Scotland) Act 2011). If a parent does not attend the hearing, but he has been notified of the date of the hearing and has no good reason to be absent, he can be prosecuted and fined by the court (s. 74 (4)). This happens very rarely, however. At a hearing panel members have the duty to encourage the participation of parents in the decision-making process (Comben et al., 2003). The parents of 16 and 17-year-old defendants do not have any role in the court proceedings, because these young people are considered adults by law (see chapter 5, section 5.2.2). As a consequence, parents do not have any role when their child is arrested and in the subsequent procedures in court. As is the case in England and Wales (see section 6.6.2), the parents of children below the age of 16 can be subjected to a *parenting order* by the court (ss. 13 and 103 Antisocial Behaviour etc. (Scotland) Act 2004).⁴⁴ The order can be imposed when a

⁴⁴ A parenting order can be made for the duration of one year, in which parents have to comply with certain requirements. One of which is attending counselling or guidance

child has engaged in antisocial or criminal behaviour and the order may prevent the child from engaging in further such behaviour. The reporter to the children's hearing can also make an application for a parenting order when this may improve the welfare of the child (s. 102). When the order is breached, parents are guilty of an offence and they can be prosecuted in court (s. 107).

In *Switzerland* parents can be held civilly liable when the prosecutor has enough evidence that parents have not been monitoring the behaviour of their child sufficiently (art. 333 CCiv).⁴⁵ According to the Swiss juvenile criminal procedural act, parents are deemed to have the explicit duty to cooperate in the juvenile justice process (art. 12 (1) Cjcp). Parents can be warned by the competent authority (i.e. the judge or prosecutor), they can be reported to the civil child protection authority or they can be subjected to a fine (of a maximum of 1000 Swiss Francs) when they do not cooperate (art. 12 (2) Cjcp). Parents can bring their own lawyer and appeal independently against the decision of the judge (irrespective of the opinion of the child concerning an appeal) (Cottier, 2006b). However, research in the youth court of Basel shows that parents only rarely take their own lawyer to court. In half of the cases in which a lawyer is involved, the lawyer represents the juvenile in 92% of these cases and in the remaining cases both the child and parent (Cottier, 2006a).

German parents have the same rights as their child with regard to being present at the court hearing and being heard, to ask questions, to file a petition or appeal and to be present at the investigations (art. 67 (1) Jcc). Moreover, parents should be sent the same notifications about the process as the young person (art. 67 (2) Jcc). Parents are summoned to appear in court for the trial (art. 50 (2) Jcc). These procedures are only in place when the young person is below the age of 18; the parents of young adults do not have these rights (art. 109 Jcc). Parents can be held civilly liable when they have not been monitoring the behaviour of their child sufficiently (art. 832 (1) CCiv).

In *Italy* and *Spain*, parents are fully civilly liable for children who still live with them. They are not liable when they could not have prevented the behaviour of their child that caused the damage (art. 2048

sessions for the duration of three months (s. 103 (1) Antisocial Behaviour etc. (Scotland) Act 2004).

⁴⁵ Parents are also jointly liable for the costs of the juvenile justice process enforced against their child (art. 44 (3) Cjcp).

CCiv; art. 1903 CCiv). However, case law shows that it is rather difficult for parents to prove that they have exercised enough control over their child (Igalada & Feliu, 2004; Venchiarutti, 2004). In *Spain*, the liability of parents is explicitly mentioned as well with regard to the damage brought about by criminal offences (art. 61 (3) Jcc). In *Italy*, parents are obliged to be notified of the hearings (art. 7 Cjcp) and of the arrest or detention of their child (art. 18 (1)/18bis (2) Cjcp). Parents should be able to provide their child with emotional and psychological assistance at every phase of the process (art. 12 (1) Cjcp). In *Spain*, it is also provided by law that parents should be able to assist their child in every phase of the procedure (art. 22 (1)(e) Jcc).

6.6.2 Civil liability and criminal responsibility

In some countries incorporated in this study parents can also be held criminally liable for the behaviour of their children, alongside their civil liability. In *Belgium* and *France*, parents are civilly liable for the damage caused by their child and they have to prove that they could not prevent the damage from occurring (art. 1384 CCiv; art. 1384 CCiv). In *Belgium*, the question of liability is determined by the youth court, during a formal hearing concerning the culpability of the young person (art. 61 Jpc). Parents can bring their own lawyer or the insurance company which insures the family can send a lawyer to the hearing. In both *Belgium* and *France* parents are summoned to appear in court when their child is charged with an offence and has to appear in court (art. 46; 54 Jpc; art. 10 Jci). Parents can be fined when they or their child does not appear at the hearing (art. 51 (2) Jpc), but the judge can also decide to adjourn (Jpc; art. 10-1 Jci) or to continue with the case (art. 48 (bis)(2)). Moreover, in *Belgium* both the judge and the prosecutor can impose *parental training* (*ouderstage*) on parents (art. 29 (bis); art. 45 (bis) Jpc).⁴⁶ This means that parents who show a lack of interest in the education of their child have to follow a course as well as individual counselling. When parents do not comply with the order, they can be fined or imprisoned (art. 85).⁴⁷ In

⁴⁶ In *France*, parental training can also be imposed, instead of a fine when parents do not appear in court (art. 10-1 Jci)

⁴⁷ Parental training was introduced in 2006, but in practice it was rarely imposed by youth court judges or prosecutors and in 2009 the funding of the programmes was withdrawn (Danckaerts, n.d.).

France, a comparable development has been taking place. Since 2007, the mayor has been in a position to impose educational measures on the parents of *mineurs en difficultés* (Secrétariat général du Comité Interministériel de la Délinquance, 2011). When parents do not comply with the order, civil child protection measures can be imposed in court (Bailleau, 2009).

In *Greece*, parents can be sanctioned when a child who has been placed under their supervision (by means of an educational measure imposed by the youth court) reoffends (art. 360 Cc). At the youth court hearing, parents can only be heard as witnesses. Moreover, when parents are heard by the judge they cannot refuse to testify against their child and they have to provide the judge with all the relevant information (art. 222 (3) Ccp).

The criminal responsibility, alongside civil liability, of parents is more common in the Anglo-Saxon countries. In *England and Wales* an ‘appropriate adult’ (see note 19) must be informed as soon as possible after the arrest of the young person (s. 57 (3) PACE) and is asked to come to the police station (s. 3.15 PACE Code C). An appropriate adult should be present during the police interrogation (s. 11.15 PACE Code C). The adult may advise his child, ensure that the interview is carried out in a fair manner and facilitate communication between the police officer and the young person (s. 11.17 PACE Code C). Parents must attend all court proceedings and the presence of at least one parent at the youth court hearing is obligatory when their child is under 16 years of age (s. 34A (1)(b) Children and Young Persons Act 1933).⁴⁸ With regard to parental responsibility for the offending behaviour of their children, a number of measures can be referred to. When a child cannot afford to pay a fine, the parents are liable. Moreover, parents must pay a *compensation order* imposed on their child who is below the age of 16 (s. 137 (1) Powers of the Criminal Court (Sentencing) Act 2000).⁴⁹ Specific *parental compensation orders* were introduced in 2005 when a child below the age of 10 has caused damage by displaying antisocial behaviour (s. 144 Serious Organised Crime and Police Act 2005). The court can also *bind*

⁴⁸ As is the case in other countries, a summons or warrant can be issued when parents do not appear in court (Centre for Social Justice, 2012).

⁴⁹ When the young person is 16 or 17 years old the court has the discretionary power to make the order against the parents (s. 137 (3) Powers of the Criminal Court (Sentencing) Act 2000).

over the parent when a child under 16 years of age has committed an offence (s. 150 Powers of the Criminal Court (Sentencing) Act 2000). Parents can be ‘bound over to take proper care and exercise proper control over the child if the court believes it is desirable in the interests of preventing further offending’ (Hollingsworth, 2007, p. 193). When the child reoffends or breaches the order, this results in a fine for the parent (s. 150 (2)(b)). Furthermore, the court can also impose a *parenting order* for up to 12 months (s. 8 Crime and Disorder Act 1998). The court must make this order when a child under 16 is convicted of an offence (except for first offenders) (s. 9 (1)) or when an ASBO has been issued (s. 85 (8) Antisocial behaviour Act 2003). When parents do not comply with the parenting order, which usually consists of a three-month parenting course (Hollingsworth, 2007), they are criminally liable and can be fined (s. 9 (7) Crime and Disorder Act 1998). According to Hollingsworth (2007) parents are not held responsible for the offence their child has committed, but for the fact that they failed to prevent their child from committing an offence. Moreover, it is argued that parents are punished for bad parenting and their failure to prevent their child from offending.

In *Ireland*, parents must also be notified of the arrest of their child (s. 58 (1) Children Act 2001). The child cannot be questioned by the police in the absence of a parent (s. 61 (1)). Moreover, parents are obliged to be present at the court hearing when their child has to appear as a defendant (s. 91 (1)(a)). When parents are not present the judge can adjourn the case and order an arrest warrant to ensure that the parents will be present at the next scheduled hearing (s. 91 (1)). The parent who is required to attend the hearing can be examined by the judge in respect of any relevant matter (s. 91 (4)).

Conclusion

From the above-described practices it can be concluded that parents are regarded differently among the 11 countries concerning liability for the damage caused by a child. In *Germany, Italy, the Netherlands, Scotland, Spain* and *Switzerland* parents can only be held liable if they have not exercised enough control over their child, which has made it possible for the child to cause the damage (see Table 6.5). Moreover, in several other countries parents can be held criminally responsible for the acts of the child. Parents can be fined or subjected to a parenting course.

In some countries, parents are obliged to appear at a court hearing. However, judges mostly have a discretionary power to continue the hearing to give the parents another opportunity to appear. The role of parents at a youth court hearing and the manner in which they are engaged in the procedures by the judge might differ as a result of their civil or criminal responsibility. The extent to and in manner in which parents are heard and spoken to by the judge differs as a result of parents' legal responsibilities. It is expected that the presence of parents and the role that they are given in the youth court have an influence on the participation of juveniles in court (see also chapter 4, section 4.2.5).

Table 6.5

Parents' civil liability and criminal responsibility

<i>Civil liability – insufficient control</i>	<i>Civil liability & criminal responsibility</i>
Germany	Belgium
Italy	England & Wales
Netherlands	France
Scotland	Greece
Spain	Ireland
Switzerland	

6.7 Conclusion

In this chapter the roles of the different actors involved in the juvenile justice system are discussed. From this discussion it becomes apparent that between individual countries numerous differences exist, when looking at the juvenile justice systems in detail. Therefore, it is difficult to draw generalisations from the above-described practices. However, some concluding remarks can be made.

With regard to the discretionary powers of the police it can be noted that only in *England and Wales*, *Ireland* and *the Netherlands* do the police officially have the power to deal with juvenile delinquency cases. Except for *Ireland* and *Italy*, in every country included in this study diversion on the level of the prosecutor is possible. In Ireland, no separate prosecution service exists and in Italy only the judge has the power to

dispose of cases. However, in some cases, for example in *France* and *Germany*, the judge has to give his permission for a conditional dismissal by the prosecutor.

In every country involved in this study a defence lawyer participates in the juvenile justice process. The presence of a lawyer is not guaranteed, though, in every phase of the process and in some countries not even at the trial phase. In *Germany*, *Greece*, *Switzerland* and the *Scottish* children's hearings system a lawyer is not always provided free of charge to represent the young person at the hearing. In these countries, only in more serious cases or when pre-trial detention is imposed is a lawyer guaranteed for the young person. In the other countries a lawyer is present in every phase of the process.

The role of the youth court judge is analysed according to the extent to which the judge plays an active role in the proceedings. In several countries on the European continent – *Belgium*, *France*, *Germany*, *Italy* and *Switzerland* – the youth court judge plays an active role throughout every phase of the process. This means that a specialised youth court judge hears the young person in the pre-trial phase and at the trial and he is in charge of the execution of the sentence. In some of these countries, it is even the same judge who performs all of these functions in the same case and young people, as a rule, are dealt with by the same judge. In the British Isles – *England and Wales*, *Ireland* and *Scotland* (the youth court) – on the other hand, the judge has a rather passive role in the process. Different judges hear the young person in the different phases of the process and, according to the adversarial legal tradition, the judge functions as a referee during the trial.

Next to the legal professionals, social workers play an important role in the juvenile justice system. The role of social workers depends on the organisation of the juvenile justice system; for example, whether the social services are directly attached to the youth court or not. Moreover, the legal tradition also influences the role of social workers. In the inquisitorial legal tradition social workers are involved with the juvenile defendant from an early moment in the process and they are given a more active role in the youth court. In the adversarial tradition, social workers come into play at a much later phase, when the guilt of the juvenile defendant has been established. Furthermore, their role in court is usually more limited.

Finally, the role that parents play in the process is explored. In every country parents are civilly liable for the damage caused by their child to a certain extent. Moreover, in *Belgium, England and Wales, France, Greece and Ireland* parents can be held criminally responsible for the delinquent behaviour of their child. In most countries parents are deemed to be present at the hearing of their child and in some countries they can even be sanctioned for non-attendance.

Part III

Effective participation in practice

Chapter 7

Hearing the views of juvenile defendants

7.1 Introduction

Children's hearing Glasgow, Scotland

A 15-year-old girl appears before the children's panel in Glasgow, because she was involved in a fight in the street, she resisted arrest and insulted a police officer. She has to come before the panel because she has been remitted back by the Glasgow Sheriff Court. Because she is already subject to a supervision order the sheriff decided to send her back to the children's panel to decide whether compulsory measures of care are necessary. The girl is accompanied by her father and the social worker who supervises her.

The chair of the panel starts the hearing by asking the girl to state her date of birth and her current address. The chair starts to ask her about the offence, whether she thought it was a serious offence or not and if she has committed any new offences. He asks her if she still associates with the same people with whom she started the fight. The girl answers that she has been doing well since the time she committed this offence and that she no longer sees those people. After that the chair asks her about her school: what sort of education she receives, whether it is going well at school and whether she likes going to school. The social worker adds that the girl is very bright and that she is now working hard. The chair also asks the girl about her involvement with alcohol and drugs. The girl admits that in the summertime she drinks some alcohol, but in general it is not a problem. Subsequently, the chair switches his attention to the social worker. He asks her what her involvement will be in the coming months. He asks the social worker what her recommendation would be and she explains that she would like to have the supervision order continued for another year. The chair asks the girl if she has a boyfriend and whether he is a nice boy. He also asks the father what he thinks of her boyfriend. Then the chair decides to wrap up this part of the hearing and asks the panel members to explain their decision.

The first panel member argues that he would like to have the supervision order continued. The other panel member and the chair agree with this decision and the chair states that a supervision requirement will be ordered for a year. He explains that a review of the order can be requested within three months. He concludes by saying: “Once you are sixteen the rules of the game change, so keep out of trouble”. After half an hour the hearing is closed and the girl, her father and the social worker leave the room.

The effective participation of juvenile defendants in the juvenile justice system – and more specifically in the youth court and other competent administrative bodies dealing with juvenile criminal cases – poses a major challenge for youth court professionals. In this chapter the results of this study will be presented on the basis of the first set of requirements for the effective participation in the juvenile justice system (i.e. hearing the views of the juvenile defendant). For each requirement an assessment will be made of the extent to which the countries involved in this study meet the ends of the requirement (sections 7.2.1 to 7.2.5). Subsequently, the countries are categorised in a table, according to the extent to which they meet the particular requirement in practice.

Throughout this chapter, the *Scottish children’s hearings system* will be highlighted and brought into prominence. It will be shown that the children’s hearings system meets the requirements for the effective participation with regard to hearing juvenile defendants in many aspects and it can serve as an example of best practice in Europe.

7.2 Requirements for hearing the views of juvenile defendants

In chapter 4 (section 4.2) the notion of hearing juvenile defendants in the youth court has been further crystallised. In total, five requirements for effectively hearing juveniles in the youth court have been elaborated. These requirements are concerned with 1) the setting of the youth court; 2) using certain conversational techniques that are geared towards adolescents; 3) giving the juvenile defendant the chance to give his own views on the case; 4) showing genuine interest in the story of the young person and 5) involving the parents of the young person in the

proceedings. These five requirements for the effective participation serve as a guideline in presenting the results of this study.

In order to do justice to the variety of practices between and within the countries included in this study the interpretation of the requirements will be described per country. Moreover, a distinction will be made between the types of youth court settings in which hearings have been studied. First, it must be made clear that different types of hearings have been observed. Youth court hearings range from the first and subsequent pre-trial (detention) hearings, hearings in which the case is settled before one judge in chambers or in court, trials before one judge or a panel of judges (a full court), sentencing and sentence review hearings. However, of specific importance for this study is the setting in which the hearing before the youth court judge takes place. Therefore, a broad categorisation is made between hearings in chambers and hearings taking place in court. This categorisation is made because in some countries different types of hearings are dealt with in chambers. For example in *France* and *Germany* minor cases are handled by the judge in chambers, whereas in *the Netherlands* only pre-trial detention hearings are held in chambers. Moreover, in the *Anglo-Saxon countries* every type of hearing takes place in court. Accordingly, a distinction is not made between (judicial) types of hearings, but between types of settings in which the hearings take place.

7.2.1 The setting of the youth court

In chapter 4 (section 4.2.1) it has been explained that many juveniles appearing in court experience feelings of stress and uncertainty. On the one hand, it has been argued that a youth court setting should have a serious and stern atmosphere, because the young person is in court concerning a serious issue (i.e. he has allegedly committed an offence). On the other hand, the youth court proceedings should be accessible (in terms of child-friendly procedures) to young people in order to facilitate their effective participation. In this section light will be cast on the variety of court settings and their atmosphere in the countries involved in this study.

Hearings in chambers

First, the typical setting of a *Scottish* children's hearing will be sketched. A children's hearing takes place before a children's panel, which consists of lay members of the community. The hearings are conducted at the office of the *Scottish's Children's Reporter Administration* and not in a court building. The hearings take place in a room, resembling an office space, with a large oval-shaped table standing in the middle of the room. The setting in which the children's hearing takes place is a rather informal one. On one side of the table the three panel members are seated next to each other, with the chair occupying the position in the middle. In front of the panel members the child and his parent(s) and other relevant persons (such as a social worker, a lawyer,¹ a safeguarder, or another representative of the child) have a seat. On the far side of the table, the reporter has a seat with a small table next to him on which a computer rests. The room is generally rather small, scarcely decorated and the windows have the blinds drawn. Because the hearings are not open to the public (s. 78 (2) Children's Hearings (Scotland) Act 2011), no space has to be reserved for members of the public. Moreover, the chairman has the duty to keep the number of people present at the hearing to a minimum (s. 78 (4) Children's Hearings (Scotland) Act 2011). The informality of the atmosphere is emphasised by the fact that the lay panel members wear their own clothes at the hearing. Moreover, they come from the same community as the child and his family and they thus know the neighbourhood and the community where the family lives. The panel members speak in laymen's terms and all the participants are seated around the same round table. The relatively small, informal and closed setting of a children's hearing contributes to the level of participation of children and parents, as will be shown in the following sections.

The setting in which the children's hearing in Scotland takes place resembles the Swiss practice. In the German-speaking part of *Switzerland* the large majority of cases are handled by the prosecutor (*Jugendanwalt*). The meeting with the prosecutor takes place at the office of the *Jugendanwaltschaft*, which is usually located in a separate building from the general prosecution service (*Staatsanwaltschaft*). The hearing has a distinct informal character. The prosecutor does not wear a gown. In

¹ No lawyers were observed at the hearings, in contrast with social workers who were present at every hearing.

the office of the prosecutor the young person is seated at a small table at the bureau of the prosecutor or they are sitting at the same rectangular or round table, as a result of which they are seated within a close distance of each other. Parents are either seated behind the young person or next to the young person at the same table. Remarkable is the fact that, when a lawyer is present,² he does not sit next to the juvenile defendant, but at another table behind or next to the young person.

In *France* it is in many cases common practice to conduct hearings in the office of the youth court judge (*en chambre*). The youth court, however, is often located in a general court building. The judge hears in principle every young person in chambers (except when the young person is taken into pre-trial detention). Mouhanna and Bastard (2011) call the interaction between the judge and young people and their families the core of the work of the judge. In chambers the atmosphere can be characterised as informal. No gown is worn by the judge and in principle the prosecutor is not present. A lawyer for the young person and a clerk are always present.

In *Germany* cases can be handled by the judge in chambers (*Zimmer Termin / im Büro*) as well as when they are of a less serious nature. However, it is not in every court common practice to do so. In Munich, the hearing in chambers takes place in the personal office of the judge, within a general court building. Hearings in chambers have an informal character, because of the intimate setting in the office of the judge. In chambers no clerk is present and in the observed cases the young person was not accompanied by a lawyer. The judge proposes to the young person that the case can be settled when the young person admits the offence, so no formal trial has to be held. In return, the young person receives a less severe sentence than would have probably been the case in court.

In *Belgium*, every preliminary hearing is held in chambers (*het kabinet*). This means that juveniles and their parents appear before the judge in his personal office in the court building. The youth courts are generally located within a separate wing of (the civil division of) the district court or in a separate building (for example, in Bruges). As is the case in France and Germany, it is clear that the office is the judge's

² A lawyer was present for 5 of the 22 juveniles (23%) appearing in the prosecutor's office.

personal workspace, because personal items, such as framed photographs of family members and work-related dossiers, documents and books are visible in the office.³ At the hearings in chambers the judge does not wear a gown and the clerk and the prosecutor are not present,⁴ in contrast to the social worker and the parents who are usually present. The young person, his parent(s) and the lawyer (who is always present) and social worker are seated at the desk of the judge. Sitting in front of the judge, at his desk, makes the encounter with the judge in France, Germany and Belgium a little more formal than is the case with the Scottish children's hearing, where everyone is seated at the same round table.

In *the Netherlands* hearings in chambers are held when a young person is detained after his arrest by the police. The first pre-trial detention hearing (*de voorgeleiding*) is held in a room in the general court building resembling an office. The judge and young person are seated at the same large table or the young person is seated at a table in front of the bureau of the judge. The judge is accompanied by a clerk and the young person by his lawyer and parents. A prosecutor is generally not present.⁵ The juvenile defendant is seated rather close to the judge. Moreover, the judge and clerk do not wear a gown, which gives the setting a less formal character. In contrast with the French, German and Belgian youth court chambers, in the Netherlands generally no personal items of the judge can be found, except for a framed poster or reproduction on the wall. Therefore, the room has a more sober and formal character than is the case in Belgium.

Youth court hearings

Besides the hearings in chambers, in every country involved in this study youth court hearings in a general courtroom have been observed. In the French-speaking part of *Switzerland* hearings of the *tribunal des mineurs* take place in a separate youth court building in a small courtroom. The

³ According to Françoise (2011) this chaotic impression can give the juvenile the idea that he is just a number, one of the numerous dossiers that are littered on the desk. Moreover, it gives the impression that the judge has a heavy workload and that cases have to be dealt with quickly; however, it can also be seen as a sign of the judge's expertise.

⁴ Except when it concerns a placement in the federal youth detention centre 'De Grubbe' in Everberg.

⁵ However, during subsequent hearings concerning a prolongation of the defendant's pre-trial detention (*raadkamerzittingen*) the prosecutor is present, next to three judges and the hearing is held in a general courtroom.

judge does not wear a gown during the hearing. In the small courtroom the distance between the judge and the young person is larger, compared to the prosecutor's office in the German-speaking part of the country. The young person sits right in front of the judge, which emphasises his position as the main actor in the process. His parents are seated behind him and the lawyer beside him.⁶ In both parts of Switzerland more serious cases are dealt with by a judge and two assessors and these hearings take place in a more formal court setting. The hearing takes place in a general court. The courtroom is larger, with the judge sitting on a raised bench, but still no gowns are worn by the professionals.

The hearings of the *tribunal pour enfants* in France are held in classical courtrooms and the professionals wear gowns, which makes the atmosphere more formal compared to the hearings in chambers. The courtroom is also rather large, with public benches at the rear of the room. The juvenile defendant is seated in front of the judge, who sits behind an elevated bureau. The young person has to stand in front of the bench when the judge asks him questions and when the judgment is pronounced.

When formal court decisions have to be made in Belgium, such as the continuation of a supervision measure, the hearing takes place in a courtroom of the *jeugdrechtbank*.⁷ The courtroom is generally rather small, compared to the courtrooms in France, but has a formal set-up. In some courts the judge, prosecutor and clerk are seated at the same height as the young person and in other courts the professionals are seated at an elevated bench. During the court hearing the professionals wear gowns, contrary to the hearings in chambers. Usually, the case dossiers that are handled during the court session lie in front of the judge. Juveniles and parents are seated in front of the judge and their lawyer(s) is/are alongside or behind them. The atmosphere of the court hearing is less informal and less intimate compared to the hearings in chambers. The hearings in court are open to the public (art. 61bis Jpc), so in some courts the doors remain open during the hearing. In other courts the doors are closed, but lawyers

⁶ In this study only 6 of the 66 juveniles (9%) appearing before a single judge youth court were accompanied by a lawyer. It has to be noted, however, that at the time of data collection the 2011 federal juvenile criminal procedural code (Jugendstrafprozessordnung) was not yet in force. As a consequence, the cantons were responsible for the appointment of lawyers and criteria were less strict compared to today.

⁷ In the youth court of Mechelen it was observed that youth court hearings were also held in the chambers of the youth court judge and not necessarily in a formal courtroom.

are free to walk in and out and to wait in the public area until their case is called.

Besides the first pre-trial detention hearing, the hearings of the youth court judge (*kinderrechter*) in *the Netherlands* are generally held in classical courtrooms in a general court building. These courtrooms range from large courtrooms to smaller-sized courtrooms. In most courtrooms the youth court judge, the public prosecutor and the clerk are seated on a slightly elevated platform, which underlines the unequal relation between the judge and the juvenile defendant. The young person is seated right in front of the judge and his parents are seated next to him at a different table or right behind their child. *German* hearings of the *Jugendgericht* take place in a medium-sized classical courtroom. The young person is either seated right in front of the judge or in front of the prosecutor. In the latter case the prosecutor and the juvenile defendant sit opposite each other and the judge sits at the head of the rectangle they form together. The *Jugendgerichtshilfe* and other experts are usually seated next to the prosecutor and the lawyer sits next to or behind the young person. Parents take their place in the public gallery, usually facing the judge, but further away from the judge compared to the young person. The atmosphere in the courtroom can be characterised as rather informal (but of course more formal than in chambers). For one thing this has to do with the fact that in almost three quarters of the observed cases a lawyer was not present and in cases involving a summary trial (*vereinfachtes Jugendstrafverfahren*) the prosecutor was not present.⁸ The young person remains seated when he speaks to the judge. Only when the judgment is pronounced the actors at the hearing have to stand up.

In *Italy* the courtroom of the *tribunale per i minorenni* also has classical characteristics, with a raised bench and the prosecutor, defence lawyer and juvenile defendant sitting in front of the judge. The youth court is however located in a separate building from the adult criminal court. Many cases are settled in the preliminary phase, but in *Italy* these hearings take place in a courtroom and not in chambers as is the case in, for example, *Belgium* and *France*. During the trial every participant usually wears a gown, but in the preliminary phase the judge, the lay judges, the prosecutor, the lawyer and the clerk wear their own clothes. In

⁸ 24 out of 61 juveniles (39%) were accompanied by a lawyer at the court hearing in *Germany*.

some courts, when the judge hears the young person the minor has to sit on a chair more closely situated to the judge (in the space between the judge and the prosecutor and his lawyer).

In the Greek youth court (*eidiko dikastirio anilikon*), the hearings take place in a classical courtroom as well, with a raised bench where the judge and prosecutor are seated. Beforehand the bench chairs are reserved for the juvenile defendant(s) and two small tables for, respectively, the youth court social worker and the lawyer. It must be noted, however, that juveniles in Greece are hardly ever accompanied by a lawyer when they appear before a single youth court judge.⁹ In the rear part of the room the public seating area is located, reserved for the juveniles' parents, victims and summoned witnesses.

The above-described settings in which youth court hearings are held contrast with the court settings in the Anglo-Saxon countries. The youth courts in *England and Wales* and *Scotland* (for young people aged 16 and over), and the *children court* in *Ireland* are generally larger than the courtrooms described above. Moreover, in the adversarial court tradition the atmosphere can be considered as more formal. For example, judges generally wear gowns and wigs.¹⁰ Courtrooms in these countries are generally divided into two sections. The professionals working in and for the court occupy the front part of the room. At the rear the public seating area is located, where defendants have to wait until their case is called and where family members can have a seat.¹¹ Between these two sections a defendant's dock is located in which the young person has to sit when his case is heard.¹² The judge sits on a raised bench, which makes it

⁹ Only in 16% of the single judge youth court cases was a lawyer present (15 out of 91 juveniles) and in 56% of the cases in a full court (9 out of 16 juveniles).

¹⁰ Exceptions are observed in England and Wales, where in some youth courts only the usher wears a gown. The formal attire of the usher can, however, cause confusion among juveniles and parents regarding his role in the youth court, whereas his task is to be the first point of contact for the defendants and their parents (see also HMI Probation, HMI Courts Administration, HM Crown Prosecution Service Inspectorate, 2011; Plotnikoff & Woolfson, 2002).

¹¹ In England and Wales courtrooms usually have no public benches and juvenile defendants and their parents have to wait outside the courtroom until their case is called, as opposed to Ireland and Scotland.

¹² The Centre for Social Justice (2012) reports that in England and Wales it is common for juvenile defendants who are being detained to sit in a secure dock surrounded by a glass screen. The involvement of the defendants is inhibited by the screen, because they have difficulty in hearing what is being discussed in court and they are physically detached from the other participants.

possible for the judge to oversee the whole courtroom and to look straight at the defendant.¹³ The juvenile defendant has to stand up when he is spoken to by the English judge or magistrate. Some districts in *England and Wales* have separately housed youth courts. In other districts the youth court is located within the magistrates' court and has a separate entrance from the adult court (see also Arthur, 2010). In *Ireland* and *Scotland* youth court cases are usually handled in courtrooms that are used to deal with adult cases as well.¹⁴ In Ireland the children's court hearings mostly take place at a different time or on a different day from the adult court hearings. Mostly, there is no specially assigned place for the juvenile defendant to take a seat. As a consequence, defendants can sit anywhere in the courtroom, mostly near the door or in the middle or to the rear of the courtroom. As a result of the large courtrooms, the distance between the judge and the young person is large as well. This physical distance can even be more pronounced when prosecutor(s) and lawyers are seated in the space between the judge's bench and the defendant's dock. Moreover, the acoustics in most of the larger courtrooms is fairly poor, which makes communicating with the young person especially difficult (see also Kilkelly, 2008a; Piacentini & Walters, 2006).

On the European continent an example of a courtroom with more adversarial characteristics can be found in the *Spanish* youth court (*juzgado de menores*). The youth court is generally located within a general court building. The prosecutor and the lawyer are seated opposite each other, each on one side of the judge. The juvenile defendant faces the judge right in front of him and, for example, in the large courtroom in Madrid he has to speak through a microphone. In principle, Spanish youth court judges are obliged to wear a gown. However, judges have the possibility to decide not to and practices seem to differ between courts.

A problem that is observed in several youth courts in Europe is the fact that the *in camera* rule is often breached. In Appendix 4 an overview is given of the countries with regard to this principle, as it is prescribed by law. Only in *Greece* and in the *Scottish* children's hearings system are the hearings strictly closed to the public. In other countries

¹³ In England and Wales it is stated in the *Youth Court Bench Book* (Judicial Studies Board, 2010) that magistrates are encouraged to sit at the same level as the other participants in court. However, the present study shows that this is not always the case.

¹⁴ Except for the Dublin children court which sits in a different building from the district court and which has a specially designed courtroom (Kilkelly, 2005).

exceptions to this principle are possible, for example when the young person is tried in an adult court or when he requests a public hearing.¹⁵ In the *Belgian* and *Scottish* youth courts the hearings are always open to the public. Some further observations can be made with regard to this issue. Notably, in *Ireland* and *Scotland* lawyers and prosecutors frequently wander in and out of the courtroom and the entrance is not sufficiently monitored as a result of which members of the public or adult defendants can mistakenly walk into the courtroom during the course of proceedings. In *Ireland* it is observed that up to 10 members of the police service (who appear as a prosecutor in court) wait in the courtroom until their case is heard (Kilkelly, 2008a, 2005).¹⁶ In *Italy* it is observed as well that on average 10 people are present during a youth court hearing who are not directly involved in the case. These lawyers wait until their case is called and in the meantime they walk in and out of the courtroom, do some work, read the newspaper or even make phone calls. In *Spain* the in camera rule is adhered to slightly better. The usher guards the door during the hearings, but in between hearings many lawyers walk in and out of the courtroom to discuss a plea offer with the prosecutor. In the corridor outside the courtroom it can become crowded, which can be a nuisance for those inside the courtroom. To a lesser extent, this practice is also observed in *Belgium* and *France*.

Conclusion

A children's hearing in *Scotland* can be seen as a good example of a hearing in which children and parents can equally participate. As is shown by the results of this study – illustrated by the case presented at the start of this chapter – the informal atmosphere makes it easier for professionals to speak with the young person and his parents and vice versa the young person is less inclined to give his views. The children's hearing cannot,

¹⁵ In international standards it is laid down that the private life of minors should be respected at every stage of the juvenile justice process. See Beijing Rules 8.1 and 8.2; Recommendation No. R (87) 20, art. 8; Recommendation (2008) 11, art. 16; Council of Europe, Committee of Ministers, 17 November 2010, 1098th meeting, IV, A, art. 9 (see also chapter 2, section 2.5.3).

¹⁶ In *Ireland*, police officers prosecute their own cases (see chapter 6, section 6.2.1). As a consequence, different charges can be brought against the young person by different police officers, as a result of which it can become very crowded in the courtroom. In some courts *court presenters* represent the police officers, who only have to come to court to testify at the trial.

however, be characterised as stern. It can be concluded that youth court practices on the European continent, such as the youth court hearings in *Switzerland* and the *Belgian, French and German* hearings in chambers, that try to find a middle course between both minimising the social and physical distance between the participants and at the same time preserving a serious and stern atmosphere, seem to meet this first requirement for effective participation best.

7.2.2 Conversation techniques

In order to hear the views of a juvenile defendant effectively the judge should use certain conversation techniques that help the young person to express his views freely and he should be encouraged to do so (see chapter 4, section 4.2.2). Two techniques are considered to be of special importance when speaking with children and adolescents: 1) the judge should not talk too much himself, and 2) questions should preferably be short, direct and semi-open-ended.

In every country included in this study it is generally observed that youth court judges lack sufficient knowledge and skills to employ conversation techniques to hear juvenile defendants in the youth court. Judges either talk very sparsely with the young person or talk too much themselves and, as a consequence, no room is left for the views of the young person. As a result of the adversarial characteristics of the youth courts in the British Isles, improving the interview techniques of the judge is not considered of much importance in these countries. During a youth court trial the judge does not have to engage in any dialogue with the juvenile defendant, because he has the role of an independent listener that has to watch over the trial that is taking place before him. The few occasions when the judge talks to the young person are, for example, to inform the young person about certain matters or to ask for some factual information. However, no dialogue emerges concerning the facts of the case or the personal circumstances of the young person. Apart from the involvement of the judge during the hearing, other more practical reasons can be found for the non-specialisation of juvenile justice professionals. For example, in *Ireland*, outside of Dublin, judges and other professionals are not specialised because of the low number of juvenile cases that are dealt with by these children courts. In *Scotland*, professionals are not

specialised in communicating with adolescents because 16 year olds are dealt with in the adult criminal justice system.

In the inquisitorial tradition of the continental European youth courts the interview techniques of judges should be an important issue, because the judge personally hears the juvenile defendant. Moreover, judges are legally educated professionals and are therefore not trained in subjects such as child development and conversation techniques. However, from interviews with professionals it has become clear that hardly any courses or training sessions on interview techniques exist for judges, prosecutors and lawyers in the 11 countries in question. In some countries, for example in *Belgium, the Netherlands* and *Switzerland*, (refresher) courses are given on juvenile (criminal) law and the topic of communicating with adolescents is touched upon; however, judges, prosecutors and lawyers are not systematically trained in these skills. Therefore, the ability of professionals to effectively hear the young person depends on their personal background, their experience in the field of juvenile justice and an interest in this topic.

In this study the children's hearings system of *Scotland* stands out as an example of good practice with regard to hearing juveniles. This holds true for the use of conversation techniques used by professionals working in the system as well. Panel members are trained in conducting and chairing children's hearings before they start participating in these hearings and they have to attend refresher courses throughout their panel membership. Moreover, prospective panel members have to observe a minimum of three sessions of hearings as part of their training.¹⁷ Furthermore, in the guide manual for panel members one chapter is devoted to communicating with children and adults. In this chapter information and best practices are described with regard to speaking with families at a children's hearing.¹⁸ Moreover, Scotland has Children's Hearings Training Units in four universities, which are responsible for the training of panel members (Comben et al., 2003). This indicates that the lay panel members are trained, at least to some extent, in communicating

¹⁷ Additionally, the training consists of discussions, group work, lectures, readings, visits to institutions and children's hearings and meetings with people who work within the hearings system (Comben et al., 2003).

¹⁸ Topics that are inter alia covered in the manual are: non-verbal communication; communicating with young children, adolescents and adults; a checklist for child-friendly language; listening; and communicating with children with certain disabilities.

with children, adolescents and their parents. In the past the children's hearings system has been regarded critically concerning the extent to which children's voices are genuinely heard by the panel. However, a number of measures have been taken to improve the position of young people in the hearings system, such as the possibility of the appointment of a legal representative, the appointment of an independent safeguarder and the possibility to hear the child in the absence of, for example, his parents (see Griffiths & Kandel, 2000, 2009). In the context of the international comparison between juvenile justice systems and the position of juveniles within these systems, the children's hearings system can still be seen as an example of good practice, thereby acknowledging the shortcomings that the system might experience.

Conclusion

The lack of well-developed interview techniques is a matter of concern in all the countries involved in this study. Only in the *Scottish* children's hearings system is attention paid to the training and education of professionals in child development and age-appropriate ways of communicating with children and their parents to a considerable degree.

7.2.3 Hearing juvenile defendants' views

For juveniles to be heard effectively in the youth court it is of importance that they are in a position to give their own views on the matter concerning which they have to appear before the judge. In the following, the different settings in which hearings take place – in chambers and in the youth court – will be assessed on the basis of this third requirement for effective participation.

Hearings in chambers

Section 27 (3) (Children's Hearings (Scotland) Act 2011) states that in case of a children's hearing, in *Scotland*, the child must have the opportunity to indicate whether he would like to express his views with regard to the case. When the child is positive about expressing his views he should be given the opportunity to do so and his views have to be taken into consideration by the panel members. Moreover, it is stated that children from the age of 12 are mature enough to form and express their

views in a children's hearing (s. 27 (4) Children's Hearings (Scotland) Act 2011; rule 15 (5) Children's Hearings (Scotland) Rules 1996). The child can give his views in person, or the (legal) representative can give the views of the child to the panel members. The child can also choose to give his views in writing, on audio or videotape or through an interpreter or an earlier appointed safeguarder can report the views of the child (rule 15 (4) Children's Hearings (Scotland) Rules 1996). The lay members of the children's panel make a serious effort to make the child and his side of the story the centre of attention. During a children's hearing an intensive dialogue develops between the panel members and the young person, his parents and the social worker (see the case *Children's hearing Glasgow* at the start of this chapter). The conversation does not revolve around the offence and the circumstances in which the offence has been committed, but the question whether the child needs help and supervision is at the forefront of the discussion. Griffiths and Kandel (2000) note that the child finds himself in the situation of a witness, who has to talk about himself, rather than in the situation of a defendant. The panel members can ask the parents or the representative of the young person to leave the room for a short period, when they feel that the views of the child cannot properly be obtained in the presence of (other) adults (ss. 76 and 77 Children's Hearings (Scotland) Act 2011). The persons who are excluded from a part of the hearing should, however, be informed about the content of what has been discussed in their absence, so the views of the young person are not entirely confidential. Furthermore, children are assisted in forming their views by filling out a form that is sent to them before the hearing. This *All about me* form can be filled out and sent to the children's reporter administration electronically and will be added to the dossier or the child can take it with him to the hearing (SCRA, 2012).¹⁹

In the *Swiss* juvenile criminal procedural code it is stated that the authorities must enable juvenile defendants to actively engage in the juvenile justice process. Moreover, juveniles should be heard personally

¹⁹ Questions that can be filled out are inter alia: Do you know why you are coming to a Hearing, and/or would you like more information?; How have things been going for you lately – are you happy with how things are at home and school?; Is there something that is worrying you – would you like to tell us about it? Things might be going well for you, tell us what is good just now and why?; What would you like to happen in your future? Would you like things to change or stay the same? (SCRA, 2012).

in their case (art. 4 (2) Cjcp).²⁰ The views of the young person are the centre of attention. During the hearing the offence is often discussed extensively with the young person. A telling finding is the average duration of a hearing, which is 52 minutes. The Swiss hearings in chambers have the longest duration of the countries included in this study. By way of an illustration, in France and the Netherlands the average duration of the hearing in chambers in this study is 34 minutes, in Germany 17 minutes and in Belgium 14 minutes. At the end of the Swiss hearing the defendant has the right to read and sign the transcript of the hearing, which is typed by the prosecutor during the hearing. The personal circumstances of the young person receive a great deal of attention from the prosecutor as well. The subjects that are discussed depend on the personal situation of the young person and the type of offence that has been committed. In some cases the young person's school record receives more attention and in others his situation at home, or his friends and leisure time. Examples of questions that are asked regarding the situation at home are:

With whom do you live? Is it going well at home? At what time do you need to be at home at night? (Zurich)

Regarding the school record of the young person:

How are you doing at school? Who is your teacher? What are you going to do when this school year is finished? (Glarus)

Is it right that you have found a traineeship and that you will work there until the summer? Has the traineeship already started? How is it going with the traineeship? Do you have any problems with getting out of bed in the morning? Or with having to do work you do not like as much? (Zurich)

Regarding friends and leisure time:

What do you do in your spare time? (Zurich)

Who are your friends? Do your parents know your friends? (Basel)

²⁰ However, the authorities have the possibility to deal with certain cases in writing.

In the exceptional situation when a lawyer is present at the hearing, he is only called upon to speak briefly and he often does not have much to add (see also Weidkuhn, 2009). All in all, it can be concluded that the young person is clearly the central figure in the juvenile justice practice in the German-speaking part of Switzerland (see also Cottier, 2006a, 2006b).²¹

In *France* the hearings in chambers can be characterised as informal as well (see also section 7.2.1). The young person is seated literally at the judge's desk and a considerable amount of time is spent on discussing his personal circumstances. For one thing, this has to do with the fact that in chambers only educational measures are imposed. In order to do so, the judge needs extra information from the young person and the attention is more focused on the needs of the young person instead of on the offence.

The same holds true for the hearings in chambers in *Belgium*. At the pre-trial hearing in chambers decisions are taken by the judge concerning a preliminary supervision measure or placement in an institution. Before the judge reaches a decision he is obliged to hear the juvenile in person, who is at least 12 years of age (art. 52ter Jpc). The emphasis during these hearings is more directed towards the welfare of the young person: what kind of support is needed and how and where to implement the intervention. Therefore, the young person, his parents and social workers have a more prominent role. For example, talking about the future of the young person with regard to a residential placement or supervision order occurs frequently. However, when a young person is brought before the judge for the first time (within 24 hours) after his arrest, it is observed that the young person is lectured to by the judge. In that case the young person is not able to give his views, but can merely listen to what the judge has to say (see section 7.2.4; see also Christiaens & Goris, 2012).

²¹ The extensive focus on the views of the juvenile defendant is also manifested in the number of interrogations, appointments with court social workers and hearings before the youth court judge which are held during a youth court procedure (in case of detention and/or a placement in an institution). In the large majority of cases the young person is heard in more than three instances alone (in 90% of a sample of 50 cases) or in the presence of his parents (in 68% of the cases) (Cottier, 2006a). It must be noted, however, that detention and placement in care are the least ordered youth court interventions in Switzerland. They account for around 3% of all youth court sanctions and measures (Aebersold, 2011). This implies that most likely the cases studied by Cottier (2006a) are not the most common types of youth court cases.

In *Germany*, less serious cases can be dealt with by the judge in chambers. The young person has the opportunity to explain his side of the story. Moreover, the judge briefly explores whether the young person is experiencing certain difficulties in his life. In a case of possession of cannabis the young person's use of drugs is discussed:

Do you know why you are here?

[The young person says he knows]

When you do not want to make a statement, I will send the case to the prosecutor and he will try the case in court.

[The young person admits the charges]

There isn't much more to say about it, is there?

How about your habit?

[The young person explains about his drug use]

Do you think that you might need professional help? It is also possible to receive support on a voluntary basis, without pressure from the court.

[The judge further explains the options for support] (Munich)

When the judge detects no issues of concern, the young person is usually dismissed with a verbal warning and a rather light sentence, such as community service. Hearings in chambers can also revolve around the issue of a young person who does not comply with a measure or the judge explains a probation plan. The judge has a more prominent role in either explaining the conditions attached to the suspended sentence or to the admonition of the young person who does not cooperate in the execution of the sentence. Usually, the young person is not in the position to give his views, because he has already had the opportunity to do so at the formal court hearing.

In *the Netherlands*, the decision that has to be taken by the judge in chambers is rather different. The judge has to decide whether the grounds for taking the young person into pre-trial detention were valid and whether the pre-trial detention needs to be prolonged or can be conditionally suspended. As a consequence, the judge needs information concerning the current situation of the young person with regard to how things are at home, his school record, his leisure time, etc. In general, the judge has a (preliminary) social report, but because of the short timespan (72 hours) between the arrest and the hearing the report is not always as extensive as it could be. On the basis of the information, which the young

person and his parents provide at the hearing, the judge decides what type of conditions should be attached to the suspended pre-trial detention.

The results concerning hearing the views of juvenile defendants in chambers are summarised in Table 7.1. In every country it can be observed that at least some consideration is given to the views of juveniles and in some countries this is done to a larger extent (the category *extensive*).

Table 7.1

Hearing juveniles' views – chambers

<i>Extensive</i>	<i>Somewhat</i>	<i>Limited</i>
France	Belgium	
Scotland – children's hearing	Germany	
Switzerland	Netherlands	

Youth court hearings

Although the hearings in the German and the French-speaking part of *Switzerland* take place in distinctly different settings, the extent to which the views of the juvenile defendant are heard does not differ as much. In the more formal looking youth court the views of the young person are thoroughly reviewed by the judge. The absence of a prosecutor and a lawyer (in most cases) has as a consequence that more time is left and devoted to talking with the young person and his parents.

At the *French* youth court hearing a dialogue between the judge and the young person emerges as well during the hearing. During the more formal hearings in the youth court the judge(s), prosecutor and lawyers wear gowns and have fixed places, and certain rituals and rules are in place. However, the young person is given the opportunity to tell his side of what has happened resulting in his appearance in court. In this setting the judge spends much time reviewing the offence and the personal circumstances of the young person (see also Blatier, 1999; De Vries & Weijers, 2010). Moreover, when a social worker is present he is given the opportunity to give his views on the life of the young person as well.

The *Dutch youth court* practice is comparable to the procedures that are observed in the French youth court. Youth court judges offer the

juvenile defendant ample opportunity to give his views with regard to the offence with which he is charged and with regard to his personal circumstances. After the charges are read to the young person by the prosecutor, the judge starts a dialogue about the facts and circumstances of the offence. Later on the young person is generally invited to comment on the social work report that has been written and which details his personal background:

Yes, I know that it is also stated in the report, but I would like to hear it from you. (Utrecht)

Generally, the judge devotes more time to hearing a young person with regard to the offence. However, when the personal circumstances of the young person are troublesome more attention is directed towards the problems the juvenile experiences. Finally, the young person is always given the opportunity to say something to the judge at the end of the hearing, the so-called final say (art. 311 (4) Ccp). The possibility to have a final say during the hearing is, when this right is used at all, interpreted by juveniles very differently. Some use this opportunity to speak to the judge to emphasise their innocence for one last time, while others use this opportunity to show their regret to the judge.

In general, in the *German* youth court room is given to the juvenile defendant to give his own views regarding the offence, as is also the case in the Dutch youth court. However, when the young person confesses to having committed the offence it is generally less extensively discussed. When the young person denies his involvement, usually witnesses are heard to establish the truth in the case. The personal circumstances of the young person are mostly discussed, but not in every case in detail. Usually, the judge or the social worker reads the personal circumstances from the written report. When a social worker is present, he has the possibility to comment on the report. The young person is hardly involved in this discussion, however. The German youth court judge generally shows a serious interest in the story of the young person and asks additional questions with regard to the offence. In Germany, the juvenile defendant has the possibility to have a final say as well (art. 258 (2) Ccp). The average duration of the youth court hearing is the longest in the above-mentioned countries. The German youth court hearing, strikingly, takes on average 80 minutes. This might have something to do

with the fact that quite a number of witnesses are heard in certain cases. At the observed hearings in the other countries this was far less common. As a consequence, the average duration of hearings is shorter: in France 64 minutes, in Switzerland 57 minutes and in the Netherlands 40 minutes.

In *Belgium* a notable difference is observed between the preliminary hearings in chambers and the trial. During the hearings in court the emphasis is more on the juridical part of the case: whether the young person admits or denies the charges and in the latter case whether the charges can be proved, the demand of the prosecutor for a certain measure, the claims for damages by victims and the final judgment. By contrast, in court more legal discussions take place between the professionals. Usually, the judge asks the young person some brief questions about how he is doing during the court hearing, but the focus is more on juridical issues. Moreover, issues concerning the protection or support of the young person have already been discussed in chambers, so less time is needed to resolve the case.

The *Greek* youth court practice can be positioned somewhere in between the inquisitorial and adversarial legal tradition with regard to the procedures in court. Inquisitorial elements are the fact that the judge reads the dossier before the hearing and puts questions to the young person during the hearing. However, the young person is not invited at all to give his own views on what has happened. He is only deemed to answer the questions posed by the judge. An independent contribution by the young person to the hearing is not appreciated by the judge and is therefore not observed in the Greek youth court.²² The average duration of the observed hearings is strikingly short, only 5 minutes. In *Italy* the same type of practice is observed, juvenile defendants are only heard by the judge to a limited extent and sometimes only their lawyer speaks to the judge on their behalf. The duration of the hearings is, however, longer than is the case in Greece; on average 31 minutes.

In the adversarial legal tradition of the *Anglo-Saxon countries*, the practice of hearing juvenile defendants in the youth court is very distinct from the practices described above. In the adversarial tradition the debate between the prosecutor and the defence lawyer lies at the heart of the

²² Social workers in Greece assist juvenile defendants in participating at a hearing. They are always present at youth court hearings, in contrast with the presence of lawyers in court (see note 9). Social workers, therefore, play an important role in the Greek youth court.

hearing (see chapter 5, section 5.4.1). During a trial the views of the juvenile defendant hardly play a role. The defendant is only given the opportunity to speak when he is summoned as a witness in the case. As a consequence, the young person can only answer the questions posed by his lawyer and by the prosecutor in the cross-examination. Generally the young person is asked closed-ended questions, to which he can only respond to with a 'yes' or 'no' (see section 7.2.2). Moreover, in other parts of the proceedings the young person is only addressed by the judge when he requires information from him. But even then, this request for information is mainly directed towards the lawyer representing the young person. Virtually without exception, every juvenile defendant who tries to say something during the trial or other type of hearing is cut off by the judge (see also Kilkelly, 2005).

During a youth court trial in *England and Wales* the judge or magistrate rarely asks the young person a question. During a trial the public prosecutor and the defence lawyer take the floor on an alternate basis to present evidence to the magistrates. The case is reviewed in depth and the young person takes no part in the discussion. In other studies it is reported that juveniles frequently look bored during the trial that takes place in front of them (Plotnikoff & Woolfson, 2002). Only at the end of the hearing may the chair ask the young person a few questions about his education and his situation at home. Usually, the judge or magistrate inquires about the personal circumstances of the young person (e.g. school, work, leisure, etc.). However, this part of the hearing only takes a few minutes at the most. This is sufficient time to direct some attention towards the young person, but it is not enough time to enable the young person to tell his side of what has happened and why he has been arrested and charged. When the young person is sentenced (i.e. when he has been found guilty by means of a trial or he has pleaded guilty) a pre-sentencing report is in certain cases available to the magistrates, which provides them with background information concerning the life and circumstances of the young person and recommendations concerning the eventual sentence. This might be the reason that magistrates are not involved in hearing the juvenile defendant thoroughly on these issues.²³ Research in England (in

²³ A joint inspection carried out by among others Her Majesty's Inspectorate of Probation revealed, however, that 75% of the 115 pre-sentencing reports reviewed are of poor quality, i.e. they were long reports filled with irrelevant information and descriptions, poor spelling, grammar and language and very little analysis of the young person's situation and

London and the south of England) illustrates that young people see themselves as bystanders during a youth court hearing. Their sole contribution is to accept or reject a plea. As a consequence, feelings of frustration emerge because defendants cannot contribute or object to what others bring forward (Hazel et al., 2002). In another study it was found that young people thought that they were not permitted to speak in court or felt unable to do so when they wanted to say something (Plotnikoff & Woolfson, 2002).²⁴

In the *Scottish youth court* a minimal amount of time is devoted to the views of juvenile defendants as well (see also Piacentini & Walters, 2006). Only in the case of a *probation review hearing* is more time spent on talking to the young person, for example about the progression he is making while on probation. In contrast with the regular youth court hearings, the judge addresses the young person explicitly and he gives his opinion on the behaviour of the young person who has been given a probation order. The judge discusses those matters that are not going well and he praises the young person when he shows good behaviour and cooperates with the probation order:

This is a very good report, a very good start. You've got to continue to do what you are doing. (Hamilton)

The judge encourages the young person to keep on the right track and to continue his good behaviour. But even when these types of cases are dealt with, the young person is mostly spoken to instead of being enabled to give his own views and opinion.

The same holds true for the *Irish children court*. Although the Irish Children Act 2001 states that children charged with offences have 'a right to be heard and to participate in any proceedings of the court that can affect them' (s. 96), hardly any direct interaction between the juvenile defendant and the judge is observed in Ireland. The questions posed by the judge regarding the life of the young person are directed towards the

the best appropriate sentence (HMI Probation, HMI Courts Administration, HM Crown Prosecution Service Inspectorate, 2011).

²⁴ In the study by Plotnikoff and Woolfson (2002, p. 27) professionals described the engagement of young people in court as follows: 'less than observers at their own trials'; 'almost completely detached from the court process', 'feel that court is something done to them and over which they have no control'.

lawyer and the young person is not engaged in the discussions that take place in court. The communication between the judge and the young person is limited to greeting the young person when the hearing commences and when the hearing is concluded. In highly exceptional cases the judge does try to engage the young person by addressing him by his own name and/or by asking him a few questions about his personal circumstances. These results can be further substantiated by the study which Kilkelly (2008a) conducted. In this study it was found that in 55% of the observed cases no communication whatsoever took place between the judge and the juvenile defendant. The young person was frequently referred to by the judge by means of a third-person narrative mode (i.e. as 'he' or 'she'). In general, the dialogue taking place during the hearing was almost exclusively between the judge and the lawyer representing the young person. When the young person was addressed by the judge it mostly involved a basic greeting at the start and/or the end of the hearing or a question to obtain particular information from the young person. In the small number of cases where juveniles were addressed by name, were asked a question about their personal situation or were wished good luck at the end of the hearing, it was observed that 'these young people were often visibly surprised at being spoken to, but appeared overwhelmingly pleased at being spoken to by name' (Kilkelly, 2008a, p. 51).

In *Spain* youth court hearings have an explicit adversarial character as well. When the young person denies the accusations that are made against him, he can be summoned as a witness and he will only be asked juridical and technical questions concerning the alleged offence by the prosecutor and his lawyer. When the young person accepts the plea offer and pleads guilty no trial will take place. In that case the circumstances of the case are not reviewed in depth at all and the hearing only takes a couple of minutes. The only instance in which more interaction between the judge and the young person is observed is when a measure or sanction is reviewed halfway through the duration of the measure (comparable to the Scottish probation review hearing). But even then the judge occupies a dominant position, lecturing the young person frequently, and as a consequence the young person's own views are not truly considered:

What are you doing on the streets at night, girls of 15 should be in bed at that time. (Madrid)

Your mother is concerned about you. You should show her more respect and you should be happy to have such nice parents. (Madrid)

In Table 7.2 the countries are categorised according to the extent to which the views of the juvenile defendant are heard in the youth court. The countries are divided into three categories; the views of juveniles are heard *extensively*, *somewhat* or to a *limited* extent.

Table 7.2

Hearing juveniles' views – youth court

<i>Extensive</i>	<i>Somewhat</i>	<i>Limited</i>
Netherlands	Belgium	England & Wales
Switzerland	France	Ireland
	Germany	Scotland – youth court
	Greece	Spain
	Italy	

Conclusion

From the results presented above it can be concluded that the practice of the *Scottish* children's hearings system, the prosecutor's and youth court hearings in *Switzerland*, the hearings in chambers in *France* and the youth court hearings in *the Netherlands* stand out as best practices in hearing the views of juvenile defendants. The story of the young person and his personal circumstances are at the centre of the hearing and the judge leaves a great deal of room to allow the young person to speak.

A second group of countries can be distinguished in which the contribution of the young person is guaranteed by a dialogue that takes place between the young person and the judge. In Belgium, Germany and the Netherlands at the hearings in chambers and at youth court hearings in Belgium, Greece, France, Germany and Italy the independent contribution of the young person is not always valued and given as much room.

In this regard, a large contrast can be observed with the *Anglo-Saxon* and *Spanish youth court* practice. The adversarial characteristics of the hearing do not leave much room for the independent contribution of the juvenile defendant to the conversations taking place in court. When a case is settled by means of plea bargaining there is no need to dig deeper

into the facts of the case or the personal circumstances of the young person. When a complete trial is held, the discussion solely revolves around the facts of the case and the lawyer and prosecutor are the main actors in the trial. Only when a probation order or another type of measure is reviewed by the judge does the young person become more involved in the hearing.

7.2.4 Showing a genuine interest

It has been argued in chapter 4 (section 4.2.4) that the effective participation of juvenile defendants in the youth court requires a genuine interest in the contributions of the young person. From article 12 CRC it follows that the right to be heard does not only mean to simply hear the views of the young person, but that his views should be seriously considered by the adult who hears his views (CRC Committee, 2009, paras. 28, 42). This means that the judge in the youth court should show an interest in the offence as well as the personal circumstances of the young person. A serious reaction to the story of the young person can be given verbally and non-verbally. When the judge shows a genuine interest this reassures the young person that his views are taken into account by the judge and this in turn encourages the young person to give his views. In the following, the showing of a genuine interest by the judge in chambers and the judge in the youth court will be assessed.

Hearings in chambers

During a children's hearing in *Scotland* the lay panel members respond explicitly to the story of the young person. The results of this study, as well as the results of other, previously conducted studies, show that the young person and his parents are the centre of attention and their contribution to the hearing is taken seriously by the panel members (compare Hallett & Murray, 1998; Martin, Fox & Murray, 1981; Waterhouse et al., 2000). This question from a panel member illustrates the genuine interest that is shown to the views of the young person:

It looks like you made progress. Is there anything you would like to ask or tell us before we make our decision? (Glasgow)

The same holds true for the practice of the *French* youth court judge in chambers and of the prosecutor in *Switzerland* (compare Blatier, 1999; Cottier, 2006a; Weidkuhn, 2009). The contribution of the young person is thoroughly reviewed by the judge or prosecutor, he responds with genuine interest to the story of the young person and additional (semi-open and open-ended) questions are asked. In these hearings the judge, the prosecutor or, in the Scottish case, the panel members decide among other things about whether a measure is necessary to prevent the young person from slipping further into recidivism. A welfare approach is prevalent in these countries and the purpose of the hearing is to assess whether an educational or therapeutic measure is necessary to deal with the problems the young person experiences (instead of or alongside a penal sanction). Showing a genuine interest to the views of the young person is therefore a rational response by the judge, because he has to assess, on the basis of *inter alia* the story of the young person, whether the young person is in need of care or protection. Therefore, besides talking about the offence a substantial amount of time is devoted to the personal circumstances of the young person.

As is the case in Switzerland, in *Germany* the youth court judge keeps his own dossiers. Accordingly, he has more background knowledge concerning the young person and his family, which makes it easier to react seriously and to show his involvement. Moreover, when the execution of a sentence does not work out as planned, the same judge hears the young person as well and decides what the proper course of action will be. In the case of a young person who does not comply with an order, the following conversation was observed:

You are here because you didn't start the aggression-regulation course.

If you don't do the course I can give you detention instead.

[The young person explains which arrangements he has made so far]

Why did it take you so long to start the course?

[The young person explains himself to the judge]

You have to be finished with the course by the tenth of January. Don't make any more difficulties. (Munich)

In *Belgium* a practice similar to the one in Switzerland and France is observed, where youth court judges appear to be very involved. The dossier of the young person stays with the same judge, until judicial

involvement with the child and his family is no longer necessary. Moreover, every decision concerning the imposition or suspension of an educational measure is taken in chambers. Only the official imposition of a measure has to occur in court and the judge can order changes to the measure at all times in chambers (art. 60 Jpc). In Belgium the judge generally knows the young person and his family very well, because he sees the young person several times in court (with every review of a current measure) and even more often in chambers. Besides, the judge is very closely involved with the execution of protective measures. Moreover, children who are already under the supervision of the court and commit an offence will appear before the same youth court judge. As a consequence the judge can ask the young person very concrete questions regarding his personal circumstances and can connect with the young person and his parents on a personal level. However, this involved attitude is not always present. When a young person reoffends and has to appear before 'his own' judge some very disapproving reactions from judges are observed with regard to the young person's behaviour:

How long has it been since you were here the last time? You are following each other on the wrong track (...). The prosecutor is now considering whether to transfer you to an adult court. That means you will have to sit in prison. I gave you a chance. A couple of weeks free and then again. When you do something, you will be punished. You are both dangerous. (Ghent)

The judge starts a stern lecture to show his disapproval. In that case the young person is not addressed in a neutral manner, but references are made to what he has done wrong since the last time he came before the judge.

The *Dutch* judge does not keep his own cases and different judges handle the case in the preliminary and in the trial phase of the process. However, the pre-trial judge in chambers generally shows a genuine interest in the story of the young person. The judge is able to collect some minimal amount of information about the young person from the dossier, which gives him some prior knowledge and helps him to respond to the young person more seriously, but not as much as is the case in the above-described countries.

With regard to a showing a genuine interest by the youth court judge or other professional in chambers two categories of countries are identified: countries in which a genuine interest is shown *extensively* and countries in which this is done at least *somewhat* (see Table 7.3). The extent to which a genuine interest is shown, resembles the extent to which juveniles have the opportunity to give their views (see Table 7.1).

Table 7.3

Showing a genuine interest – chambers

<i>Extensive</i>	<i>Somewhat</i>	<i>Limited</i>
France	Belgium	
Germany	Netherlands	
Scotland – children’s hearing		
Switzerland		

Youth court hearings

The practice of the *Swiss* youth court judge resembles the practice of his colleague, the prosecutor in chambers. Concerning the offence the judge generally asks the young person several questions so as to hear about the details of the offence. The personal circumstances of the young person are also given much attention and the judge has an active role in collecting information by means of talking to the young person.

The *Dutch* and *German* youth court practice resembles the practice in chambers in these countries as well. In both countries it is observed that the judge usually pursues the views of the young person in greater depth, by asking complementary questions. Mostly the judge hears the story of the young person and shows a genuine interest, but this does not happen in every court and during every hearing. Moreover, the reaction is not always made deliberately. Overall, it can be concluded that the Dutch and German youth court judges make a real effort in responding properly to the views of the juvenile defendant, by way of asking additional questions, making eye contact and nodding at the young person.

This is an example of a Dutch judge who deliberately takes the views of a young person seriously:

Are you indeed a girl who bottles it up inside you? Could you describe yourself? I understand that this is hard to do with so many people in the room. If you prefer I can send them all out of the room now.
(Amsterdam)

The same is observed in *France*. The involvement of the judge is generally larger in chambers, compared to the hearing in the youth court, where the offence is more the centre of attention. However, the views of the young person are seriously considered and reacted to. In *Belgium*, the contrast between the hearing in chambers and the hearing in court is even larger. The views of the young person are in general not heard to a large extent in court and the judge is more engaged in listening to the prosecutor and the lawyers.

As was explained before, in *Greece* and *Italy* the views of juvenile defendants are heard by means of posing a few questions. In *Greece* it is observed that, in spite of the fact that in a number of cases the judge tries to engage the young person in a dialogue with the court by asking him questions with regard to (the reasons for committing) the offence as well as his current situation, he (as well as the other members of the bench and the prosecutor) does not seem to listen very carefully to the young person's version of the events and take his views seriously into account. Moreover, reluctance on the part of juveniles to express their views is frequently observed and judges are not able to encourage these young people to engage in a dialogue.

The views of juvenile defendants are heard marginally in the *Scottish* and *English* youth courts, the *Irish* children court and the *Spanish* youth court (see section 7.2.3). As a consequence, a genuine interest in the story of the young person is often lacking as well. The chair of the three magistrates in the English youth court is the only person who to some extent makes direct contact with the young person during the hearing. At the start of the hearing the young person is sometimes greeted and his personal details are verified. During the trial the magistrates have a role as listeners and not as active participants. Only when the sentence is imposed does the chair sometimes speak to the juvenile directly, explaining why a particular sentence is chosen. A distinct feature of the Anglo-Saxon youth courts is the distant attitude of the judge, which is amplified by the formal proceedings and attire of the participants (see section 7.2.1). The judge does not show much interest in the young person, by asking questions or

by his posture, glance or tone of voice. Generally, the judge in the above-mentioned countries only exceptionally displays serious interest in the young person, by asking him for his views on the offence or his own personal circumstances.

Table 7.4 shows the ordering of countries with regard to the extent to which the judge shows a genuine interest in the story of the young person (see Table 7.2).

Table 7.4

Showing a genuine interest – youth court

<i>Extensive</i>	<i>Somewhat</i>	<i>Limited</i>
France	Belgium	England & Wales
Germany	Greece	Ireland
Netherlands	Italy	Scotland – youth court
Switzerland		Spain

Conclusion

From the analyses of the findings it can be concluded that a genuine interest in the views of juvenile defendants in the youth court is not a regular practice in many of the countries involved in this study. The hearings held in chambers in four countries included in this study stand out in this regard; i.e. *France, Germany, Switzerland* and *Scotland*. In these countries juvenile defendants are actively encouraged to give their views and in order to make the best appropriate decision (with regard to a welfare measure) the views of the young person are taken into account by the judge.

In many countries on the European continent the views of juvenile defendants are generally heard to some extent, but a genuine interest shown by the judge is not a matter of course. The views of the young person are sometimes heard as a formality and in that case the young person is not reassured of the fact that his views are actually taken into account.

The countries in which the youth court practices can be characterised as more adversarial or where the judge has a more directive approach in hearing juveniles share the practice of not carefully responding to the answers and views of the young person. The adversarial

characteristics of the *Anglo-Saxon youth courts* do not leave much space for the judge to seriously react to the contributions of the young person. This is the case because, among other things, the young person can hardly utter his views in the first place.

7.2.5 Hearing parents' views

To hear a juvenile defendant effectively, his parents should also be able to express their views to the judge (see chapter 4, section 4.2.5). It has been explained that parents should be given designated seats in the courtroom. Moreover, they should be welcomed at the start of the hearing, as a way to indicate that they are acknowledged by the judge as participants in the hearing. To further substantiate the active participation of parents it is of importance that parents are involved by the judge in the decision-making process by asking the parents questions regarding their child.

Hearings in chambers

A clear example of actively involving parents during a hearing can be found in the children's hearings system in *Scotland*. One of the fundamental principles of the system is that parents are generally considered to be the most appropriate persons to bring up their children. Moreover, the views of children and parents must be taken into account when the children's panel makes a decision concerning the child. Parents have both the right and duty to attend the hearing (ss. 74(2) and 78(1) Children's Hearings (Scotland) Act 2011). In this study parents were always present at the observed hearings. At the children's hearings parents are given a central role from the start; they are welcomed explicitly and they are regarded very seriously in the discussions that take place. Secondly, parents receive ample time to speak to the panel members. Not only the child can tell his own story to the panel members, the parents can do so as well. The panel members have prepared questions for the parents, so they are actively engaged in discussing whether the child needs care or protection by means of a protective measure. Moreover, the panel members thoroughly discuss the available care and protective measures with the parents so as to hear the parents' opinion about the options that are available.

In *Switzerland* parents are deemed to have the explicit duty to cooperate in the juvenile justice process (art. 12, para. 1, Cjcp). In the large majority of cases at least one parent or primary carer was present at the hearing. The practice at the prosecutor's office of engaging parents in Switzerland differs per canton. In Zürich, for example, parents are not present when the young person is heard by the prosecutor. Instead, parents talk to the social worker and the social worker makes a quick assessment of the situation at home, at school and in other areas in the life of the young person. When the parents and juvenile are heard separately, they are invited to the office of the prosecutor, who, after consulting with the social worker, gives the final decision. In other cantons juvenile defendants are heard in the presence of their parents and subsequently the parents are heard by the prosecutor in the presence of their child. In that case the parents sit next to their child at the desk of the prosecutor or behind their child. The moment at which parents are heard differs as well. However, this usually takes place after the young person is heard about the offence and his personal circumstances. If parents have questions or other comments they are generally given the opportunity to voice these at other points during the hearing as well. Parents are interviewed extensively about the behaviour of their child at home and about the school record of their child. In a case involving violence at home the prosecutor asked the mother of the young person:

How is it going with Mounir at home? What used to be the problem at home? (Basel)

The offence is in general not discussed with the parents. Questions about the friends and leisure time of the young person are only discussed with parents when they add something to the account given by their child. In general the prosecutor shows an interest in the story of parents and additional (open-ended) questions are asked. Overall, it can be concluded that parents are engaged by the prosecutor and their accounts are seriously considered, but the behaviour of the child remains the main subject under discussion (see also Cottier, 2006a). Parents are also engaged in discussions with regard to measures, which the prosecutor considers to implement. In the same case the prosecutor asked the mother:

What do you think is the best we can do for Mounir? (Basel)

Serious efforts are made to explain to parents what a certain therapy or placement in care entails and prosecutors try actively to realise cooperation between them and the family. Social workers often play an important part in these discussions as well, because they support the prosecutor in this case.

At the *Belgian* hearings in chambers, in the large majority of cases young people are accompanied by at least one parent or primary carer. The young person and his parents sit next to each other and right in front of the judge, who sits behind his desk. At the hearing in chambers the judge talks mainly to the young person and some questions are asked of the parents. Generally, a youth court social worker or a social worker from an institution is present. This means that the judge asks the social worker certain questions about the personal situation of the young person and his family, next to asking the parents about this.

In chambers, parents in *the Netherlands* are generally seated within close proximity of their child. In around two thirds of cases a parent is present at the hearing.²⁵ In some courts every participant sits at the same table and in those cases parents are usually seated next to their child. During the pre-trial detention hearing in the Netherlands the judge usually asks parents about the situation at home. In most cases a general question is asked to initiate the conversation with parents:

And how are things going at home? (Utrecht)

The offence is in general only discussed with the young person, but the judge gains additional family-related information from the dialogue with the parents. In this study, it appeared that parents can have an important influence on the decision of the judge. It seems that when parents can make clear to the judge that they are in a position to supervise their child at home, the judge is more likely to take the decision to suspend the pre-trial detention. In that case, at the hearing, parents can be involved in making agreements with the young person concerning the conditions he has to comply with during the period of the suspension of the pre-trial

²⁵ A possible explanation for the absence of some parents is the fact that they are not always informed in good time about the hearing of their child. This has to do with the fact there is no authority officially responsible for the notification of parents. Parents can thus be informed of the court date by the court, the prosecution service, the lawyer, a social worker or the police and practices differ per region (Hepping, 2012).

detention. When the pre-trial detention of the young person is not suspended, parents are usually given the opportunity to say goodbye to their child.

In *France*, parents are also by and large present at the hearing in chambers. Parents sit next to their child at the desk of the judge. The judge always asks them a couple of questions, after the young person is heard. Generally, the personal circumstances of the young person and the situation at home are discussed with parents, but not the offence. At the hearings in chambers in *Germany*, interestingly parents are generally not present. This has probably to do with the fact that the parents of young adults are not invited to the hearing and young adults can still be dealt with by the youth court judge (see chapter 5, section 5.2.4).²⁶ But also when the juvenile's parents are not present the hearing in chambers continues. When parents are present they sit next to their child and they are usually asked only a few questions, for example whether they have punished their child at home as a reaction to the offence.

In Table 7.5 the extent to which parents are heard during the procedure in chambers is reported. The countries are ordered in nearly the same way compared to the extent to which the views of juveniles are heard in chambers (see Table 7.1). However, in *France* and *Germany* parents are heard to a lesser extent compared to the young person.

Table 7.5

Hearing parents' views – chambers

<i>Extensive</i>	<i>Somewhat</i>	<i>Limited</i>
Scotland – children's hearing	Belgium	Germany
Switzerland	France	
	Netherlands	

Youth court hearings

When comparing the practice of the Scottish children's hearings to the youth court hearings in other European countries, the involvement of parents in *the Netherlands* most resembles the practice in the children's

²⁶ Of the 84 observed juveniles at least 45 were 18 years or older (54%).

hearings system. Dutch parents have the right to react to the statements made by their child, any fellow defendants, witnesses and experts. However, they can only comment on those matters that serve to defend their child (art. 496 (2) Ccp) and parents are obliged to appear at the hearing of their child (art. 496 (1) Ccp). However, judges do not always welcome parents and praise them for their presence in court. Their place in the courtroom differs per court, but they generally sit at a separate table next to their child or behind their child in the public area. Parents are mostly involved when the personal circumstances of their child are discussed. The majority of Dutch parents make use of their right to speak, but they usually only say a few words. Generally, they are involved in a dialogue with the judge for a few minutes. To initiate the conversation, judges usually ask a general open-ended question, such as:

Would you like to say something?

Would you like to add something to what has been discussed so far?

Or a question is asked regarding the behaviour of their child at home. Judges mostly do not ask follow-up or further questions in reaction to what parents have brought forward and parents are not meant to contribute to the hearing when nothing has been explicitly asked of them. Moreover, parents are not encouraged to participate in the decision-making process with regard to finding a solution to the delinquent behaviour of their child (as is usually the case at a children's hearing in Scotland). In general, it can be stated that parents are more involved when the judge asks them several open- or semi-open-ended questions and engages in an actual dialogue with the parents. This usually only occurs when the young person is not a first offender and/or is experiencing other personal problems, besides the offending behaviour. In the Netherlands, just as in the children's hearings system in Scotland, parents are considered to be the primary responsible persons for the young person and they are seen as informants about everything that has to do with the upbringing and development of the child. Although parents have a rather small role at the hearing, the fact that they are addressed as educators can be seen as positive. This can be illustrated by the following remark by a judge:

I will turn to the parents now. I can imagine that it is hard to hear all this. You are sitting here absolutely not as defendants, would you like to add anything? (Haarlem)

This role as educators is not hampered by issues such as parental liability or criminal responsibility for the behaviour of their child. Parents cannot be held criminally responsible and they are only fully civilly liable for the damage caused by a child that is below the age of 14 (see chapter 6, section 6.6.1). In other countries these issues play a more important role, as will be shown in the following section.

In *Switzerland*, the participation of parents in the youth court in the French-speaking part of the country does not differ markedly from the practice described in the previous section concerning their participation in chambers. Parents are always asked several questions about their child and the situation at home. Generally, they are asked if they can confirm the story of their child and whether they would like to add anything. The judge usually asks follow-up questions, such as in the following example of a dialogue between the judge and a parent:

Is Daniel a kind person?

[Yes, very kind, but he is naïve]

Do you give him pocket money?

[The parent explains this to the judge]

Did you punish him for what he has done?

[Yes, he is under house arrest until the end of the year, at least]

(Fribourg)

In theory, parents are obliged to be present at the court hearing in Belgium and France (see chapter 6, section 6.6). In *France* parents are always given the opportunity to speak to the judge about their child. When they talk to the judge they approach the bench and have to stand in the dock before the judge. During the remainder of the hearing the parents sit in the public area in the courtroom. The extent to which parents receive an opportunity to give their views depends on how much they would like to tell the judge and how much effort the judge puts in asking them additional questions. When parents are less talkative or do not speak French very well their views are heard to a lesser extent.

In *Belgium*, despite the fact that parents are usually present at the hearing, they are not given much opportunity to talk to the judge. Parents are seated next to their child and right in front of the judge. In many instances parents are only asked a single question, for example whether they would like to add anything to what has been said, or they are not asked anything at all. In some cases this has to do with the fact that parents have brought their own lawyer, who talks on their behalf.²⁷ However, the lawyer is mostly concerned with monetary claims from victims and not with the personal circumstances of the family, because parents are liable for any damage caused by their child.

In *Italy* the preliminary phase plays an important role in the youth court process. During this phase the judge generally addresses parents when they are present. Usually, the judge inquires about their opinion concerning the offence and the potential measures, in order to come to a decision. Parents do not have a designated seat, they have to sit in the public area of the courtroom. Sometimes, the judge anticipates the sentiments of parents and speaks to the young person about how difficult it must be for his parents to have a child that displays delinquent behaviour and about the impact the arrest and visit to the court must have on his parents. For example, when a mother reacts emotionally and/or is crying in court, the judge makes use of the emotions she displays fairly well by morally addressing the juvenile:

Look Sandro, your mother is crying because of what you have done. Are you proud of yourself now? An almost grown-up man who makes his mother cry. The woman who has given birth to you and raised you with love for many years. (Bologna)

However, in other cases it is observed that parents are hardly addressed by the judge.

In the German, Spanish and Greek youth courts parents play an even more marginal role. In *Germany* and *Greece* parents are in many cases absent. In *Germany* this has to do with the fact that the parents of young adults are not invited with their child, because the young person has reached the age of majority. However, when parents are present at the hearing they are not enabled to participate. Sometimes the judge asks

²⁷ Parents were accompanied by a lawyer in 21 of 98 cases (21%).

parents a question, but no effort is put in engaging them systematically in the process. Moreover, parents take their place on the public benches, sometimes even behind a small gate, which physically is not beneficial to their position in the courtroom.

In *Greece* parents mostly view the hearing in silence. They sit in the public seating area, together with witnesses and/or the victim. Parents can only answer questions posed by the judge concerning the situation at home and about the school and work of their child. They are not allowed to say anything that serves to defend their child. When parents try to defend their child they risk a reprimand from the judge or they may be sent away. In *Spain*, parents are only addressed when a victim claims damages, because they can be held civilly responsible. They sit behind their child in the rear of the courtroom. Parents must agree to the settlement and they must guarantee a payment to the victim. In other respects, parents are not able to participate at the hearing and they have no opportunity to speak to the judge. When parents try to communicate something to the judge, it is made clear to them that they are not in a position to do so.

The marginal role of parents in the German, Spanish and Greek youth courts resembles the role of parents in the British Isles. This can be illustrated by the practice in the *Scottish* youth court. Parents do not have any role at the hearing in the youth court, because their children are considered to be adults under criminal law. In the courtroom parents and defendants are seated on the public bench and parents have to stay there when their child is called for the hearing. They are, similar to everyone else, seated on the public bench. During the hearing, some judges ask the social worker, provided that he is present, or the juvenile's lawyer questions concerning the family background of the young person. Only on rare occasions are additional questions asked to the parents.

In *Ireland* the situation is largely the same, although parents are obliged to be present at the court hearing when their child has to appear as a defendant (s. 91 (1)(a) Children Act 2001). Parents and their children are seated in the public area of the courtroom and the judge does not always know whether parents are present or not. When parents and children chat with each other they are reprimanded by the judge. The judge only exceptionally talks to parents about their child. Moreover, Kilkelly (2005) observed that juveniles frequently appeared in court

alone, while only a very small number of cases were adjourned because of the absence of parents. When parents attend the hearing they often bring other (younger) children, as a result of which the public area of the court is overcrowded with people.²⁸

As a result of the adversarial tradition, parents in England and Wales and Ireland are generally only addressed in the sentencing phase of the youth court hearing, after a plea offer has been accepted or a trial has taken place. In *England and Wales* the situation is, however, slightly more positive. Two observations show that procedurally things work better for parents in the English youth court, compared to the other Anglo-Saxon countries. First, the juvenile defendant in the English youth court is, unlike young people in the Scottish youth court and Irish children court, allowed to sit next to his parents and his lawyer, as prescribed by the *Youth Court Bench Book* for youth court magistrates (Judicial Studies Board, 2010). Second, parents are allowed to utter words to defend their child during the trial, after the lawyer has made his argument. Often, parents are asked to give their opinion regarding the allegations and to speak to the magistrates about how their child is behaving at home. Moreover, the judge or magistrate often emphasises that their presence at the hearing is appreciated:

Thank you for coming to court for support. It's appreciated. (Sheffield)

In Table 7.6, the countries included in this study are categorised according to the extent to which parents' views are heard in the youth court. In countries in which the views of juveniles are heard to a *limited* extent (see Table 7.2) the views of parents are generally heard marginally as well. Exceptions are *England and Wales*, where parents are heard to a larger extent compared to their child, and *Germany* and *Greece* where the opposite practice is observed; parents are engaged to a lesser extent compared to the juvenile defendant.

²⁸ These results correspond with the results of observations in the adversarial youth court practice in Canada. Parents are absent from the hearings in approximately 30% of cases and in this case the judge rarely inquires about the reason for their absence. Moreover, when parents are present this is only explicitly acknowledged by the judge in half of the cases, parents remain seated in the audience section of the courtroom and they play a minor role during the hearing (Peterson-Badali & Broeking, 2010).

Table 7.6*Hearing parents' views – youth court*

<i>Extensive</i>	<i>Somewhat</i>	<i>Limited</i>
Netherlands	Belgium	Germany
Switzerland	England & Wales	Greece
	France	Ireland
	Italy	Scotland – youth court
		Spain

Conclusion

The *Scottish* children's hearing is a good example of a practice in which parents can effectively participate. Parents are seen as important sources of information for the panel members and sources of support for the child and they play an important role in the decision-making process. The same holds true for the position of parents in the juvenile justice system in Switzerland and in the youth court in the Netherlands.

Procedurally the role of parents in youth court proceedings in the other continental European countries does not differ distinctly between countries. Although in several countries parents are obliged to attend the youth court hearing of their child, their presence is not used to its fullest potential in every country. The role of parents in the majority of countries remains rather small.

From the results of this study it can be concluded that the practice in *England and Wales* resembles the practice of the youth courts on the European continent more than the practice of the other Anglo-Saxon countries, in spite of the adversarial character of the youth court procedures. In *Ireland* and *Scotland* even less consideration for the presence and possible contribution of parents can be observed. With regard to Scotland, this implies an immense contrast between the engagement of parents in the children's hearings system and their non-engagement in the court system, once their child has turned 16.

7.3 Conclusion

In this chapter it has been argued that the layout and the atmosphere of a courtroom influence the extent to which juvenile defendants can effectively participate in a hearing. It has been shown that the *Scottish* children's hearings can be characterised as highly informal. Juveniles and parents have ample possibilities to participate in the discussion that takes place during the hearing. It can be concluded that parents and young persons can participate adequately during the hearing and that the presence of a social worker contributes to their participation. Moreover, the absence of a lawyer in many cases seems to contribute to the informal atmosphere at the hearing. The fact that the hearing revolves around the welfare of the young person and protective measures can be imposed can be seen as a factor, which contributes to the dialogue with the young person and his parents. These aspects can all be seen in the case presented at the start of this chapter; the girl is involved in everything that is discussed at the hearing and the views of the social worker and the father are considered as well before the panel members give their final decision.

It can be concluded that the hearings in chambers on the European continent, such as in *Switzerland, Belgium, France, Germany* and *the Netherlands*, have an informal atmosphere as well. But at the same time a discussion regarding the delinquent behaviour and its consequences is not avoided by the judge. Youth court hearings in countries that have an adversarial legal tradition are generally held in large, classical courtrooms, procedures are formal and the social and physical distance between the professionals and the juvenile defendant is rather large. The formal setting does not seem to contribute to the participation of juveniles and parents.

With regard to hearing the views of juvenile defendants it can be concluded that in countries such as *Scotland* (children's hearings), *Switzerland, France* and *the Netherlands* the views of the young person and the discussion of his personal circumstances are the centre of attention in a youth court hearing. In other countries a dialogue might take place, but without the possibility for the young person to independently contribute to the hearing. In the Anglo-Saxon countries (*England and Wales, Ireland* and *Scotland* (youth court hearings)) the views of the young person are hardly heard at all. It can be concluded that the legal tradition in which a court operates has an important influence on the

extent to which the judge can enable the young person to participate at the hearing. In the British Isles the judge is far more restricted in opening a dialogue with the juvenile defendant.

A genuine interest in the views of juvenile defendants in the youth court is not self-evident in every country involved in this study. In *Scotland* (children's hearings), *Switzerland* and *France* (in chambers) juvenile defendants are encouraged to give their own views and they are actively questioned about their personal circumstances. In every country, though, a lack of well-developed interview techniques is observed.

With regard to the participation of parents at the hearing, again the *Scottish* children's hearing is an example of good practice. Parents are actively engaged because they are seen as important sources of information regarding the young person. Moreover, they cannot be held criminally responsible for the behaviour of their child. In countries where the criminal and civil liability of parents is a frequent topic under discussion, the role of parents at the hearing is rather different. They are themselves subject to the law and their role as educators is viewed from that perspective.

Chapter 8

Juvenile defendants' understanding

8.1 Introduction

Prosecutor's office Basel, Switzerland

A 14-year-old boy appears before the prosecutor in Basel, because he is accused of bike theft and shoplifting, along with two other juveniles. At the hearing a social worker and both parents of the young person are present. When the young person and his parents enter the office of the prosecutor they are welcomed by the prosecutor with a handshake and they are told where to sit. At the start of the hearing the prosecutor verifies the name and date of birth of the boy. The prosecutor explains what has previously occurred in the case, he states what will be discussed today and he introduces himself and the social worker. Furthermore, he explains to the young person his rights and he asks the young person to explain to him what one of the rights entails.

After the introduction the prosecutor starts to question the young person with regard to the offences. He asks in detail what has happened, what the young person has done exactly and which part he has played in committing the acts. When the charges are discussed, the prosecutor tells the young person that the insurance company of the victim (a shop owner), has filed a claim for the damage that has been caused. The costs for different types of damages are explained to the young person and the prosecutor explains the terms excess and joint liability. The young person and his father sometimes intervene to ask additional questions. A couple of times the prosecutor asks the young person if he understands everything and if he has additional questions.

During the following part of the hearing the personal circumstances of the young person are discussed. For example, the prosecutor asks the young person what he told his mother when he was arrested and if he was punished at home. The young person says that he had house arrest and did not receive pocket money for a while.

At the end of the hearing, after a short recess, the prosecutor delivers the sentence: five days of community service. The prosecutor

decides right away to which project the young person is assigned (a sports complex). He explains to the young person that he will receive a letter with the phone number of the project and that he has to call to make an appointment. The work has to be completed within one month. The prosecutor asks if the young person has any further questions. The boy asks what he will have to do at the sports complex. The prosecutor explains to him that he cannot say exactly, but he mentions several things that might be possible. It is also explained to the young person that he has to pay the costs of the criminal process (420 Swiss Francs). Furthermore, the prosecutor explains that the sentence is unconditional and explains what that means. The prosecutor completes the hearing by saying to the young person: 'I hope this was the first and last time you were here. You have had luck this time. Don't do something like this again, you can now prove that you can behave well. It's in your hands now'. The hearing has taken one hour and 25 minutes, with a break of twenty minutes in between.

Next to the requirement to be heard in the youth court, understanding procedures in court is seen as a requirement for effective participation. In this study it is argued that understanding what is discussed during the hearing and what the consequences are of what is decided is essential for the young person to give his (informed) views. Hearing and understanding are therefore connected to each other and form prerequisites for effective participation. Moreover, understanding the proceedings increases the perceived fairness of the legal procedure. This in turn increases the degree of acceptance of the legitimacy of authorities and the final decision that is made (i.e. the sentence) by these authorities (Tyler, 2003, 2006a).

The aim of this chapter is to present and analyse the findings of this study regarding juvenile defendants' understanding of the youth court proceedings and the role court professionals play in facilitating juveniles' understanding. The results regarding the 11 countries will be structured according to the second set of requirements for effective participation in the juvenile justice system as presented in chapter 4 (section 4.3). For each country the manner in which and the extent to which the requirements are put into practice are analysed (sections 8.2.1 to 8.2.4). At the end of each section a table is provided in which the countries are listed according to the extent to which they comply with the requirement in practice.

Switzerland will be highlighted and brought into prominence throughout this chapter. It will be shown that the practice in the Swiss prosecutor's office and in the youth court meets the requirements for effective participation, with regard to enhancing the understanding of juvenile defendants, in many respects.

8.2 Requirements for enhancing juvenile defendants' understanding

In chapter 4 (section 4.3) the notion of the juvenile defendant's understanding of youth court proceedings has been crystallised. In total, four requirements to enhance the understanding of juvenile defendants have been explained. These requirements are concerned with 1) explaining the purpose of the hearing, the procedures that are followed and the participants and their roles; 2) avoiding the use of judicial jargon; 3) clarifying the judgment and sentence; and 4) contributing to the understanding of the consequences of the offence. The four requirements for effective participation, with regard to understanding, serve as a guideline in presenting the results of this study. In tandem with the structure of chapter 7, for each requirement an assessment will be made of the extent to which the countries involved in this study meet the ends of the requirement. Moreover, as is the case in chapter 7, a distinction will be made between hearings held in chambers and hearings held in general courtrooms.

8.2.1 Giving explanations

To optimise the understanding of a juvenile defendant requires that it is constantly ensured that he understands what is being discussed in court. A fundamental part of the understanding of the juvenile defendant can be improved by preparing him properly before the youth court hearing. This preparation can best be provided by the lawyer. However, these preparatory activities cannot be taken for granted. It cannot be assumed that the young person is always prepared and/or that he has remembered everything correctly (see chapter 4, section 4.3.1). Therefore, judges also have an important task in explaining the youth court proceedings to the

juvenile defendant, in order for him to effectively participate at the hearing. First, this implies that at the start of the hearing it should be explained what the purpose of the hearing is (i.e. what the young person can expect to be discussed and decided upon during the hearing). Second, the order of the proceedings has to be explained and, third, the persons present and the roles they fulfil during the hearing have to be explained.

Hearings in chambers

In *Switzerland* the prosecutor starts the hearing with a short introduction. In general the participants at the hearing are introduced to the young person and his parents. The function of the participants is not always explained, but due to the small number of people present and the fact that young people generally come before the same prosecutor (when reoffending) it is often clear to the young person which role the different participants play. The prosecutor explains why the young person has to appear before him and what has happened before in the case and usually it is explained what will be decided during the current hearing. Before starting to question the young person with regard to the offence, he will be told what his rights are as a defendant and usually the following is said to the young person:

Are you in the position to answer the questions?

You have the right not to answer the questions. Your answers will be used as evidence. Do you understand that?

You have the right to a lawyer. Would you like to have a lawyer?

At the start of the *Scottish* children's hearing the chair similarly explains the purpose of the hearing and the order of the proceedings that will be followed. The chair introduces himself and the other participants present at the hearing. Several times during the hearing the panel members refer to and explain the steps and decisions that are taken.

In *the Netherlands* an explanation of the proceedings and the roles of the different actors is given much more attention at a pre-trial detention hearing compared to the regular youth court hearing. The introduction by the pre-trial judge consists of welcoming the young person and the other persons present, introducing everyone, explaining their role and finally explaining the purpose of the hearing and the decision that has to be taken.

At the hearing in chambers in *France*, the judge generally introduces himself briefly, but not the clerk who is present at the hearing. The role of the judge and the clerk is not explained to the young person and the order of the proceedings is not always explained. This last point depends on the individual approach of the judge. When the judge already knows the young person from previous hearings, the introduction is naturally less extensive (see also Mouhanna & Bastard, 2011).

At the hearing in chambers in *Germany* only the judge is present, so he does not have to introduce any other participants. Moreover, for young people it is clear that they are appearing before the judge in chambers. The purpose of the hearing is always explained, because hearings in chambers can be held for different purposes; for example, in the case of a first minor offence, to explain the probation plan for the young person or to warn a young person who does not comply with a sentence. Generally, the judge starts the hearing by asking the young person:

Do you know why you are here? (Munich)

During the hearings in chambers in *Belgium* only a bare minimum of explanation is provided to the young person. The participants at the hearing are not introduced, their role is not explained and the order of the procedures is not clarified to the young person. An important factor influencing these findings is, however, the fact that in a large number of cases the young person has met all the participants before. During the preliminary phase in the Belgian youth court process the young person has to appear before the judge several times, because the judge supervises the execution of a (preliminary) measure. Moreover, the young person might have been involved with the youth court before, so, as is the case in Switzerland, France and Germany, he knows the judge. An introduction by the judge is therefore not always necessary. Moreover, explaining the procedures is left to the lawyer of the young person, who is always present.

In Table 8.1 the six countries in which hearings in chambers have been observed are categorised according to the extent to which explanations are provided. Explanations are provided *extensively*, *somewhat* or to a *limited* extent. It must be noted that the intimate and

informal setting does not always make it necessary for the judge to give extensive explanations. The number of participants are limited and the young person generally knows that he is appearing before a judge and it can be assumed that he knows for which matter.

Table 8.1

Explanations – chambers

<i>Extensive</i>	<i>Somewhat</i>	<i>Limited</i>
Scotland – children’s hearing	France	Belgium
Switzerland	Germany	
	Netherlands	

Youth court hearings

The youth court hearing in *Switzerland* does not differ markedly from the hearing in chambers by the prosecutor, with regard to explanations provided to the young person. At the start of the hearing the judge introduces the participants, briefly explains the aim and order of the hearing and mentions the offence with which the young person is accused. At these hearings only a small number of participants are present as well and mostly no lawyer is present (see chapter 7), which implies that fewer participants have to be introduced and that a lawyer does not give explanations to the young person either before or after the hearing.

In countries such as the Netherlands, France, Germany and Italy it is not common practice to explain the procedures and the participants at the start of the hearing. The practice in the *Dutch* youth court differs notably between different courts around the country. At the start of the youth court trial in some courts the proceedings are always explained and the participants are always introduced by the judge.¹ However, in other courts this introduction is not given at all to the juvenile defendant. In some instances only the participants are introduced and the proceedings are not explained (or the other way around) or the judge asks the lawyer if he has provided the young person with an explanation of what will happen in court. Comparable research in a Dutch adult court also shows that the

¹ In some courts name plates with the function of the judge, prosecutor and clerk are placed in front of them, which point out where the specific professionals are sitting.

order of the procedures is not explained at the start of the hearing in a substantial number of cases (in 40% of the observed cases, De Jager et al., 2011).

At the youth court hearings in *France* an introduction or explanation of the procedures is generally not provided to the young person. The judge verifies the personal details of the young person and starts immediately with discussing the facts of the case with the juvenile defendant. Sometimes, however, the judge explains in which phase of the process the juvenile defendant finds himself and the procedures that will be followed during the hearing. Most explanations are provided with regard to the meaning and content of a sentence or measure (see section 8.2.3).

In *Germany*, the youth court judge also does not systematically introduce all the participants. Only when witnesses are summoned is their presence verified in order to make sure that the hearing can commence. The order of the procedures is not explained. The judge starts the hearing by verifying the personal details of the young person (i.e. his name and date of birth). Furthermore, the charge is read out in formal and juridical terms by the prosecutor and it is not explained or 'translated' into everyday terms. However, during the interrogation by the judge concerning the facts more everyday language is used by the judge.

Italy demonstrates a different picture in this regard. On the one hand, a minimal amount of explanations is given to the young person during the hearing and the judge assumes (often wrongly) that the lawyer has prepared the young person sufficiently before the start of the hearing. During the hearing procedural rules are only rarely explained.² On the other hand, the juvenile defendant is sometimes asked to explain to the judge what he is charged with, which gives an interesting indication of the young person's understanding of why he has to appear in court. Besides posing this question, during the remainder of the hearing much of what is discussed is probably not fully understood and noticed by the young person, mostly because of the hectic situation in the courtroom.³ However,

² An exception to this rule concerns the procedural right to remain silent, which is always clearly explained to the juvenile defendant.

³ The youth court in Rome, for example, can be considered a very chaotic environment. Hearings are often resigned, people walk in and out of the courtroom and lawyers and prosecutors start informal chats from which the young person is excluded or which he does not understand.

the lack of explanations is not due to unwillingness or indifference on the part of the judge, but it seems to be due to the hectic routine that exists in some courtrooms. This becomes clear when a young person poses a question, because in that case the judge considers this question very seriously. This contrasts with what happens in, for example, the Anglo-Saxon countries, where defendants are urged to remain silent. Italian judges encourage young people to ask questions when they do not understand something that happens or is being discussed. And judges are sensitive to the intellectual capabilities of young people. They employ a very friendly and uncomplicated approach, for example when a young person has limited intellectual capacities:

Alberto, do you know the difference between right and wrong? And do you know why it is wrong what you have done with that chair?
(Bologna)

Moreover, in general young people do not hesitate to pose questions and to ask for explanations during the hearing. This might be the case because defendants feel that the judge considers their views seriously.

By contrast, in the youth courts in Belgium, Greece, Ireland, Scotland and Spain the notion of giving the juvenile defendant explanations regarding what is happening is given hardly any consideration. As far as is observed, any form of explanation is lacking in these youth courts. During the court hearings in *Belgium*, very minimal explanations are provided with regard to the procedures. The main decisions are taken by the judge in chambers, so it has been observed on several occasions that the judge in court refers to what he has discussed with the young person and his parents in an earlier hearing in chambers. The hearing in the youth court is merely a formality to (re)confirm the current measure. In *Greece*, the judge also provides the young person with minimal explanations of the process. The fact that hearings last on average 5 to 7 minutes (see appendix 5) indicates that generally there is little room for the judge to give extensive explanations to the young person and his parents. In *Ireland*, *Scotland* and *Spain* it is observed that in some instances the young person does not even seem to be able to differentiate between which participant is who and which role the judge, the prosecutor and the clerk play in court. Only very exceptionally does

the Irish judge ask the young person for example if he understands the bail conditions (Kilkelly, 2008a).

The practice in the *English* youth court is different from its counterparts in the other countries of the British Isles with regard to giving explanations. In the Magistrates' Courts (Children and Young Persons) Rules 1992 it is stated that the nature of the youth court proceedings and the substance of the charge must be explained to the juvenile defendant in simple language that is adapted to the age and level of understanding of the young person (rule 6). At certain moments during the hearing it is observed that brief explanations are given to the young person. At the start of the hearing the chair of the magistrates explains to the young person what will happen and what will be decided during the hearing. The clerk is often introduced separately by the chair of the magistrates:

The woman in front of me is the clerk. Listen carefully to what she has to say. (Sheffield)

Listen to the gentleman in front of you. He is going to ask you some questions. (Sheffield)

The exact role of the clerk is, however, not explained to the young person. Other instances at which an explanation is provided to the young person regarding what is happening is when a new court date is scheduled and when the magistrates order a recess for consultation. However, this last message is not always explicitly directed at the young person himself.

The inspection report of Her Majesty's Inspectorate of Probation (2011) underscores these findings by stating that in the majority of the seven courts that were visited,⁴ magistrates tried to explain to juvenile defendants what happened in court. The inspectorate expected the YOT court staff to be more engaged in explaining to young people and their parents what will happen in court while they are waiting before the hearing, by means of explaining the court layout and legal terminology. However, this was not the case at all (HMI Probation, HMI Courts Administration, HM Crown Prosecution Service Inspectorate, 2011). On

⁴ The seven courts were selected on the basis of whether they had been recently inspected, their size and a mix of rural and urban areas. The inspected courts are located in Essex, Havering, Kent, Kingston Upon Hull, Neath/ Port Talbot, Oxfordshire and Staffordshire.

the other hand, though, the basic amount of explanations that is provided to the young person during the hearing means that the youth court practice in *England and Wales* scores better on this point, in comparison with the practices in *Ireland, Scotland* and *Spain*.

Again, on the basis of these findings the 11 countries are classified under three headings (see Table 8.2). Compared to the hearings in chambers it can be observed that the amount of explanations in chambers does not differ from the amount of explanations given in court in the same countries. However, in court more explanations might sometimes be needed because more participants are present at the hearing and the procedures are generally more formal and less straightforward for young people. Interestingly, the absence of a lawyer, in many court cases (see chapter 7), does not always mean that the judge gives more explanations to the young person, as can be seen in *Germany* and *Greece*.

Table 8.2

Explanations – youth court

<i>Extensive</i>	<i>Somewhat</i>	<i>Limited</i>
Switzerland	England & Wales	Belgium
	France	Greece
	Germany	Ireland
	Italy	Scotland – youth court
	Netherlands	Spain

Conclusion

With regard to the explanation of procedures and the actors in the youth court, it can be concluded that two extremes are observed among the countries involved in this study. On the one side, *Scotland* and *Switzerland* seem to meet the ends of this requirement best. During the children’s hearing in Scotland and the hearings in chambers in the youth court in Switzerland serious investments in terms of time and effort are made in giving explanations to the young person. Interestingly, a lawyer was generally not present at these hearings; however, when he was present no notable difference was seen in the amount of explanations that were given.

At the other extreme, countries can be found in which the youth court shows many characteristics of the adversarial legal tradition. In *Ireland*, *Scotland* and *Spain* the judge is not involved in giving explanations to the young person. However, this practice is also observed in *Belgium* and *Greece*. In these countries it is seen as the task of the lawyer to prepare the young person before the hearing and to explain what has been decided afterwards.

In countries that fall somewhere in between these two extremes, the lawyer plays a crucial role as well in preparing the young person before the hearing. However, the youth court judge compliments the task of the lawyer by repeating some explanations and making the young person feel more comfortable by explaining what he can anticipate will happen at the hearing. In these countries, however, the judge should be able to pay more attention to this requirement.

8.2.2 Avoiding judicial jargon

The less legal terminology and judicial jargon are used, the better the chance that the juvenile defendant will be able to actively take part in the youth court process (see chapter 4, section 4.3.2). However, in most youth courts or other administrative bodies it is not possible to avoid using judicial terms completely. In such cases, it is crucial that professionals are conscious of the fact that they use judicial jargon, complex and lengthy sentences or difficult words and that they provide an explanation to the young person of the terms used. The extent to which this is done in the different settings will be explained below.

Hearings in chambers

In the prosecutor's office in *Switzerland*, in many instances no lawyer is present at the hearing and the case is handled by the prosecutor alone, which means that legal discussions between professionals do not generally take place. As a result legal terminology is not much used, and when used the young person is generally provided with an explanation of the terms. Examples of terms that are used and also explained to the young person, are:

Strafverfahren [criminal procedure],
Verfahrensrechten [procedural rights],
Offizialdelikt [criminal offence],
Mittäter [co-offender] and
Solidarhaftung [joint and several liability].

Moreover, prosecutors generally ask the young person if he understands everything that has been discussed and because of the informal atmosphere it is observed that young people do not feel restrained in asking questions or in indicating that they do not understand certain matters. This was clearly observed in the case as described at the start of this chapter. On several occasions the prosecutor gave explanations to the juvenile defendant and he asked the prosecutor questions himself.

The limited use of jargon is observed during the children's hearing in *Scotland* as well. This might have to do with the fact that lay members of the public conduct the hearing and the judicially trained reporter only intervenes when the panel members have a judicial or procedural question. The only time when more technical language is used is when the grounds for the referral are read by the chair of the panel at the start of the hearing. Usually the grounds are translated into language that the young person understands (see also Griffiths & Kandel, 2000).

Moreover, the intimate setting in *Scotland* and *Switzerland* contributes to the fact that the prosecutor or panel members are very much focused on the young person. Because of the close physical distance between the professionals and the juvenile defendant a lack of understanding on the part of the young person is noticed almost immediately, when for example the young person has a questioning look on his face. Furthermore, the fact that one engages in a dialogue with the young person means that jargon has to be avoided in order to have a proper conversation with the young person. When the young person does not understand what is being said, he is not able to contribute to the conversation.

During the hearings in chambers in *France* and *Belgium* the use of jargon is also very limited. In both countries a lawyer is always present on behalf of the young person, but the prosecutor is generally not present. The issues that are discussed in chambers do not generally concern legal matters, but are related to the supervision or support of the young person, which explains the limited use of legal jargon.

The same can be said about the hearings in chambers in *Germany*. Jargon is hardly ever used and when a term is used the young person is in a position to ask for an explanation from the judge or the judge explains the term spontaneously.

A similar situation is observed with regard to the pre-trial detention hearing in *the Netherlands*. The pre-trial judge tries to avoid the use of legal terms and abbreviations and to provide the young person with explanations of terms, when they are used and of what is discussed.

In Table 8.3 it can be seen that in every country the use of judicial jargon is at least to some extent avoided, so no country falls within the *limited* category.

Table 8.3

Avoidance of judicial jargon – chambers

<i>Extensive</i>	<i>Somewhat</i>	<i>Limited</i>
Belgium		
France		
Germany		
Netherlands		
Scotland – children's hearing		
Switzerland		

Youth court hearing

In the French and Italian youth courts, which are held in medium-sized or large classical courtrooms and where a prosecutor and one or more lawyers are always present, the use of jargon is strikingly rather limited as well. Sometimes it can occur that lawyers use judicial terms among themselves, but towards the juvenile defendant hardly any jargon is used. In *France*, the only terms that are used commonly relate to the different sanctions and measures that can be imposed and the criminal record of the young person. In *Italy*, the charges are often read in judicial language (which is the case in most countries involved in this study). However, the judge generally translates the charge into ordinary terms, which the young person understands. Moreover, it is also observed that judges often ask the young person to explain in his own words the offence he is accused of. By

doing so, the judge checks whether the young person understands what he is charged with. In the *Swiss* youth court, the use of jargon and abbreviations of terms is also very limited. Moreover, the absence of a prosecutor and a lawyer means that legal discussions hardly take place during the hearing. When a legal term is used, such as the term *bedingt* (conditional), the judge asks the young person if he knows what the term means and explains it when the young person is not able to give a correct explanation of the term.

In Germany, Belgium, Greece and England and Wales the use of jargon is rather limited as well. As is explained in the previous section, in *Germany* the charges are read out in juridical language by the prosecutor. However, during the subsequent parts of the hearing the young person is addressed in a manner that takes into account his level of maturity and understanding of the process. The judge generally does not use complex sentences and legal terms. The only exception is when the judgment and sentence are read out by the judge at the end of the hearing. However, the judgment is always explained in understandable language (see section 8.2.3).

In *Belgium*, legal jargon is used fairly often by the prosecutor and lawyers. The fact that many lawyers are present at a youth court hearing (representing the young person, the parents and one or more of the victims) means that extensive legal discussions are in some cases held about the damages and the liability of the young person and his parents. The judge for his part does not use many legal terms, especially not when talking to the young person and his parents.

In *Greece*, jargon is frequently used by both the prosecutor and the lawyer representing the young person. The reading of the charges and the closing speech by the prosecutor as well as the speech by the lawyer are laced with judicial terms. These parts of the hearing are not further explained to the young person until after the hearing is finished. The youth court social worker has an important task in explaining to the young person what has happened during the hearing and what is the outcome of the case. Although the youth court judge avoids the use of legal terms and the social worker assists the young person, most of the hearing is difficult to grasp for juveniles, because of the often complex arguments that are presented by the prosecutor and lawyer.

In the *English* youth court the use of legal terms is quite limited. This probably has to do with the fact that magistrates are lay members of the public, as is the case in the children's hearings system. As a consequence, discussions more often take place in laymen's terms and the magistrates are provided with explanations of terms when they do not understand something the prosecutor or lawyer has brought forward. In the *Youth Court Bench Book* it is prescribed that magistrates should use plain language and avoid legal jargon (Judicial Studies Board, 2010). It has to be borne in mind, though, that the explanations are directed towards the magistrates and not towards the juvenile defendant, who can be seen as a bystander in this regard.

From England and Wales it is a small step to consider the other youth courts in the adversarial legal tradition, in Ireland and Scotland, in which legal jargon is omnipresent. However, *the Netherlands* can be grouped together with the countries in which jargon is used most often and explained to the young person the least as well. During the Dutch youth court hearing legal terminology is used far more often, compared to the pre-trial hearing. Examples of terms that are used in court are:

aanhouden [adjourn],
bezwaarschrift [notice of objection],
in vereniging [in association],
jurisprudentie [case law],
proces-verbaal [summons] and
subsidiar [alternately].

Although the use of jargon differs substantially between judges in the Netherlands (compare with Ten Brummelaar & Kalverboer, 2011), prosecutors often make extensive use of legal terminology and do not explain their arguments to the young person. They often speak quickly and direct their arguments towards the judge, who fully understands the prosecutor, as opposed to the young person. Judges generally speak to the young person in a calm manner, adapt their speech to the cognitive level of the young person and explain to him what is happening. However, judges, prosecutors and lawyers can have the habit of using complex words and long and complex sentences. The professionals in court understand one another perfectly well, but the young person tends to be omitted from precisely the dialogue one is trying to establish with him.

The young person experiences that he does not understand what is being discussed and sees that the other participants understand each other perfectly well. At this point the juvenile can lose his attention and start looking around, not being involved in the conversation at all. This is at odds with the attempts of the judge to help the young person to participate in the hearing.

In the *Irish* and *Scottish* courts, which operate within the adversarial legal tradition, the extensive use of legal jargon is observed. In the case that any explanations are provided in the Irish children court, they are usually not attuned to the cognitive level of the young person. It usually occurs that juveniles are unable to respond to a question that is posed to them on the rare occasions that they are actually asked something. They make a questioning glance towards their lawyer or parents to help them out of the situation (see also Kilkelly, 2005, 2008a). The same holds true for the Scottish youth court. The youth court is situated in the adult sheriff court and no laymen are appointed and only professional lawyers work in the youth court. This means that legal jargon is omnipresent here as well (see also Piacentini & Walters, 2006). The young person and his parents stand on the fringes of a legal ‘contest’ that is taking place in front of them. Both physically and mentally they are excluded from the discussions in the youth court (see also chapter 7, section 7.2.1). The judge expects that the young person is properly instructed by his lawyer, that he knows at which point to come over to the dock and when to respond to a question, so the youth court procedures can take place smoothly. Generally, only after the hearing is the young person given explanations by his lawyer of what has been decided in court.

The same picture can be sketched for the *Spanish* youth court. In general, juvenile defendants understand little of what is being discussed. For example, when they accept a plea arrangement with the prosecutor it is observed that they are surprised when they hear the conditions from the judge, which should have been explained to them before they agreed to plead guilty (see also section 8.2.3). On the other hand, young people are sometimes not aware of the fact that they have been discharged, which leads to awkward situations in court.

In Table 8.4 it can be seen that the categorisation of countries is different from the one provided with regard to explaining the procedures to the young person. Five countries do better with regard to avoiding the

use of jargon compared to giving explanations (i.e. *England and Wales, France, Italy, Belgium and Greece*). In *the Netherlands* more explanations are provided by the judge, compared to the avoidance of jargon by the professionals in court. Three countries – *Ireland, Scotland and Spain* – all provide explanations and avoid jargon only to a *limited* extent.

Table 8.4

Avoidance of judicial jargon – youth court

<i>Extensive</i>	<i>Somewhat</i>	<i>Limited</i>
England & Wales	Belgium	Ireland
France	Germany	Netherlands
Italy	Greece	Scotland – youth court
Switzerland		Spain

Conclusion

With regard to the use of judicial jargon, the children’s hearings in Scotland and the hearings in chambers in Switzerland and France are again examples of good practice. But also in the youth court in *Italy* the use of jargon is very limited. In the children’s hearings system in *Scotland*, the prosecutor’s office in *Switzerland* and the hearings in chambers in *France* the limited use of jargon is probably related to the fact that these hearings are held in an intimate and informal setting and the presence of a limited number of (legal) professionals (see chapter 7, section 7.2.1).

In countries in which the youth court practice shows more adversarial characteristics the use of jargon is quite prevalent. *England and Wales* stand out as an exception, because the use of jargon is not as frequent as in, for example, *Ireland*. In *the Netherlands* by contrast, jargon is used fairly often. The use of jargon can conflict with the notion that the young person should be able to understand what he is charged with (see CRC Committee, 2009, para. 60). In many countries it is observed that especially the charge is read out in complex legal jargon and with a rapid pace.

8.2.3 Clarifying the judgment and sentence

According to article 12 (1) CRC the right to be heard means that the views of the child must be given due weight in accordance with the age and maturity of that child. This implies that the decision maker in question has to inform the young person of the outcome of the process and to explain how the views of the child are considered in the decision-making process. The CRC Committee on the Rights of the Child (2009) argues that giving feedback to the child is a guarantee that the views of the child are not only heard as a formality, but are actually taken seriously in the decision-making process (para. 45). Therefore, a genuine interest should not only be shown in the views of the young person (see chapter 7, section 7.2.4), but it also implies that the judgment and sentence should be properly explained to the young person. Explaining the judgment and the choice for a specific sentence can be seen as a requirement that follows from the right to be heard (art. 12 CRC). Moreover, explaining the sentence helps the young person to better understand the process and its outcome, which in turn contributes to the perceived fairness of the youth court process (see chapter 4, section 4.3.3).

Hearings in chambers

In *Switzerland* the final decision that the prosecutor makes in a case is generally extensively explained to the juvenile defendant. The young person is asked whether he understands the decision and its implications and, if needed, the prosecutor gives additional clarifications regarding the reasons for ordering a certain measure or sentence and its content and the manner in which it is executed. Moreover, when community service is ordered, the practicalities are discussed with regard to when and where the work should be carried out (see the case at the start of this chapter). Other topics that are often discussed at the end of the hearing concern the process costs the young person has to pay, the liability for claims made by victims, the possibility to appeal against the decision, the registration of the offence and what the consequences are when the defendant is convicted of the same offence but when he has already reached the age of majority. During this part of the hearing there is always room for questions from the young person and his parents.

This is the judgment, did you understand it?

Do you agree with the judgment? (Zurich)

In the *Scottish* children's hearings system a similar practice is observed. The panel members ask the young person several times during the hearing if he still understands what is being discussed, especially when they receive clues that indicate that the young person does not understand something that is being discussed. At the end of the hearing the three panel members independently give their thoughts about whether the young person needs to be subjected to a supervision order. In this way the young person and his parents gain an insight into the reasons behind the imposition of a supervision order. The chair of the panel gives the final decision and the reasons, without adjourning the hearing. He once again makes sure that the young person understands what is decided. The Scottish Government has prescribed in the manual *Best practice for panel members* (2009) how the written account of the decision and its reasons, which the young person and his parents receive after the hearing, must be drafted. The decision and its reasons must be stated in plain English, which is understandable to everyone and long and complex sentences should be avoided (see also Comben et al., 2003).

At the hearings in chambers in *Belgium* the decision is given at the end of the hearing by the judge. In chambers, generally room is given to explaining the reasons behind the decision, what the consequences of the decision are and what will happen henceforth in the case. When the social worker is present, which is often the case, it is observed that he complements the explanation of the decision given by the judge, for example by providing practical information.

In *Germany*, the judge in chambers generally explains the sentence as well. In the case of a first offender community service is usually imposed. The judge explains the number of hours, when the community service should be finished and with which organisation the young person should get in touch. A printed copy of the judgment is given to the young person at the end of the hearing. In Munich this organisation has its office a couple of times per week in the court building. At the end of the hearing the judge makes an appointment for the young person on the same day, so that he can make the arrangements with the organisation for the fulfilment of the sentence. When the young person appears in

chambers to discuss his probation plan, the conditions are extensively explained. Moreover, it is discussed with the young person and the social worker whether a certain therapy (e.g. an alcohol or drug rehabilitation programme) is needed.

In *France*, a comparable approach is observed in chambers when a case is closed by the judge. The judge imposes a minor sanction and explains to the young person what the sentence entails. Usually, the judge also explains that with the fulfilment of the sentence the young person will not be sent to court for a formal trial. When the young person is heard by the judge in his position as a pre-trial judge the case is sent to the court for sentencing. In that case the explanation of what will follow is far less extensive, because the case is not closed and no decision has yet been taken. Mouhanna and Bastard (2011) note in their study that French youth court judges indicate that extensive explanations are especially needed when they impose an educational measure. According to the judges, the young person and his parents have to understand why a measure is imposed in order to gain their cooperation.

When a young person is heard at a pre-trial detention hearing in *the Netherlands* his statements are dictated by the judge to the clerk. The statements are typed and printed and the young person has to sign the document and he is given a copy. This means that the young person can hear what has been discussed once it is dictated and he is able to read through his statements, which may improve his understanding of what has been discussed and decided during the pre-trial detention hearing. This practice is also observed in *Switzerland* and *France*, although the statements are not always read out loud in both countries; instead the juvenile defendant reads it for himself before signing it.

The countries in which hearings in chambers take place are again classified into two categories; *extensively* and *somewhat* explaining the sentence (see Table 8.5). A positive outcome is the fact that the judgment and sentence are clarified extensively in countries where a lawyer is not always present at the hearing to represent the young person (i.e. in Germany, Scotland and Switzerland).

Table 8.5

Clarifying the judgment – chambers

<i>Extensive</i>	<i>Somewhat</i>	<i>Limited</i>
Germany	Belgium	
Scotland – children's hearing	France	
Switzerland	Netherlands	

Youth court hearings

As is the case in the prosecutor's office in *Switzerland*, the youth court judge generally explains the final decision quite extensively. The reasons for imposing a certain sentence, its content and implications are explained. And when it is asked by the parents or the young person the judge explains the registration of the conviction. The manner in which the judgment is explained by the judge is illustrated by the following excerpt:

I don't think it is very serious, it is a game. But you don't have the right to do such a thing with a child. Alright? It is going well with your parents, so you don't need a measure. You are still a child, so I have decided not to impose a sanction. Do you think my judgment is strict?
(Fribourg)

In the *German* juvenile court code it is stated that the written judgment must contain the reasons for the conviction and for the imposition of a certain measure or sanction. The mental and physical condition of the juvenile defendant should be taken into account in this regard. The reasons for the judgment can be withheld from the young person when it is expected to have a negative influence on the upbringing of the child (art. 54 Jcc). The youth court judge puts a great deal of effort into explaining the final decision to the young person as well. After rapidly reading the verdict and sentence and in judicial language, the judge explains what the sentence or measure entails in practice, the reasons behind ordering a specific sentence and he usually stresses what the consequences will be if the young person does not comply with the order. The judge uses this part of the hearing to provide the young person with a message. This generally

means that the judge urges the young person not to reoffend and to comply with the current sentence:

Make sure you stay on the right track, with all the help you receive. In the adult court you can receive a sentence of 6 to 8 months for this offence. You have been shown a double red card now. Detention is not needed now, but when you come back here you will receive it. (Munich)

When a conditional detention sentence is imposed, the young person is called to come to the judge in chambers at another moment. In such a case the probation plan and the conditions are more extensively discussed together with the social worker who supervises the probation.

An equivalent of the German practice is found, surprisingly enough, in the adversarial Scottish youth court. In *Scotland*, the judge generally only addresses the juvenile defendant personally when he gives his judgment. The sentence is briefly explained and the consequences, in case the young person does not comply with the conditions that are attached to a certain sentence (such as probation), are explained. Moreover, as is the case in Germany, the Scottish sheriff uses this part of the hearing to warn the young person against any future misbehaviour:

When growing up in this area, there appears to be a belief that spitting at police officers is not such a big problem. Recently, I have given one person 10 months in prison and another seven months for the same offence. I wanted to add you to my list of persons who I have locked up for this charge. However, I am persuaded by your social worker and your positive attitude. We are not going to accept the kind of behaviour you displayed, this behaviour is not going to occur again. I will also impose a probation order for 3 years. The reports will be sent to me and you will see me again. I will lock you up when you do not cooperate. It is up to you whether you want to spend a long time in Polmont⁵ or not, I don't think you want that. It is up to you if you take this chance. (Airdrie)

In *England and Wales*, the Magistrates' Courts (Children and Young Persons) Rules 1992 prescribe that 'on making any order, the court shall explain to the relevant minor the general nature and effect of the order'

⁵ Polmont is the name of a young offenders' institution in Scotland for people between the ages of 16 and 21.

(rule 11). The manner in which one abides by this rule differs, however. On the one hand, three lay magistrates can lead the youth court hearing. On the other hand, the hearing can be led by one professionally trained stipendiary magistrate or district judge. In the first case, it depends entirely on the individual chair of the magistrates to what extent an explanation is provided to the juvenile defendant regarding the reasons behind selecting a particular sentence and the content of that sentence. Moreover, when an explanation is given, it is usually directed towards the prosecutor and the defence lawyer. In turn, the lawyer has the task of providing the young person with an explanation of the judgment and sentence after the hearing is finished. The stipendiary magistrate, strikingly, gives a far more extensive explanation of his judgment. This justification for the judgment and sentence is given step by step and is more accessible for the young person, compared to the explanations given by the lay magistrates (see also Weijers & Hokwerda, 2003).

It should be noted, though, that the setting of the courtroom and the limited opportunities for young persons to participate at the English youth court hearing (see chapter 7) have their effect on juvenile defendants' understanding of the judgment as well. Research indicates that juveniles experience considerable stress, because of the fear of being sent into custody. This makes it very difficult for them to register and to keep up with the reasoning given by the magistrate (Hazel, 2003; Hazel et al., 2002). Feelings of stress can build up considerably during a trial, because a trial generally takes a fair amount of time (up to a couple of hours and sometimes spread out over several days). Moreover, lay magistrates always adjourn the case before they pronounce the judgment. This adjournment generally takes between 30 and 60 minutes, which is a fairly long time for young people to wait for an important decision. In the case of a trial, usually a sentencing hearing is scheduled once the young person has been found guilty. In the meantime the local Youth Offending Team prepares a pre-sentencing report (PSR). When the young person settles the case with the prosecutor a sentencing hearing is not held when it concerns a straightforward case and no discussion exists with regard to the type of sentence to be ordered. In more difficult cases a PSR is called for as well.

Compared to England and Wales, in *the Netherlands* often not much attention is paid to explaining the sentence.⁶ When the case is dealt with by one youth court judge, the judgment is pronounced immediately (art. 499 (2) in conjunction with art. 378 (1) Ccp) and this part of the hearing is open to the public (art. 499 (1) in conjunction with 362 (1) Ccp). Generally, judges explicitly explain how the judgment (i.e. guilty or not guilty) has been arrived at. However, it is rarely explained why a specific sentence has been chosen and what the underlying reasons are for the length of the sentence. Some judges ask the young person whether he understands what has been decided. However, this is not common practice in every court.

In *Belgium*, in the case of a hearing in court the judgment is written by the youth court judge after the trial has taken place. This means that a new hearing is scheduled in order to pronounce the judgment, which, just like the trial, is a public hearing. In many cases, however, the young person is not present when the judgment is pronounced and he receives it through the post. The judge is obliged to provide reasons for the judgment and to specify the length of a measure (art. 37 (2)(11) Jpc). When the young person and his parents are present at the hearing they receive a copy of the judgment. Otherwise it is sent to them (art. 61Bis Jpc). In less complex cases the judgment is pronounced directly after everyone has been heard in court. This is the case when it is clear that a supervision measure has to be prolonged or suspended (when the young person has turned 18 years, a sentence is already served in the preliminary phase and further supervision is not deemed to be necessary). As a consequence the judge does not always have to explain as much when the judgment is given in court, because preliminary interventions have already been started or have been rounded off.

Finally, this section concludes with quite a large number of countries where explaining the judgment and sentence is done very poorly. In *Greece*, for example, the prosecutor provides the necessary justification for a certain sentence and the judge commonly follows this line of reasoning. However, the justification by the prosecutor and judge is formulated strictly in judicial wording, which is difficult for the young

⁶ When a case is dealt with in a full court consisting of three judges (*de meervoudige kamer*) the judgment is pronounced at the latest two weeks after the trial has taken place and the defendant is not obliged to be present at the pronouncement of the judgment.

person to understand. The court social worker can only provide the young person with additional clarifications after the hearing has finished. The Greek youth court judge personally addresses the young person to a limited extent. However, at the end of the hearing he generally warns the young person not to reoffend:

You have to collaborate with your probation officer. Try to avoid missing appointments. This is your chance. If you don't take it, you will go to prison. (Athens)

In two other Southern European countries, France and Italy, even less weight is attached to the pronouncement of the judgment. In large courts in *France* the judgment is pronounced publicly (art. 14 Jci) at the end of the day for every juvenile defendant who has appeared in court on that particular day. Every defendant, together with his lawyer, parents (and/or other family members) and social worker, waits in the same courtroom until the judge delivers his judgment. In some courts, judgments are pronounced in between hearings, for example when the young person needs to be transported back to an institution. The judge sometimes gives additional explanations, clarifications or justifications for the sentence:

Do you know what community service means? That means working for the community. If you don't carry out this sentence properly, you will end up in prison. (Paris)

I refer you to the care of your parents, because it is the first time. Only the police and the justice system have registered this offence in their files for the duration of three years. (Paris)

Generally, though, the judgments are read out very speedily by the judge and, as a consequence, defendants find it hard to keep up. Therefore, young people depend on their lawyer for further information and explanations. A lack of time seems to be the most important reason for the judge to omit further explanations and reasons for the judgment and sentence.⁷

⁷ The judgment can be delayed by a maximum of one month in complicated cases, for example involving multiple defendants (art. 14 Jci). This has not been observed in the present study.

In *Italy* a comparable practice is observed, at least in the larger court of Rome. At the end of the day, juvenile defendants, parents and lawyers gather once again in the courtroom, after hours of waiting after the hearing has been closed. The judgment is read very quickly by the judge and is formulated in juridical terms. Moreover, numerous people walk in and out of the courtroom, creating a chaotic and noisy atmosphere. As a consequence, it is difficult to follow the reading of the judgment and sentence for a particular person and it is even more difficult for the young person to understand what is being said. Sometimes, even lawyers ask for the judgment to be repeated, because they do not hear or understand it. In smaller courtrooms, in for example Bologna and Turin, the judgment is explained to the young person in simple terms. However, proper reasoning with regard to why a certain sentence has been chosen is not given in these smaller courts either, certainly during the cases observed in this study. The justification for a particular sentence is only discussed when the young person is subjected to a provisional probation order (*la sospensione del processo con messa alla prova*). The implications for the young person of ordering this measure and the content of the measure are in this case important topics, because the young person has to abide by the conditions attached to the measure in order to prevent a harsher sentence.

In Ireland and Spain it is observed that juvenile defendants show a lack of understanding of the judgment when it is pronounced. In both countries the judgment is given in very brief wording and in juridical terms. Generally, no attention is paid to the reasoning behind imposing a certain sentence and no personal message is given to the young person to take home with him (see also Kilkelly, 2005). In *Ireland* it regularly occurs that the young person only understands that his hearing is finished when the next defendant comes in and takes his place in the dock. As is the case in the Anglo-Saxon countries, in *Spain* plea bargaining is common practice. This means that when the prosecutor and the defence lawyer have reached an agreement, the judge closes the case immediately by pronouncing the sentence. If a trial has taken place, the judgment is sent to the defendant through the post, which implies that the judge hardly plays any role in explaining the judgment and sentence. It was observed that several juveniles did not understand that they had received a sentence when they accepted a plea offer from the prosecutor. As a consequence,

when the judgment is pronounced the confusion among young persons is even more profound in such a case.

In Table 8.6 it can be seen that certain countries – *France* and *Italy* – perform worse with regard to explaining the judgment, compared to the two requirements discussed above. In general, in chambers the judgment and sentence are clarified to a larger extent. In *Germany* and *Switzerland*, however, this is done *extensively* in both settings.

Table 8.6

Clarifying the judgment – youth court

<i>Extensive</i>	<i>Somewhat</i>	<i>Limited</i>
Germany	Belgium	France
Switzerland	England & Wales	Greece
	Netherlands	Ireland
	Scotland – youth court	Italy
		Spain

Conclusion

The above-described results show that in the 11 countries the judgment is pronounced rather differently. The categorisation of countries (see Tables 8.5 and 8.6) is distinct from the categorisations concerning the first two requirements for understanding, because it does not show as profoundly the adversarial versus inquisitorial divide. On the one hand, in several countries no special attention is paid to explaining the judgment and the sentence that is attached to the judgment. On the other hand, in some countries this part of the hearing is used to give the young person a message to take home with him. Again, *Switzerland* and *Scotland* (the youth court hearing and the children’s hearing) are good examples. In *Germany* as well, the judge seizes the opportunity to provide the young person with explanations and advice on how to behave in the future.

Several southern European countries show less positive results. In various youth courts the pronouncement of the judgment is conducted rapidly and the young person is not addressed personally. In other countries the judgment is not orally presented to the young person, but is sent to him in writing. In that case the young person is not provided with any reasoning for the judgment and sentence by the decision maker.

8.2.4 Understanding the consequences

Discussing the moral side of the behaviour of the juvenile defendant can contribute to the young person's understanding of the consequences of his behaviour for others and his acceptance of responsibility for what he has done. Discussing this topic may contribute to the young person reflecting on his own behaviour and may eventually even contribute to the prevention of reoffending.

A first finding is the fact that in most countries involved in this study the judge, to some extent, appeals to the moral emotions of the juvenile defendant. The extent to which moral emotions are addressed during a youth court hearing, the moment at which this is done and the manner in which the youth court judge makes this appeal differs, though, between the countries in question.

Hearings in chambers

In *Switzerland* the young person is clearly the central figure in the juvenile justice procedure and he is addressed concerning his delinquent behaviour and its consequences (Cottier, 2006a; 2006b). It is observed, however, that the prosecutor does not morally condemn the young person explicitly. Sometimes references are made to the individual responsibility of the young person for what has happened and what the consequences are when he commits such an act as an adult (i.e. 18 years or older). However, references to the victims or the damage that has been caused by the offence are hardly ever observed. Only the more technical points with regard to claims by victims are discussed and the emotional consequences for victims are not considered. It seems that, as is the case in the *Scottish* children's hearings system, more emphasis is placed on the young person and the best appropriate way to deal with the offending behaviour (by means of a sanction or measure) and not so much on morally educating the young person. At a children's hearing very little attention is paid to the consequences of the offence for the victim. The focus is merely on the child and the consequences of the offending behaviour on the life of the young person. Sometimes a young person is warned not to reoffend, because once he is 16 years old he will have to appear in the adult criminal justice system:

Once you are 16 the rules of the game change, so keep out of trouble.
(Glasgow)

In *Belgium* a comparable practice is observed. At the preliminary hearings the focus is largely directed towards the personal circumstances of the young person and the protective measures that have to be put in place to prevent further offending. At these hearings the judge highlights the young person's own responsibility for what he has done and the consequences it has for him. Sometimes the consequences for victims or parents are highlighted. Concerning a young person that has reoffended it is observed that the judge can be very stern and admonishing towards the young person. Reoffending is in that case strongly rejected by the judge (see chapter 7, section 7.2.4; see also Christiaens & Goris, 2012).

In *the Netherlands* the pre-trial judge generally addresses the young person concerning the behaviour he has displayed and the consequences it has had for the victims of the offence. The consequences for parents or other significant other persons are usually not pointed out. The judge generally discusses the societal impact of the offence. This probably has to do with the fact that when a pre-trial detention hearing takes place a more serious offence has been committed or the young person has repeatedly offended. Young people in pre-trial detention often show regret during the hearing. A logical explanation for them expressing regret is the fact that juvenile defendants tend to give socially accepted answers, because they would like to be released and await their trial at home.

At the hearings in chambers in *France* usually an appeal is made to the responsibility of the young person for what he has done. For example, remarks are made about the fact that the young person could have known that he did something that is against the law and that he should take responsibility for the damage that he has caused. Some judges ask the young person how he feels about what he has done, so he has to reflect on the offence he committed:

How do you feel about it? (Grenoble)

How do you think about it today? (Toulouse)

Did you consider what could happen? (Toulouse)

In *Germany*, remarks are mostly made regarding the responsibility of the young person for his own behaviour as well. The judge warns the young person not to commit any further offences or that he has to commit himself to the execution of the sentence.

In Table 8.7 the countries in which hearings in chambers are observed are categorised according to the extent to which the consequences are addressed. Addressing the consequences of one’s behaviour is not done *extensively* anywhere, but it is observed to appear *somewhat* or to a *limited* extent.

Table 8.7
Addressing the consequences – chambers

<i>Extensive</i>	<i>Somewhat</i>	<i>Limited</i>
	France	Belgium
	Germany	Scotland – children’s hearing
	Netherlands	Switzerland

Youth court hearing

The youth court judge in Italy and Greece most explicitly makes an appeal to the moral emotions of the juvenile. In *Italy* the consequences of the young person’s behaviour for others are discussed and the feelings of empathy of the young person are regularly addressed during the hearing. The young person is commonly asked how he would feel when he imagines experiencing what he has done to others. When the young person does not respond genuinely enough to this question, he can expect to be lectured to by the judge, regarding good and bad behaviour, throwing away his future and the obligations he has towards society. The judge can also ask the young person to show regret; however, it is less common to do so. When a juvenile defendant does not show any emotions or responses to what the judge has said, certain judges can become angry. In that case the judge shows his anger by shouting at the young person and banging his fist on the table. When the parents are present, the judge involves them as well in addressing the moral emotions of the young person (see also chapter 7, section 7.2.5). The judge tends to blame, for example, the young person for making his mother cry in court. In that way

feelings of guilt experienced by the young person are addressed. The lack of regard for the explanation of the judgment and sentence (as has been shown in section 8.2.3) can be explained by the fact that the juvenile defendant is already addressed in this regard during the hearing. The fact that the judge extensively makes an appeal to the sense of responsibility of the young person and lectures him on the consequences of his behaviour makes up for the brief and formal pronouncement of the judgment and sentence.

In *Greece* it is common practice to reprimand the young person, often in strong wording, at the end of the hearing. The young person is made aware of the consequences of his behaviour and an appeal is made to feelings of regret and shame. Only in serious cases are the consequences for victims more extensively discussed. In Greece and Italy the young person is generally addressed with regard to his own personality and the judge sometimes even blames the young person for what he has done and gives warnings concerning his future behaviour. The addressing of moral emotions does not take place by means of a dialogue and the young person is hardly ever stimulated to think about the concrete short and long-term consequences of his behaviour for others, but is given a reprimand.

In *the Netherlands* it is also common practice for the youth court judge to reprimand the young person and to express his condemnation regarding the young person's behaviour. In general, at the youth court hearing the judge discusses the responsibility of the young person for what he has done. The following excerpt from a hearing illustrates this:

It is not only your New Year's Eve, but also other people's. And I don't think they have had a nice New Year's Eve. They fear for their safety. Luuk has to answer for that too. Jewellery has an emotional value. That makes it even worse. The same for the notebook, because of all the photographs in it. (Lelystad)

Indirectly, the judge can appeal to the young person concerning the feelings of victims, by asking him how he would feel if his parents, grandparents, brother or sister would be a victim of such a crime. Or by asking if he can imagine how the victim feels about what has happened to him:

How would you feel, if this happened to you? (Lelystad)

You should have stayed out of it. When that happens to you, you wouldn't like to be beaten up by someone. (Rotterdam)

When the judge inquires about feelings of guilt and regret, he sometimes asks the young person whether he will do something with those feelings, such as expressing them to the victim (e.g. by means of a letter of regret). Generally, critical remarks are only made with regard to the behaviour of the young person and not regarding his personality. Sometimes a prosecutor makes remarks with regard to moral emotions as well. This, however, happens far less often and the contribution of the prosecutor consists mainly of admonishing the young person. In this regard, an interaction is observed between the prosecutor and the judge. When the prosecutor has given the young person a stern admonition, the judge will exercise restraint. With this the different roles of the prosecutor and the judge are made clear to the young person. The prosecutor takes on a more condemnatory function, whereas the judge takes a more neutral stance. In the Netherlands, juvenile defendants are generally made aware of their responsibility and the consequences of their behaviour for others. However, it seems that the extent to which and the manner in which this is done depends strongly on the personal styles of the judge and prosecutor.

In the *German* youth court the judge devotes little attention to the consequences of the delinquent behaviour. When the judge has delivered the sentence he can make some remarks about staying on the right track and stressing the responsibility the young person should feel for the behaviour he has displayed (see Kurtovic & Weijers, 2010). However, it is not common for the judge to do so in every case and references to the victims of crimes (if there are any) are rarely made.

In the *English* youth court it is observed that the magistrates make an appeal to the sense of responsibility and feelings of empathy of the young person at the end of the hearing. The young person is for example asked how he would feel if he would be the victim of such a crime. In general, the magistrate speaks to the young person in a very stern manner. The admonishing manner in which the magistrate talks to the juvenile is comparable to the way in which the Greek and Italian judges talk to the young person, but the judges in the countries on the European continent have more room to bring their message across to the young person. The

English magistrates can only put their message across at the end of the hearing or trial when they impose a sentence.

At the youth court hearing in *Belgium* hardly any references are made by the judge with regard to the sense of responsibility of the young person for what he has done. Victims or their legal representatives can, however, be present at the hearing and are given the opportunity to put forward their claims. As a consequence, the juvenile defendant hears to what extent the victim has suffered physical and emotional damage and the extent to which the victim has struggled to rectify the damage. In certain instances the young person is seated directly opposite the victim in the courtroom and hears what the victim has gone through. However, the claims of the victims are purely monetary and the young person is not engaged in a moral dialogue concerning what he has done.

In the *Swiss* youth court not much attention is paid to admonishing the young person or discussing the consequences of his behaviour either. In some cantons in Switzerland, mediation is one of the ways in which cases are settled or it can be ordered as a measure by the judge (Hebeisen, 2010). This might explain why in court less attention is paid to the moral consequences of certain behaviour, because the young person can be referred to a mediation project. It has to be noted, however, that mediation or restorative justice projects are carried out in more countries throughout Europe, also where the consequences of certain behaviour are addressed more extensively in court, compared to Switzerland.

The admonitions, which are given to the young person in the above-mentioned countries, are absent in *France* and *Spain* as well. In these countries, remarks concerning the consequences of the offence for victims or for society as a whole, or admonitions were hardly ever observed. In Spain, for example, the judge sometimes admonishes the defendant after he has imposed the sentence:

Boys, you really should change your behaviour, especially before you turn 18. Otherwise you will be in serious trouble, ok? (Albacete)

In *Ireland* and *Scotland* references to moral emotions are absent as well. Paternalistic reprimands do occur, however, in the first place concerning the attire and attitude of the young person (i.e. remarks about having to sit

up straight, not to chew gum or to wear a baseball cap) and in the second place warnings are given with regard to reoffending, i.e. stating in forceful or threatening language what the consequences will be of appearing in court again. This can be illustrated by the following statement by a Scottish sheriff:

This is your last chance Colin. If you don't take it, you'll go to detention. You understand that? (Hamilton)

The categorisation of countries as provided in Table 8.8 resembles the categorisation provided with regard to the hearings in chambers; an appeal is made to the consequences of the offence either *somewhat* or to a very *limited* extent.

Table 8.8

Addressing the consequences – youth court

<i>Extensive</i>	<i>Somewhat</i>	<i>Limited</i>
	England & Wales	Belgium
	Greece	France
	Italy	Germany
	Netherlands	Ireland
		Scotland – youth court
		Spain
		Switzerland

Conclusion

Directing attention to the consequences of the behaviour of juveniles takes place differently among the 11 countries. Considering the consequences of the young person's behaviour receives the most attention in *the Netherlands, England and Wales, Italy* and *Greece*. The consequences for victims are brought forward by the judge and the young person is sometimes lectured and admonished. It depends on the personality of the judge to what extent this topic is highlighted, but doing so is not considered to be a taboo subject.

In the other countries involved in this study, making the defendant aware of the consequences of his acts is not a topic to be discussed at the

hearing; not in chambers and not in the youth court. The children's hearing in *Scotland*, the hearings in chambers in *Belgium* and the hearings in *Switzerland* are largely focused on the welfare of the young person and at the observed hearings in this study the consequences of the offence were hardly ever discussed.

8.3 Conclusion

From the findings of this study it can be concluded that the *Scottish* children's hearings system and the *Swiss* hearing at the prosecutor's office and in the youth court are best suited to contribute to juvenile defendants' understanding of the procedures. Substantial attention is paid to providing explanations to the young person during the hearing. Generally, the participation of social workers at the hearings seems to contribute to giving explanations, for example regarding a measure or sanction. In *Ireland*, *Scotland* (youth court) and *Spain* the judge is not involved in providing explanations to the young person with regard to what is taking place in court. This is a remarkable finding because in the latter countries all types of cases are dealt with in court, so also rather serious cases in which more explanations might be beneficial to the participation of the young person. In contrast, in *Switzerland* the prosecutor and the single youth court judge mostly deal with less serious cases in which it is expected that less explanations are needed.

With regard to avoiding the use of judicial jargon, the same countries appear to perform well. However, some countries seem to stand out. On the positive side *England and Wales* can be found, while on the negative side we can point to *the Netherlands*, where judicial jargon is often used compared to its neighbouring countries on the European continent. The participation of lay magistrates in the youth court seems to contribute positively to the avoidance of legal jargon.

Concerning the clarification of the judgment and sentence it is observed that, especially in *Ireland* and the Southern European countries, no special attention is paid to this part of the hearing. The lawyer, who is generally present, plays an important role in this regard in explaining the judgment. In some countries, the young person is given a message to take

home with him. *Switzerland* and *Scotland* (children's hearings) are again good examples of making use of this element of the hearing.

Appealing to the moral emotions of the juvenile defendant is interpreted rather differently among the 11 countries. In *the Netherlands*, *Greece*, *Italy* and *England and Wales* the consequences of the offence are discussed to some extent, while in the other countries this hardly ever appears to be done. It can be concluded that the hearings in *Switzerland* and the *Scottish* children's hearings cannot be considered to be an example of best practice with regard to this final requirement for effective participation.

Chapter 9

Conclusions

9.1 Introduction

This study revolves around the issue of the participation of juvenile defendants in the youth court. The European Court of Human Rights has put forward the notion that (juvenile) defendants should be able to participate *effectively* in a court hearing. Moreover, in international children's rights law it is stipulated that minors who are in conflict with the law should be dealt with by specialised youth courts and trained professionals. These two notions are combined in this study. The first aim of this study was to formulate requirements for effective participation in the youth court. The second aim was to study the actual participation of juvenile defendants in practice. Therefore, two central research questions were formulated:

1. *Which requirements for the effective participation of juvenile defendants in the youth court or other competent administrative body can be formulated on the basis of international children's rights law and standards and developmental psychological theory and research?*
2. *In which manner and to what extent are juvenile defendants enabled to effectively participate in the youth court or other competent administrative body in juvenile justice systems in 11 European countries?*

The first research question has been studied by means of literature research, combining legal sources and developmental psychological theory and research. The second research question has been studied by means of empirical research. In 11 European countries, in total, the cases of 3,019 juvenile defendants have been observed in 50 different youth courts and other competent administrative bodies (e.g. the Scottish children's hearings system).

In the following the conclusions of this study will be presented (sections 9.2 to 9.6), thereby providing answers to both research questions. Finally, some concluding remarks will be made that address key issues that emerge from this study (section 9.7).

9.2 A combined perspective: children's rights and developmental psychology

With regard to the participation of juvenile defendants in the youth court, key children's rights law and standards and case law can be identified. The children's rights law and standards that are addressed in this study can be found on the international and European level. The UN Standard Minimum Rules on the Administration of Juvenile Justice (the Beijing Rules) and the UN Convention on the Rights of the Child (the CRC) can be seen as most influential in this regard. Besides the Beijing Rules, the CRC and recommendations made by the UN Committee on the Rights of the Child, several additional European standards and the case law of the European Court of Human Rights have addressed the notion of participation in juvenile justice proceedings. These additional standards have further shaped the idea that juvenile defendants should be able to participate in juvenile justice proceedings.

The right to be heard in juvenile justice proceedings was first laid down in rule 14.2 of the Beijing Rules. It is stated that the proceedings should be conducted in an 'atmosphere of understanding' which allows the juvenile defendant to participate and to express himself freely. This provision has served as an example for the adoption of the broader right to be heard as formulated in article 12 CRC. The right to express oneself freely lies at the heart of this study.

Article 40 CRC has strengthened the legal position of minor defendants by formulating several procedural safeguards for a fair trial. It can be argued that article 40 CRC is based on two fundamental principles. On the one hand, the right to a fair trial for juvenile defendants is recognised in line with the procedural safeguards that also apply to adults. On the other hand, states are called upon to guarantee specialised treatment for juveniles in accordance with their age and maturity. In this study, it is argued that this special treatment entails that juvenile defendants should be able to participate effectively in the youth court.

Case law generated by the European Court of Human Rights has important implications for the concrete interpretation of what a fair trial for juvenile defendants should entail. According to the Court a fair trial entails that a juvenile defendant should be able to participate effectively in the criminal trial, with the assistance of his lawyer. The trial must be adapted to the intellectual abilities and the developmental stage of a juvenile defendant and it should not be held in public. The Court has recommended, in accordance with article 40 (3) CRC, that juveniles should be tried in specialised youth courts. Moreover, understanding the procedures in court is considered to be an important part of being able to participate effectively. Lawyers play an important role in explaining the purpose and nature of the process and what is discussed during the court hearing.

The CRC Committee has attempted to further crystallise the concepts of effective participation and adapted courtroom procedures for minors. Recent recommendations of the CRC Committee (2007, 2009) have strengthened the notion that juvenile defendants should be able to participate in juvenile justice proceedings. According to the Committee, to express one's own views freely and to understand what is happening in court are fundamental assumptions underpinning the right to a fair trial for juvenile defendants and contribute to effective participation.

From the analysis of international children's rights law and standards it can be concluded that the implication of article 12 CRC for youth court procedures is such that juvenile defendants should be encouraged to give their personal views on the criminal case and that professionals in court should consider these views seriously. Moreover, participation also presupposes that the juvenile defendant understands what is happening during the judicial proceedings in which he is involved. This means that the young person should be provided with adequate information and that language is used that he understands.

Children's rights law and standards support a developmental perspective on children. As a consequence, in order to achieve the effective participation of juvenile defendants adapted proceedings and specialised treatment for juvenile defendants should be in place to make true participation possible and to take into account the age, developmental stage and evolving capacities of the young person. Moreover, this

implicitly requires that juvenile justice procedures should be adjusted to fit the needs of children of different ages and with different capacities.

It should be noted, however, that an important shortcoming of most international children's rights law is the fact that states still exercise a large degree of discretion in the implementation of these provisions and few control systems are in place (see Freeman, 2007; Goldson & Muncie, 2012). The CRC is still ratified by states which have made reservations concerning certain provisions (also concerning articles 12 and 40) and the General Comments, although they are welcome supplements to the CRC, are not sufficiently directive with regard to the actual implementation of measures to ensure the effective participation of juvenile defendants. A recent positive development is the formulation of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (2011), which in the future will give children the possibility to file complaints regarding violations of rights set forth in the CRC. As yet, the protocol is not in force.

International children's rights law and standards can be further complemented and crystallised by insights drawn from developmental psychological theory and research. The participation of defendants in court is not only important for minors, but is of equal importance for adult defendants. However, juveniles are in the middle of their development towards maturity. Because of their incomplete cognitive and emotional development and the fact that they have less experience with interacting with authorities it can be argued that juveniles need extra assistance in the exercise of their right to be heard. Their views should not only be considered in accordance with their age and level of maturity (art. 12 (1) CRC), but because of their immaturity they should be provided with the adequate means to be able to express their views in the first place.

Requirements for a fair trial for (juvenile) defendants are laid down in several general human rights conventions, as well as the CRC. Tyler (2003, 2006a) has added a psychological dimension to the concept of fair trial by indicating elements that psychologically contribute to the perception of being treated in a fair manner. In this study, the judicial requirements for a fair trial are complemented by psychological requirements for a fair trial. In order to do so, theory and research concerning the concept of procedural justice were used in this study to come to a more complete understanding of a fair trial for minors.

Procedural justice can be defined by the quality of decision-making in court and the quality of the interpersonal treatment of defendants by court professionals. The decision-making process can be perceived as being fairer when decisions are taken in a neutral and unbiased way, i.e. by applying rules consistently across situations and persons. The interpersonal treatment can be perceived as being fairer when the defendant is able to voice his own account and/or opinion.

In this study it has been argued that participation in the youth court contributes both to the quality of decision-making and the quality of interpersonal treatment. Moreover, it contributes to the perceived legitimacy of the juvenile justice system and juveniles' acceptance of the final decision by the judge. In order to fulfil these requirements juveniles need special attention and assistance. This argument is made on the basis of research findings in the field of adolescent development.

Young people mature significantly during adolescence, both cognitively and emotionally. On the cognitive level, adolescents are able to think in more advanced, abstract, efficient and effective ways than children. However, their increasing cognitive abilities are hampered by several psychosocial factors. For example, susceptibility to peer pressure, an underestimation of inherent risks, impulsiveness and not being able to fully take into account the long-term consequences of one's behaviour. As a result adolescent behaviour is more reckless and adolescents tend to experiment more with different kinds of behaviour, including delinquent behaviour.

As a consequence of the ongoing and not yet complete cognitive and emotional development, adolescents' understanding of the juvenile justice process is not optimal. Several studies concerning the adjudicative competency of juveniles conclude that young persons below 14 years of age are not able to sufficiently understand a criminal court hearing. Apart from some exceptions, the average young person only starts to understand what it means to be criminally tried in court from the age of 14 onwards. Moreover, even older adolescents are not yet able to fully participate in a youth court hearing without the assistance and support of an adult and some research evidence suggests that intelligence might have a stronger impact on understanding than age.

Juvenile defendants need special assistance in the court process in order to be able to participate effectively and to experience procedural

justice. Many (young) adults also need this support, but – in line with the CRC – it can be stated that taking into account the best interests and the age and maturity of the child implies that extra attention should be provided to ensure the effective participation of juvenile defendants. It has been argued that lawyers and parents can play important roles in this regard. First, the lawyer can support the young person in preparing him before the hearing(s) and assisting the young person at the court hearing. He should explain the procedures, the judicial jargon and the rituals in court, such as the charges, what is expected of the young person and his rights. Second, parents are important providers of social support. In order to enhance the participation of juveniles in the youth court it is of importance to hear the parents as well. The views of parents can help the young person to better understand the impact of his behaviour on others (such as significant other persons). Moreover, involving parents in the juvenile justice process can contribute to the young person's acceptance of the sentence and the appropriate execution of that sentence. Assisting young people in court will lead to a better understanding of the process, which in turn will increase the perception of the young person that the process and the decision-making in court are indeed fair.

Summarising, the effective participation of juvenile defendants in the youth court is of importance, not only because participation is a fundamental right of the child (the right to be heard) or because it contributes to the young person's understanding of the juvenile justice process, but also because it contributes to the perceived fairness of the procedures and decisions made by authorities. On the basis of these assumptions concrete guidelines have been formulated as to how to ensure the effective participation of juvenile defendants in the youth court.

9.3 Requirements for effective participation

Juvenile defendants' right to be heard and the fact that juvenile defendants have a limited understanding of the juvenile justice process are taken as starting points to formulate directives in order for young persons to be able to participate effectively in the youth court. To enable juvenile defendants to participate in the youth court the judge and other professionals in court should fulfil certain tasks. These tasks refer to the

hearing of juvenile defendants and contributing to their understanding. By formulating requirements for effective participation the first aim of this study is complied with.

With regard to hearing a juvenile defendant, first of all it is of importance to create a suitable setting for hearing juvenile defendants. The atmosphere in the courtroom can be stern but should be accessible, that is juveniles and parents should be able to communicate with the professionals in court. Second, the judge should be trained in conversational techniques suitable for communicating with adolescents and the younger the child, the more important this is. Third, the most fundamental requirement for participation is the possibility for the young person to express his opinion freely concerning the alleged offence. Fourth, it is of importance that the story of the young person is considered seriously and that the judge is able to encourage the young person to tell his side of the story. Fifth, parents should be actively involved in the youth court proceedings as well, because young people feel that they are taken seriously when their parents are also heard.

Concerning the young person's understanding of the youth court process, the first and most fundamental requirement is being conscious of the fact that adolescents have a limited understanding of what is happening in the youth court hearing. Additional explanations and clarifications with regard to the purpose of the hearing, the order of the proceedings and the persons who are present as well as the roles they fulfil at the hearing are needed. Second, it is of importance to avoid judicial jargon (or to explain such jargon, when its use is inevitable). Third, it is crucial to provide reasons for the sentence that is imposed. Fourth, an appeal should be made to the moral aspects of the case. This should not be done in an abstract manner, but by pointing to the concrete consequences of the offence for victims and other important persons in the life of the young person and to the responsibility of the young person for his deeds.

Giving one's views and understanding the youth court process, together, are prerequisites for effective participation. However, hearing and understanding should not be seen as entirely separate notions as they are interrelated with each other. Providing explanations is necessary for the young person to be able to give his (informed) views, for example with regard to the proposed measure or sanction. The court setting and

atmosphere are also related to the extent to which explanations are provided and the extent to which the consequences of the delinquent behaviour are discussed. Moreover, clarifying the final judgment (orally as opposed to only in writing) can be seen as part of showing a genuine interest in the views of the young person and explaining to what extent these views have had an influence on the final decision.

9.4 General characteristics and the main actors

In order to be able to understand the context in which juvenile defendants are heard in the youth court or another competent administrative body, three general characteristics of juvenile justice systems have been outlined in this study, on the basis of national legislation and policies. Next to these three general characteristics it was of importance to dig deeper into the manner in which different professionals are involved in the juvenile justice system. Before turning to the presentation of the empirical results of this study (section 9.5), the general characteristics of the juvenile justice systems and the roles of professionals will be summarised.

9.4.1 Three general characteristics

The general characteristics of juvenile justice systems that have been analysed are the age limits of criminal responsibility, the relationship between juvenile justice and child protection and the legal tradition in which the juvenile justice system operates (i.e. the inquisitorial versus the adversarial legal tradition). The first notion defines which young people can come before a judge in the youth court. The second notion defines which types of cases are dealt with by the youth court judge; i.e. only criminal cases or also child protection cases. The third notion sheds more light on the legal tradition in which the youth court operates in specific countries.

1. Age limits

The CRC Committee has recommended that the minimum age of criminal responsibility should be at least 12 years of age and preferably higher. The minimum age of criminal responsibility is set at 12 years of age or higher

in half of the countries involved in this study (i.e. Belgium, Germany, Ireland, Italy, the Netherlands, Spain). In England and Wales, France, Greece, Scotland and Switzerland children can be tried, in principle, in court from an early age (i.e. from 8 to 10 years of age). The upper age limit is set at 18 years in every country, except for Scotland where it is set at 16 years.

The countries included in this study employ quite different lower and upper age limits. Across the 11 countries involved, children from the age of 8 to young adults up to the age of 21 can come into contact with the juvenile justice system. The settings in which these young people of different ages come before a judge or other decision maker differs markedly as well, i.e. from welfare hearings in chambers to formal trials in court (see section 9.5). It can therefore be concluded that in practice the implementation of age limits is complicated and nuanced, because it depends on factors such as the setting in which hearings are held and the dispositions that are available to the judge (see also Cipriani, 2009).

2. Juvenile justice and child protection

The extent to which child protection and juvenile justice are seen as separate jurisdictions influences the way in which the juvenile justice system operates and what the goals of the system are. In several countries involved in this study the child care and protection system and the juvenile justice system work fairly close together when a young person has committed a crime. In countries such as Belgium and Scotland a welfare system is in place in which young people who have committed an offence and those who are in need of care or protection are dealt with in the same manner. In countries such as Germany, Greece, Ireland, Italy and the Netherlands more distance exists between the child protection and the juvenile justice system, because in the latter system the focus is primarily on the allegedly committed offence and sanctioning and much less on the protection or support of the young person. When both fields of law operate independently, as is common in England and Wales and Spain, welfare considerations are less apparent in court and the emphasis is laid more on prosecution and sanctioning.

3. *The inquisitorial and the adversarial legal tradition*

Determining the truth is the overall goal of the criminal trial in both legal traditions; however, the manner in which this is done differs. In the inquisitorial legal tradition a dossier is compiled before the hearing, which is available to the judge, the prosecutor and the defence. At the criminal trial the judge has an active truth finding role. Because of the existence of a dossier not all the evidence has to be presented in court. The interaction between the judge and the defendant lies at the heart of the trial in the inquisitorial tradition. In the adversarial legal tradition the criminal court process revolves around two equal parties: the prosecutor and the defence lawyer. The trial does not take place on the basis of a dossier and in principle the two parties present all the evidence in court. The task of the judge is to oversee the whole process, to make sure that the trial is held in a fair manner and to bring in a verdict of guilty or not guilty.

In general it can be stated that the Anglo-Saxon countries show more characteristics of the adversarial legal tradition, whereas countries on the European continent show more characteristics of the inquisitorial legal tradition. It was expected in this study that the characteristics of the procedures, being either more adversarial or more inquisitorial, shape the role of the judge, the prosecutor, the defence lawyer and the juvenile defendant in court, and therefore this can have an important influence on the extent to and the manner in which juveniles can participate in court.

Although many hybrid forms of legal traditions in juvenile justice exist and none of the countries included in this study employs a juvenile justice system that is either purely inquisitorial or adversarial, acknowledging these structural differences between systems is of crucial importance.

9.4.2 *The main actors in the juvenile justice system*

The roles which the police, prosecutors, judges, lawyers, social workers and parents play in the juvenile justice process have an important influence on the extent to which and the manner in which juvenile defendants can participate in court. In general it can be concluded that between the countries numerous differences exist with regard to the roles of professionals.

With regard to the discretionary powers of the police it can be noted that in England and Wales, Ireland and the Netherlands, the police officially have the power to deal with juvenile delinquency cases. Diversion on the level of the prosecutor is possible in all the countries included in this study, except for Ireland and Italy. In every country a defence lawyer participates in the juvenile justice process. However, the presence of a lawyer is not guaranteed in several countries and throughout all phases of the process. This is the case in Germany, Greece, the Scottish children's hearings system and Switzerland.

The role of the youth court judge has been analysed by examining the extent to which the judge plays an active role in the proceedings. In several countries on the European continent, for example in Belgium and Germany, the youth court judge plays an active role throughout every phase of the process. This means that a specialised youth court judge hears the young person in the pre-trial phase and at the trial and he is in charge of the execution of the sentence as well. In Belgium it is even the same judge who performs all these functions in the same case and young people are, as a rule, dealt with by 'their own' judge. In the English-speaking countries, on the other hand, the judge has a rather passive role in the process. In these countries different judges hear the young person in the pre-trial and trial phase of the process and, in accordance with the adversarial legal tradition, the judge functions as a referee during the trial.

Social workers play an important role in the juvenile justice system. Their role depends, however, on the organisation of the juvenile justice system, for example whether the social services are directly attached to the youth court, which is the case in Belgium, France, Greece, Italy, Spain and Switzerland, or not directly attached to the youth court (in the English-speaking countries, Germany and the Netherlands). Moreover, the legal tradition in which the system operates also influences the role of social workers. In the inquisitorial legal tradition, social workers are involved with the juvenile defendant from an early moment in the process and they are given a more active role in the youth court. In the adversarial tradition, social workers come into play at a much later phase, when the guilt of the juvenile defendant has been established. Furthermore, their role in court is usually more limited.

Finally, it can be concluded that parents have different roles in different countries. In every country parents are civilly liable for the

damage caused by their child to a certain extent. Moreover, in several countries (i.e. England and Wales, Ireland, Belgium and France) parents can be held criminally responsible for the delinquent behaviour of their child. In most countries, parents are deemed to be present at the hearing of their child and in some countries, such as Scotland, Switzerland, Belgium and France, they can even be sanctioned for non-attendance.

9.5 To what extent are the requirements for effective participation met?

The second aim of this research was to study the fulfilment of the requirements for effective participation in practice in the youth court. Therefore, juvenile justice cases have been observed in 50 youth courts and other competent administrative bodies in juvenile justice in 11 European countries. The empirical findings of this study provide answers to this second research question.

9.5.1 Hearing juvenile defendants' views

In order to effectively hear the views of juvenile defendants, five requirements should be met, concerning 1) the less formal setting of the youth court; 2) the use of certain conversational techniques that are geared towards adolescents; 3) the opportunity for the juvenile defendant to give his own views on the case; 4) a genuine interest in the story of the young person, and 5) the involvement of parents in the proceedings.

In this study a distinction was made between hearings held in chambers and hearings taking place in court. This choice has been made during the course of the study, because it appeared that the setting in which a hearing before a judge or other decision maker takes place was of specific importance to the questions that are central in this study. Hearings in chambers included the first and subsequent pre-trial (detention) hearings, hearings in which the case was settled before one judge or a panel of lay members of the public. Hearings in court mostly included trials before one or more judges, but also pre-trial (detention) hearings, sentencing and sentence review hearings.

1. Setting

At one extreme, the Scottish children's hearings can be characterised as highly informal. The roundtable discussion creates an atmosphere in which communication between the different parties is enabled to a large extent. At the hearing only a limited number of people are present. Moreover, the hearing has a welfare-orientated approach and in this study social workers were always present. The expectation that the involvement of social workers contributes to the participation of the young person and his parents is substantiated by the observations of the children's hearings. The contribution of social workers and attention to the personal circumstances of the young person contribute to their effective participation. But the children's hearing does not have a stern or serious character with regard to the offence; i.e. the offence is hardly discussed and no critical or admonishing remarks are made with regard to the offence.

The judge in chambers on the European continent, such as in Switzerland, Belgium, France, Germany and the Netherlands, tries to find a middle course between a stern and serious atmosphere and enabling the participation of juvenile defendants and parents. The hearings in chambers in these countries can also be characterised by a minimum social and physical distance between the participants, a limited number of people present and an informal atmosphere. These factors help the judge to enable the young person to participate in the hearing. At the same time a discussion regarding the delinquent behaviour and its consequences is not avoided by the judge.

At the other extreme, youth court hearings in countries that have an adversarial legal tradition, but also hearings in court (instead of in chambers) in countries on the European continent are, as a consequence of the setting and atmosphere, much less geared towards hearing the views of juvenile defendants. This is mainly the case in the Anglo-Saxon countries and in the youth courts in, for example, France, Germany, Greece and the Netherlands. The hearings are held in large, classical courtrooms, procedures are formal and the social and physical distance between professionals and juvenile defendants is rather large. It can be concluded that in this setting it is rather difficult for the judge or other competent decision maker to enable the effective participation of the juvenile defendant.

2. *Conversation techniques*

A lack of well-developed interview techniques is a matter of concern in every country involved in this study. The impression has arisen from this study that only in the Scottish children's hearings system is slightly more attention paid to the training and education of professionals, in child development and age-appropriate ways of communicating with children and their parents. In Scotland a training programme is in place for panel members and in practice it appears that the panel members benefit from the training and supervision they receive. From the observations it became clear that in the other countries much can be gained from training judges, prosecutors and lawyers to promote better suited ways of communicating with juvenile defendants and parents, for example regarding the way in which they should address young people and their parents, the kind of questions they can ask and the appropriate manner in which to do so. In some countries, training programmes, for example concerning communication with adolescents, are available for judges (e.g. in Switzerland and the Netherlands), but it seems that these are not as extensive as is the case in Scotland.

3. *Hearing juveniles' views*

On the basis of the observations conducted in this study three groups of countries can be specified with regard to hearing the views of juvenile defendants; 1) countries in which the views of the young person and the discussion of his personal circumstances lie at the heart of the hearing. This was the case in the Scottish children's hearings system, hearings in chambers in France and Switzerland and youth court hearings in Switzerland and the Netherlands; 2) countries in which a dialogue between the juvenile defendant and the judge takes place, but merely directed by the contribution and questions of the judge. This was observed in chambers in Belgium, Germany and the Netherlands and at youth court hearings in Belgium, Greece, France, Germany and Italy; and 3) countries in which the views of juvenile defendants are hardly heard at all, which was observed in England and Wales, Ireland, Scotland and Spain.

It can be concluded from the results of this study that the adversarial characteristics of the youth court hearings in the last category of countries prevents the judge or magistrates from having a constructive dialogue with the young person. The role of the judge is to oversee the

process and not to conduct an interview with the juvenile defendant, because the prosecutor and the defence lawyer present the evidence to the judge. In countries in which the inquisitorial legal tradition is apparent the judge directly hears the young person and engages in a dialogue with him. Moreover, in these countries hearings in chambers are more prevalent and educational or protective measures can be imposed in reaction to a criminal offence. In the Anglo-Saxon countries these types of hearings are not observed at all, with the exception of the children's hearing in Scotland. It has been observed that in several countries, such as Belgium, France, Germany and Switzerland, the setting in which hearings (in chambers and in court) are held is more informal and more attention is paid to the personal circumstances of the young person, as opposed to strictly focussing on the offence.

It can therefore be concluded that, as was expected in chapters 5 and 6, the manner in which and the extent to which juveniles are heard in court is influenced by the legal tradition, because this influences the roles the judge, prosecutor and lawyer play in court. In the inquisitorial legal tradition, the judge has more room to personally hear the views of the young person during the hearing, because it is his task to do so in the light of truth finding. In the adversarial legal tradition the judge does not have this task, because truth finding takes place by means of hearing the accounts of the truth of the prosecutor and the defence lawyer.

4. Genuine interest

In several countries a genuine interest in the views of juvenile defendants was observed, most notably at the Scottish children's hearing, in Switzerland, France, Germany and the Netherlands, both at hearings in chambers and hearings in the youth court. In these countries, juvenile defendants are encouraged to give their own views and they are actively questioned about their personal circumstances. The possibility to impose welfare measures influences the role of the decision maker and the topics that are discussed during the hearing. When a welfare measure can be imposed, it makes it more important for the decision maker to actively encourage the young person to give his views on the matter at hand and to react genuinely to his views. This was clearly observed with regard to showing genuine interest in the views of the young person. In the adversarial youth courts in England and Wales, Ireland, Scotland and

Spain a genuine interest in the views of the young person was far less frequently observed, because his views were only heard to a limited extent in the first place. Moreover, welfare measures are not imposed by these youth courts.

5. Hearing parents' views

With regard to the participation of parents at a hearing, again the Scottish children's hearing can be seen as an example of good practice. Parents are actively engaged and questioned by the panel members because they are seen as important sources of information regarding the young person. Therefore, the views of parents are always taken into account in the decision-making process. This is the case in Switzerland and the Netherlands as well. In both countries, parents are seen as the primary educators of the child and they cannot be held criminally responsible for the behaviour of their child. This seems to have a positive influence on their participation in the juvenile justice process.

In countries on the European continent, but also England and Wales, parents are also involved in the procedures in the youth court to a certain extent. Although parents are generally present at the hearing in these countries their role remains rather small. The questions that are asked are mostly general by nature, for example concerning how the young person behaves at home or how it is going at school. In some of these countries (i.e. Belgium, France and Greece) parents can be held criminally responsible for the acts of their child, but in practice this does not seem to occur very often and therefore it does not have a large influence on the actual position of parents in court.

The youth courts in Ireland, Scotland and Spain show the worst results with regard to providing opportunities for parents to participate in the youth court hearing of their child. In Scotland, the fact that young people from the age of 16 are regarded as adults before the criminal law has as a result that parents are not given any role at the court hearing. Moreover, in these youth courts parents usually sit somewhere at the back of the courtroom, which does not contribute to their opportunities to participate. Again, as was expected in chapter 5, the legal tradition in which a juvenile justice system operates appears to have an important influence. It appears to shape parents' possibilities to participate.

Overall it can be concluded that the requirements for hearing juvenile defendants are best met in the Scottish children's hearings system and in the prosecutor's office and youth court in Switzerland. In these countries hearing juveniles, showing a genuine interest in their views and hearing parents is done extensively. On the other side of the coin, in the youth courts in England and Wales, Ireland, Scotland and Spain hearing juveniles and showing a genuine interest occurs to a limited extent. Hearing the views of parents is only done more extensively at the Scottish children's hearing, in Switzerland and in the Netherlands.

9.5.2 Juvenile defendants' understanding

In order to improve juvenile defendants' understanding of court procedures, four requirements should be met, concerning 1) explaining the purpose of the hearing, the procedures that are followed and the participants involved and their roles; 2) the avoidance of the use of judicial jargon; 3) the clarification of the judgment and sentence; and 4) the contribution to the understanding of the consequences of the offence.

1. Explanations

With regard to the explanation of procedures and participants and their roles in the youth court it can be concluded that a clear divide exists between countries in which the youth court procedures are influenced by the adversarial legal tradition and countries in which the inquisitorial legal tradition (or a welfare model) prevails. It can be concluded from the findings of this study that the Scottish children's hearings system and the Swiss hearings of the prosecutor and the judge are best suited to meet the first requirement of contributing to the understanding of the procedures. In these countries substantial attention is paid to giving explanations to the young person during the hearing. Moreover, the results of this study show that at hearings in chambers, as opposed to hearings in large courtrooms, more attention is paid to providing the young person with explanations. This might be interpreted as an unexpected result, because hearings in chambers in several countries (e.g. Germany, France and Switzerland) revolve around less serious cases and in chapter 6 it was expected that in more serious cases handled in court young people need more explanations to be able to participate effectively. However, in practice the contrary has

been found: in the youth court less explanations are given to juvenile defendants and in chambers more explanations are given.

Furthermore, it was expected that lawyers could contribute to giving explanations to young people. Although this might be true, at the hearings in Switzerland and Scotland in the majority of cases a lawyer was not present. The young person was provided with substantial explanations, so in that regard the presence of a lawyer was not strictly necessary. From this study it cannot be concluded whether more explanations were provided because of the absence of a lawyer at the children's hearing. However, no notable difference was observed in the amount of explanations at the Swiss hearing when a lawyer was present compared to when a lawyer was absent. Social workers play an important role at the hearings, because they, next to the judge, engage in giving explanations about possible sanctions or measures and therefore contribute to the understanding of the young person. In sum, it can be concluded that the informal atmosphere, the slight physical distances and the lower number of people present in chambers all contribute to giving explanations, irrespective of the seriousness of the case and the presence of a lawyer.

At the other extreme, countries can be found in which the youth court procedures show many characteristics of the adversarial legal tradition. At the hearings observed in Ireland, Scotland and Spain the judge was not involved in giving explanations to the young person with regard to what is taking place in court. However, this was also the case in Belgium and Greece, where in general the court procedures have more inquisitorial characteristics. It was observed that when the young person was not properly prepared before the hearing, this led to confusion and distraction during the hearing on the part of the young person. It can therefore be concluded that, especially in these countries, the lawyer has an important task in preparing the young person before the hearing and to explain what has been decided afterwards. At the hearings in the Anglo-Saxon countries and in Spain observed as part of this study, a lawyer was always present. However, from this study it does not become clear to what extent lawyers engage in providing the young person with information before and after the hearing.

In the countries that fall in between these two extremes explanations are given to a limited extent. The lawyer can therefore play a

crucial role in preparing the young person before the hearing. Moreover, in countries such as France, Germany and the Netherlands social workers play a role as well, because they can inform the young person and his parents before the hearing and in some cases assist them during the course of the hearing. However, when the youth court judge complements the task of the lawyer and social worker by giving explanations, the young person is even better equipped to understand what is happening in court. In these countries, however, it was observed that judges only gave explanations to a limited extent.

2. Judicial jargon

Concerning the avoidance of the use of judicial jargon the adversarial – inquisitorial divide is again apparent, although less profoundly. England and Wales, by virtue of their lay magistrates, score better on his point, while in the Netherlands judicial jargon is used more often compared to its neighbouring countries on the European continent. It can be concluded from the observations that within the inquisitorial tradition, especially at hearings in chambers, and at hearings in the youth court in France, Italy, Switzerland and England and Wales the use of jargon is less frequent. The understanding of the juvenile defendant is taken less into account in certain countries, particularly in Ireland, Scotland, the Netherlands and Spain, because legal jargon was in general used more extensively.

3. Judgment

Regarding the clarification of the judgment and sentence the categorisation of countries is not in agreement with the adversarial – inquisitorial divide that has been noted before. That is, from the results of this study it can be concluded that the judgment is not necessarily better explained in youth courts that show characteristics of the inquisitorial tradition. Especially in Ireland and the Southern European countries (i.e. France, Greece, Italy, Spain) at the observed hearings no special attention was paid to explaining the judgment and sentence orally at the end of the hearing. Lawyers are generally always present to represent the juveniles in these youth courts, so they can play an important role in explaining the judgment and sentence after the hearing has finished. To study the extent to which lawyers provided explanations to juvenile defendants and parents before and after the hearing was, however, not possible within the scope of this research. What is lacking in these countries in general is an

explanation to the young person about the extent to which his views have played a role in the decision-making and consequently the type of decision that has been taken.

The difference between hearings in chambers and hearings in court is, however, apparent. The judgment in chambers is always clarified at least to some extent. From the observations it can be concluded that Switzerland and Scotland (i.e. the children's hearings system) are again good examples of making use of this element of the hearing. In the more formal court hearing in Germany, the judgment and sentence are very well clarified and explained to the young person as well. After the judge has issued the judgment in juridical terms, everyone can sit down again and the sentence is explained to the young person in comprehensible terms. Moreover, this part of the hearing is clearly used to give the young person a message to take home with regard to avoiding future delinquent behaviour.

In some of the countries involved in this study the part of the hearing in which the judgment is given is open to the public. In large courts in France (Paris) and Italy (Rome) the judgments in all the cases handled on a particular day are given at the end of that day and all the defendants, parents and lawyers are present. In these courts no explanations of the judgment and sentence are given, so the publicity and the manner in which the judgment is given does not contribute to the understanding of the young person. In the Netherlands and Belgium the judgment is also given in public; however, it is given at the end of each youth court case and it is explained more extensively. In Germany, every part of the youth court hearing is closed to the public. So, it can be concluded that it does not become clear from this study whether the (non-)publicity of the judgment has an influence on how it is given.

4. Understanding the consequences

Appealing to the moral emotions of the juvenile defendant and thereby improving the young person's understanding of the consequences of his behaviour is done very differently among the 11 countries. No notable differences are observed between hearings in chambers and hearings in court and between the inquisitorial and adversarial traditions with regard to this requirement. In the Netherlands, Greece, Italy and England and Wales the consequences of the offence are in general discussed to some

extent. For example, in England and Wales this can take place after the young person has been found guilty. From this study it appears that in the remaining countries this requirement is hardly given any attention. Most notably, the Scottish children's hearings system and the Swiss practice have in common that the consequences of the offending behaviour were almost never addressed during the hearings observed in this study.

It can be concluded that the requirements for contributing to the understanding of juvenile defendants are best met in the Scottish children's hearings system and in the juvenile justice system in Switzerland (as is the case in hearing juvenile defendants as well). Although the consequences of offending behaviour are addressed to a limited extent, giving explanations, avoiding jargon and clarifying the judgment takes place extensively in these countries. Addressing the consequences of the offence is only done somewhat or to a limited extent in every country and in general nowhere is this done extensively. Overall, Ireland seems to show the worst results with regard to this set of requirements, because these are only taken into account to a limited extent.

9.6 Best practices

From the empirical results of this study two countries emerge as examples where several of the requirements for effective participation are employed to a large extent. In this section, the best practices as employed by these countries will be highlighted.

With regard to hearing the views of juvenile defendants, the Scottish children's hearing provides a clear example of how the requirements for effective participation can be met. The young person and his parents are at the centre of attention at the hearing, in order for the panel members to take the best appropriate decision. It can be concluded that a small (court)room, in which the different participants can hear and see each other clearly, greatly facilitates effective participation. The children's hearing is a good example of a hearing that is held in a small room, where everyone is seated around the same round table. The views of the young person are heard extensively, panel members show a genuine interest in these views and give a serious reaction and parents are given the opportunity to participate as much as their child. Moreover, social

workers play an important role at the hearing as well, because they can give the panel members information concerning the welfare needs of the young person and the best appropriate response to these needs. The views of the social worker are always heard and this practice might contribute to an atmosphere in which every participant is given the opportunity to give his views freely.

Concerning the atmosphere in the youth court it can be concluded that a hearing may contain stern and serious elements when the offence is discussed and the juvenile defendant is addressed concerning the offending behaviour he has shown. The children's hearing, as far as has been observed in this study, shows a lack of regard for the delinquent act itself and/or stern remarks concerning the behaviour of the young person from, for example, the panel members. Making the young person understand the consequences of this behaviour can be seen as a point of improvement for the children's hearing.

With regard to improving the understanding of juvenile defendants, the juvenile justice practice in Switzerland meets the requirements for understanding the youth court hearing to the greatest extent. At a hearing before the prosecutor or the judge it is ensured that the young person understands every step and every topic that is discussed, including the judgment and sentence. The purpose of the hearing, the presence of certain participants and their roles are explained to the young person. Judicial terminology is avoided to a considerable degree. Addressing the consequences of the delinquent behaviour does not happen very often. However, it seems that morally addressing the young person is slightly more common in Switzerland as opposed to the Scottish children's hearings system. The informal atmosphere that has been observed in Switzerland contributes to the understanding of the young person. Young people (and their parents) are encouraged to ask the prosecutor or the judge questions for clarification. Moreover, by virtue of its setting, professionals more easily notice incomprehension on the part of the young person. When a social worker is present he complements the task of the judge or prosecutor by providing information and explanations concerning certain measures or sanctions.

To some extent the expectations that were formulated in chapters 5 and 6 were substantiated by this study. The practices show that the welfare model as employed in Scotland and the inquisitorial legal

tradition that prevails in Switzerland influence the role of panel members, the judge or prosecutor in a positive manner. The professionals who conduct the hearing have many opportunities to personally hear the views of the young person. This might also have to do with the fact that child protection measures can be taken in both systems, as a response to offending behaviour. Moreover, the presence of parents and social workers and their active involvement seems to contribute to an atmosphere in which the juvenile defendant can participate effectively. In both countries, parents cannot be held criminally responsible for their child's behaviour and they have a duty to be present at the hearing.

However, the expectation that the presence of a lawyer contributes to the participation of juveniles is not substantiated by the results from these countries. In most cases no lawyer was present at the hearing, so the young person was not assisted in this regard by a lawyer. The other participants already provided many explanations about the procedures that were followed as well as the judgment and sentence. Therefore, it can be concluded from the observations that it is highly probable that the absence of a lawyer did not harm the understanding of the juvenile defendant substantially. Furthermore, the extent to which explanations were given cannot be explained on the basis of the severity of the case (as was expected), because, especially in Switzerland, most cases were of a less serious nature.

9.7 Concluding remarks: suggestions for the juvenile justice practice

Overall, it can be concluded that youth court practices differ substantially with regard to the extent to which the requirements for effective participation are brought into practice. Structural differences between systems, such as the legal tradition or the setting in which hearings are held, have an important influence on the participation of juvenile defendants.

To conclude this study a number of final issues, that are open to discussion, will be presented. First, the importance of the setting for effective participation will be discussed. Second, effective participation will be regarded in light of the inquisitorial and the adversarial legal

tradition. Third, the role of an independent judge and fourth, the role of legal representatives will be discussed. Finally, some directions for the future, arising from this study, will be formulated.

9.7.1 What is the importance of the setting for effective participation?

From the empirical findings of this study it can be concluded that the effective participation of juvenile defendants is influenced by several factors which are part of the setting in which juvenile justice cases are handled. The setting of the hearing forms one of the requirements for effective participation (see chapter 4, section 4.2.1). Three aspects of the setting will be discussed more thoroughly: 1) the attire of professionals, 2) the space in which hearings are held, and 3) the physical position of participants within this space.

1. Attire of professionals

An interesting point of discussion that has come forward in this study is whether professionals should wear gowns and wigs at a youth court hearing. As a response to the rulings of the European Court of Human Rights in inter alia the Bulger case, the British Ministry of Justice has formulated a practice direction concerning the treatment of vulnerable defendants, which includes young people below the age of 18. It is stated in this practice direction that in Crown Court cases involving minors gowns and wigs should not be worn or only in the sentencing phase of the process (Ministry of Justice, 2012). Moreover, the CRC Committee (2009) and the drafters of the guidelines on child-friendly justice (Council of Europe, 2010) comment that official clothing, such as wigs and gowns, should not be worn by professionals in juvenile justice procedures.

In this study it has become clear that practices differ substantially in and between countries; for example, at the youth court hearing in the Netherlands, Germany and Belgium the judge always wears a gown, whereas in chambers the judge in these countries generally does not. In Scotland (children's hearings system) and Switzerland (in chambers as well as in court), the countries that are highlighted as employing best practices, gowns (and wigs) are not worn by professionals. In general, it can be concluded that at hearings in chambers professionals do not wear

official clothing and it can be argued that this contributes to a more informal setting.

From the results of this study the impression arises that wearing a gown does not, at least, contribute to an setting in which the young person can participate to the fullest extent. However, whether it necessarily stands in the way of effective participation does not become clear from this study. It can be argued that when professionals wear a gown this delivers a message to the young person that he is at a hearing because of a serious matter and that he is taken seriously (see also Council of Europe, 2010, explanatory memorandum, art. 123). Therefore, it can contribute to the more stern and serious character of the hearing, during which the professionals are not afraid to discuss the offence and its consequences. Wearing a wig can be considered to be of a different nature and it might have a different influence on the participation of juveniles. It is namely part of a tradition and a performance that is presented by the professionals in court. A topic that should be further studied is to what extent wearing a gown or a wig and gown forms a hindrance to the effective participation of juvenile defendants.

2. *Space*

From this study it can be concluded that the hearings in chambers are examples of good practice with regard to the effective participation of juvenile defendants. Although the views of juvenile defendants are heard to a considerable extent in the youth courts in the Netherlands, Germany and France, juveniles are even better able to give their own views at hearings held in chambers. From the results of this study it can be concluded that a more intimate setting can be regarded as a basic requirement for effective participation. It can even be concluded that the informal setting contributes to effective participation, irrespective of the degree to which the judge is specialised in communicating with adolescents. For example, in Switzerland prosecutors who conduct hearings in chambers are largely specialised by many years of experience in working as a juvenile prosecutor and not because of the fact that they enrolled in courses concerning adolescent development and communication. Nevertheless, young people appearing before the Swiss prosecutor were largely enabled to participate.

It can be concluded that communication with a young person is facilitated when the space in which a hearing is held is rather small and every participant is able to sit within hearing distance of each other. Everyone can clearly hear each other and no microphones have to be used to communicate with each other. It has been observed in practice that speaking into a microphone places a burden upon adolescents to communicate freely. On the other hand, when the courtroom is large and no microphones are used the different parties cannot hear and understand each other. Most notably, adolescents feel very uncomfortable when they have to speak aloud (when their natural voice is soft) or when they are repeatedly asked to speak up.

3. *Physical position*

Next to the basic requirement of being able to hear each other, being able to see each other has emerged as an additional important feature of the setting. This might seem to be an obvious notion, but what this means, as has been theorised in chapter 4, is that in a smaller space people are better able to read each other's facial expressions. For the judge this is of special importance, because by being able to look at the young person directly and from a close distance, he is able to pick up non-verbal signs of, for example, incomprehension. Again, even judges who are not specially trained in communicating with children pick up these signs. This was for example clearly noticeable at the pre-trial detention hearings in the Netherlands, which are conducted by pre-trial judges who do not necessarily conduct other youth court hearings and who are often general criminal court judges. As a consequence of the physical position of the young person in relation to the judge, the judge conducting a hearing in chambers is better able to adapt his explanations and clarifications to the level of understanding of the young person.

Moreover, from this study it has become clear that in a more intimate setting the juvenile defendant is more inclined to ask questions if he does not understand something or would like to receive further explanations of a certain matter. In several countries it has been observed that judges tried to copy the more intimate atmosphere of a chamber in the general courtroom. In Belgium, Germany, Italy, the Netherlands and Switzerland this was for example done by placing the young person right in front of the judge's bench. As a result, the judge was able to look the

young person in the eye and to read his facial expressions and the young person was in a position to catch the judge's attention when he did not understand something. The distance between the judge and the young person is not as close as is the case in chambers and the judge is sitting at an elevated bench, as opposed to sitting at the same table and level as the young person and his parents. Nevertheless, this strategy contributed to a constructive dialogue between both parties.

Interestingly, hearings held in chambers in the countries included in this study, mostly concern less serious and less complicated cases. These cases require fewer explanations with regard to complicated judicial procedures or terms, although in this setting it is potentially possible to give more extensive explanations. In chapter 6 it was expected that generally in court more serious cases are dealt with, because those cannot be diverted by the police or prosecutor, and that because of the seriousness of these cases more effort needs to be put into contributing to the effective participation of juvenile defendants. Cases in which these explanations are very much welcome for the young person are usually held in standard courtrooms, which by virtue of their size are far less suited to contribute to the understanding of juvenile defendants. This is partly overcome in some countries by placing the young person right in front of the judge in the courtroom. However, in several countries this is not the case and as a consequence the participation of juvenile defendants is not optimal, although it concerns a serious case with serious consequences for the young person.

The presence and the physical position of parents can also be highlighted as an important feature of the setting. First, the presence of parents can be seen as a basic requirement for the effective participation of juvenile defendants. Taking the views of parents seriously contributes to the perception of the young person that his views are taken seriously as well. Moreover, parents can provide the decision maker with valuable information concerning their child and with their contribution they can make their child aware of the consequences of his behaviour for his wider environment. With these claims it is assumed that parents necessarily have a positive influence on their child. It should be noted that this is not always the case, however. One can think of parents who downplay their child's behaviour or who are involved in criminal activities themselves. However, in the large majority of cases parents have a positive influence

on their child and they have the best intentions for their child. So, in this study this large group of parents is taken as the starting point in considering the position of parents in youth court procedures and the positive influence they can have.

Second, the views of parents are heard most extensively at the Scottish children's hearing, in Switzerland and in the Netherlands. The practices in these countries have in common that the views of juveniles are heard extensively during the hearing. In line with hearing juveniles, parents are heard as well by the decision maker. Moreover, parents are seated close to the bench or right in front of the judge and generally not on the public benches in the courtroom. As was hypothesized in this study, placing parents within hearing distance and in sight of the judge relates to their active participation. Therefore, the physical position of parents in chambers and in court seems to contribute to their participation at the hearing.

Making judges and other decision makers aware of the importance of involving parents can contribute to their active involvement at the hearing. Still, much can be gained from training decision makers in the manner in which they can involve parents at the hearing in chambers and in the youth court, because in several countries parents only had a negligible role in the proceedings. These training programmes should include topics such as the physical position parents should occupy in the courtroom, the moment at which parents should be involved, the topics that can be discussed with parents and the manner in which questions should be asked.

It can be concluded that a more intimate and informal setting contributes to making the hearing more accessible for the young person and his parents. As a result, an informal setting proves to be best geared towards the effective participation of juvenile defendants. An intimate setting, however, does not necessarily imply that the atmosphere in chambers should be of a non-serious nature. The procedures at a hearing before a judge may radiate seriousness and a sterner ambiance can contribute to the juvenile's feeling that he is in court for a serious matter. Indeed, it should be clear to the young person that he is appearing before a judge because of a serious matter and that he can be asked to take responsibility for his behaviour. As has been argued before, wearing a gown might contribute to this. It is of importance to stress here that,

regardless of the informal setting in chambers, the requirement of enhancing the understanding of the consequences of one's behaviour should still be fulfilled.

As is the case with the physical position of parents, professionals should be more mindful of the influence of the physical position of the juvenile defendant in court and in chambers. Although professionals might consider it to be a minor issue, the setting and position of participants proves to be of great importance for the effective participation of juvenile defendants.

9.7.2 Is effective participation possible in the adversarial youth court?

Next to empirically exploring the participation of juvenile defendants in the youth court an important goal of this study was to draw a normative framework with regard to the concept of the participation of juvenile defendants in the youth court. From this normative framework requirements were proposed to guarantee the effective participation of juvenile defendants in the youth court hearing. These requirements serve the purpose of providing points of special interest when dealing with juvenile defendants in court. Professionals working in the youth court and policymakers in the field of juvenile justice can use these requirements to bring their local or national practice more into line with the normative framework as described in this study. Moreover, it should be stressed that the countries included in this study have an obligation to fulfil the demands that follow from the CRC – including article 12 – because of their ratification of the Convention. These demands do not only follow from empirical research results, but also from the judicial obligations attached to ratifying the CRC.

It should be noted, however, that national practices are largely influenced by the legal tradition in which a justice system is situated. The manner in and the extent to which the requirements for effective participation can be implemented depends, therefore, on the manner in which a juvenile justice system operates. In line with Brants' (2011) reasoning that rules cannot be simply imported into a country's justice system because they seem to work somewhere else, in this study it is not argued that every country should adopt a welfare model, such as the Scottish children's hearings system, because it is best geared towards

hearing minors. However, it is argued that efforts should be made to implement the requirements for effective participation in youth court practices to the greatest extent possible. This study shows that in every country some of the requirements are (fairly) well fulfilled, whilst others are not fulfilled. This means that basically in every country one or more requirements should be given extra attention, in order to enable juvenile defendants to participate to the largest extent. With this study, professionals working in youth courts and other competent administrative bodies and policymakers in the field of juvenile justice can be made aware of the gaps that exist in their system with regard to the fulfilment of the requirements for effective participation, as part of states' obligation to implement this fundamental right of juvenile defendants.

On the basis of the results of this study the question can be asked, however, to what extent is effective participation possible in the adversarial youth court, as it has been observed in England and Wales, Ireland, Scotland and to a certain extent in Spain as well? In order to enable juvenile defendants to participate effectively at the hearing an active role for the judge (or other competent decision maker) is required. By taking the lead at the hearing, the judge is in the position to ask the young person questions, to elicit reactions from the young person on what he has done and on his life in general and the judge is in the position to contribute to the young person's understanding of the procedures and the decision that is finally taken. This active role of the judge is largely hampered in the above-mentioned youth courts by the characteristics of the adversarial legal tradition. In this tradition the judge has the role of controlling the judicial process. The prosecutor and the lawyer have an active role in court, both arguing their case before the judge. These features prevent the judge from being able to enable the effective participation of juvenile defendants, as concretised in this study. The views of the young person and his parents are not personally heard by the judge and the judge and other professionals do not engage in contributing to the understanding of the young person by providing explanations, avoiding judicial jargon, explaining the judgment and pointing to the consequences of the young person's behaviour. The bulk of cases are settled by means of plea bargaining, which has as the result that the young person, his parents and the judge do not have an active role in the deliberations between the prosecutor and the lawyer.

Only on rare occasions, such as when a sentencing hearing is held after a trial or a probation review or sentence review hearing is held during the course of the execution of the sentence, is the judge in the position to enable the participation of the young person by fulfilling the requirements for effective participation. This is done by explaining the judgment more thoroughly and making the young person aware of the consequences of the offence. It should be noted that the English youth court hearing seems to score better on some of the requirements, compared to its adversarial counterparts in the other countries. This is the case with regard to involving parents, providing explanations, avoiding judicial jargon, clarifying the judgment and contributing to the understanding of the consequences of the young person's acts. Still, at the hearings in countries where the inquisitorial tradition is dominant, these and the other requirements are fulfilled at least to the same extent or much better.

From the results of this study it can be concluded that the fulfilment of the requirements for the effective participation of juvenile defendants is not possible in the adversarial youth courts in Europe. This is problematic in light of the obligations attached to international children's rights law. As has been noted before, every country included in this study has ratified the CRC. This means that these countries should fulfil the obligations of article 12 (2) CRC. As is shown in this study, in the adversarial youth courts it is clear that juveniles are not given the opportunity to be heard. Article 12 (2) states that 'the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law'. With regard to the last part of this provision it can be stated that countries in which adversarial youth court procedures are dominant cannot justify the poor participation of juvenile defendants in practice on the basis of the organisation of their legal system. Although in less strict wording, this is also confirmed by the CRC Committee (2009, para. 38). Therefore, youth court practices should be adapted and improved to enable the effective participation of juvenile defendants, irrespective of the legal tradition in which the youth court operates.

It can be concluded that individual countries, in which the adversarial legal tradition is dominant, should seriously invest in improving their juvenile justice practice. A first practical suggestion, with which countries can start to improve the participation of juvenile defendants, is to pay more attention to the immaturity and incomprehension of the young person and to support him throughout the trial. At the start of the hearing an introduction can be given in which it is explained what is being considered at the hearing, who the persons present at the hearing are and what their role will be, what will be discussed or decided at the hearing and why it is being done and according to which procedures. Moreover, during every step the judge can give the young person a personal update on what is discussed and what will be considered next. These explanations help to improve the participation of the young person. Second, the judge should hear the young person personally at a certain point during the hearing. He should obtain the views of the young person concerning the offence and his own circumstances. With regard to the offence this should not have to be an interrogation, but the simple question “How do you feel about what has happened” gives the young person the opportunity to give his own views. In line with this, the personal circumstances of the young person should always be given some attention, even when the case is closed by means of plea bargaining. The judge should ask the young person some questions regarding his personal life and how the offence has affected his life. Moreover, when the judge knows a little more about the young person, he is better able to adhere to the consequences of his offending behaviour and to give the young person a message to take home with him at the closing of the case.

9.7.3 Does an independent judge contribute to effective participation?

Another point of importance to highlight is the relationship between the requirements for effective participation and procedural safeguards for a fair trial. In the guidelines of child-friendly justice it is stated that child-friendly justice implies respecting children’s ‘rights to due process, to participate in and to understand the proceedings’ (Council of Europe, 2010, para. I, art. 1). The legal safeguards as well as the participatory rights of juvenile defendants should be incorporated in youth court

procedures. When looking at the juvenile justice process solely from a pedagogical perspective this might lead to paternalism, in the sense that the emphasis is laid on the welfare of the child and assistance, without the active involvement of the young person. It is argued here that procedural safeguards for a fair trial, as prescribed by international human and children's rights law, should not be lost track of in juvenile justice cases. As has been shown in this study, the European Court of Human Rights has made an explicit link between being able to participate and receiving a fair trial. Furthermore, from procedural justice studies we know that a person feels as though he is being treated fairly when court professionals show neutrality, a lack of bias, honesty, politeness and respect for the defendant.

One of the procedural safeguards for juvenile defendants enshrined in the CRC is the right to have the case dealt with by an 'independent and impartial authority or judicial body' (art. 40 (2)(b)(iii) CRC). It has been argued in this study that neutrality, as a sign of the impartiality of the judge, can be attained by using certain conversation techniques to hear juvenile defendants and by providing the young person with explanations concerning the procedures that are followed during the justice process.

However, with regard to the impartial stance of the judge it has been observed that in some countries, such as Belgium and Germany, the same youth court judge remains involved in every phase of the process; i.e. from imposing pre-trial measures, to conducting the trial and supervising the execution of the final sentence. In, for example, Belgium, the judge has extensive contact with the young person and his parents throughout the process. Generally, protective measures are imposed in the preliminary phase of the process, which are frequently reviewed and when the final judgment has been made the judge supervises the execution of the measure. As a consequence, the judge speaks with the young person in chambers quite often during the implementation of the judicial interventions and he knows the family very well. In France, this was common practice as well until 2013. Nowadays, the pre-trial youth court judge, who imposes measures in the preliminary phase, can no longer conduct the trial in court in the same case. This practice has been abolished to guarantee an independent trial judge for the juvenile defendant. However, the French pre-trial judge is still in a position to

close the case during this phase of the process, without conducting a full trial (see chapter 6, section 6.4.1). Since 1995, different phases of the juvenile justice process are always led by different judges in the Netherlands (see chapter 5, section 5.3.2).

To guarantee juveniles a fair trial, the question can be asked whether an independent judge should be competent in different phases of the juvenile justice process. The European Court of Human Rights has ruled in the case of *Nortier against the Netherlands*¹ that the impartiality of a youth court judge is not automatically in jeopardy when he has taken decisions in the pre-trial phase of the process (for example, concerning the imposition of pre-trial detention). According to the Court, the scope and nature of the decisions taken in the pre-trial phase of the process influence the extent to which the judge can be considered to be impartial in the process (para. 33).

From a pedagogical point of view, when young people see the same judge at every subsequent hearing this can have important advantages. First, it is easier to communicate with an adult who is already familiar to the young person, starting from the assumption that the judge is able to adequately communicate with the young person. When this is not the case or when the judge displays a negative attitude towards the young person, he might be better off seeing another judge in the subsequent phases of the process. Second, the judge who deals with the same case throughout the process knows more and possesses more information about the young person and his family. This might contribute to the imposition of the best appropriate measure or sanction. Third, prolonged contact with the same judge, who also supervises the execution of for example a probation measure, can have a positive influence on the young person. From this study it can be concluded that, apart from the participation of juvenile defendants at the hearing, judges can play an important role in supervising the execution of a sanction or measure. The judge is the person who explains to the young person what is expected of him at the start of the measure and the same judge cautions the young person when he does not comply with a measure during the course thereof. When this takes place in the more intimate setting of the judge's chambers (which is the case in Belgium, France and Germany) this probably has a positive impact on the effect of the intervention that is imposed on the

¹ ECtHR, 24 August 1993, Appl. no. 13924/88.

young person. However, future studies should further explore the role that the judge plays in the execution of sentences.

Although prolonged contact between the judge and the young person may contribute to effective participation, it is not the only factor contributing to it. As is shown in this study, effective participation is the result of a combination of factors and complexities operating in juvenile justice systems. For example, the fact that the preliminary hearings in Belgium are held in chambers contributes to the participation of young people. Moreover, the inquisitorial legal tradition in which the Belgian and German youth courts operate contributes to effective participation as well. In this regard, the youth court practice in France and the Netherlands does not differ as much on certain points from the one in Belgium and Germany, where the same youth court judge is competent in every phase of the process. The juvenile justice process in France, for example, has distinct inquisitorial characteristics: preliminary hearings are held in chambers, protective measures can be imposed in the preliminary phase of the process and the trial judge supervises the execution of the sentence.

Overall, it can be concluded that juveniles in these continental European countries can rather equally participate in the juvenile justice process, irrespective of whether they appear before the same judge at every hearing. Therefore, it is argued here that seeing the same judge throughout the process is not necessarily a prerequisite for effective participation. However, starting from the pedagogical advantages attached thereto, seeing the same judge is recommended. At the same time, the right to an impartial judge should not be jeopardised and should always be available to every juvenile defendant and in every phase of the process. Juvenile defendants should have the right and opportunity to ask for an independent judge to handle their case at all times when they believe that their case is not being dealt with in an impartial and neutral – i.e. a fair – manner.

9.7.4 What is the importance of legal representation for effective participation?

In some of the countries involved in this study very good results are found with regard to effective participation, for example in Switzerland and the Scottish children's hearings system. However, in some countries certain

procedural safeguards are marginally in place for juvenile defendants. One of these safeguards is that legal or other appropriate assistance should be available in every phase of the process (see art. 40 (2)(b)(iii) CRC). With regard to the appointment of a lawyer it can be stated that not every juvenile defendant in the 11 European countries included in this study is assisted by a lawyer throughout every phase of the juvenile justice process. This was for example observed at the hearings in court and in chambers in Germany, Greece, Switzerland and the children's hearings in Scotland.²

It was expected in this study that the absence of legal representation does not only have consequences for the young person's stance in the process from a legal perspective, but also for his participation in the youth court (see chapter 4). For reasons of principle, to ensure equality of arms juvenile defendants should be provided with legal assistance in every phase of the process. Moreover, it has been shown in this study that, with regard to effective participation, lawyers can contribute to the juvenile's understanding of the process, for example by providing him with explanations before and after the hearing. This has not been found, though, in every country and for every type of hearing. Therefore, the question arises whether the basic procedural safeguard of being assisted by a *lawyer*, as prescribed by the equality of arms principle, should be available to every juvenile defendant and in every phase of the process and in every setting in which juvenile justice procedures take place.

In some of the juvenile justice settings described in this study the presence of a lawyer might not seem to be strictly necessary for the effective participation of juvenile defendants. Consider, for example, hearings which are held in an informal setting and where explanations are provided by the judge (or other decision maker) and social workers. Moreover, these hearings only concern minor offences for which light sentences can be imposed, such as a warning and/or a limited number of hours of community service. A practical obstacle to effective participation is the fact that the informal atmosphere at the hearing might be harmed by the presence of another legal professional. As a consequence, more people are present at the hearing and the discussions might become more legally-

² In addition, in other countries the appointment of free legal assistance is not guaranteed at other levels of the juvenile justice system. For example, this is the case in the Netherlands when the young person receives a sanction from the police (a Halt sanction) or from the prosecutor (community service or a fine) (see chapter 6, section 6.3).

oriented, as opposed to welfare-oriented. It can be argued that this makes it harder for the young person to understand everything that is discussed, to contribute to discussions at the hearing and to have room to express his views freely. Moreover, it is argued here that the decision maker is in a position to contribute sufficiently to the effective participation of the juvenile defendant and at the same time to keep an eye on his procedural rights. A social worker or the parents are in a position to provide the young person with emotional support during the process. So, should the procedural safeguard of being assisted by a lawyer be guaranteed at any costs?

From this study it becomes clear that preserving the informal atmosphere in the youth court should be aimed at, because this contributes markedly to the effective participation of juvenile defendants. Moreover, the CRC prescribes that every child involved in justice procedures should be guaranteed ‘to have legal or other appropriate assistance in the preparation and presentation of his or her defence’ (art. 40 (2)(b)(ii) CRC) and to have the case handled ‘in the presence of legal or other appropriate assistance’ (art. 40 (2)(b)(iii) CRC). This implies that assistance should not necessarily have to be provided by a lawyer, but that another person can also provide such appropriate assistance (see also the case of *S.C. against the United Kingdom*,³ CRC Committee, 2007, para. 50). For example, in minor cases parents or a social worker can assist the young person in the process, next to the role the judge or prosecutor plays at the hearing. The CRC Committee (2007) argues that others (such as social workers) can also provide such assistance ‘but that person must have sufficient knowledge and understanding of the various legal aspects of the process of juvenile justice and must be trained to work with children in conflict with the law’ (para. 49). The Committee does not see parents as the appropriate persons to provide the young person with legal assistance in juvenile justice procedures.

It should be stressed here that notwithstanding the informal atmosphere in some countries’ juvenile justice procedures, far-reaching measures can be taken, which include placements in closed or semi-closed institutions. As a consequence, in these cases the absence of a lawyer can result in a substantial disadvantage for the juvenile defendant. If a longer sentence, which has a greater impact on the life of the young person, is

³ ECtHR, 15 June 2004, Appl. no. 60958/00, para. 29.

being considered (for example, placement in an institution), the presence of a lawyer is highly recommended. This has been confirmed by the European Court of Human Rights in the Güveç case against Turkey,⁴ in which it is stated that because of the lack of legal assistance the juvenile defendant was not assisted to the largest extent in participating at the hearings (para. 132). The Dutch Supreme Court has also confirmed this, by ruling that the presence of a lawyer presumes that the lawyer informs the juvenile defendant about the sanctions that can possibly be imposed. This was even determined in a less serious case which involved the endorsement of a young person's driving licence. The fact that the young person was not informed by the court of the possibility of imposing this particular sentence was not seen as a violation of good procedures, *inter alia* because he was represented by a lawyer.⁵

In serious cases involving far-reaching sentences, for example involving out-of-home placements, a minor should be assisted by a legal professional in every phase of the process. However, in order to enable the effective participation of juvenile defendants the need for a specialised lawyer is argued for here. Lawyers should adhere to certain requirements for *child-friendly defence*. This study underscores the conclusions by both Ten Brummelaar and Kalverboer (2011) and Kilkelly (2005). In the first study it is concluded that although juvenile defendants see their lawyer as a 'partner' in their case, they are generally of the opinion that their lawyer does not have enough time and attention for them (Ten Brummelaar & Kalverboer, 2011, p. 70). Kilkelly (2005) recommends in her study of the Irish children court that lawyers should undergo 'professional education training as a matter of urgency. This should include training on the relevant criminal law (...). Those representing children in criminal cases should also be required to undertake training incorporating child advocacy and communication and (...) social policy, child psychology and criminology' (Kilkelly, 2005, p. 77). Moreover, the CRC Committee (2007) argues that states parties should 'provide as much as possible for adequate trained legal assistance, such as expert lawyers or paralegal professionals' (para. 49) and it recommends 'specialized defenders' (para. 92). Only by educating lawyers in the field of juvenile justice and requiring them to specialise themselves will they be able to make a

⁴ ECtHR, 20 April 2009, Appl. no. 70337/01.

⁵ HR 28 August 2012, LJN BX3807, NJ 2012, 506.

substantial contribution to the effective participation of juvenile defendants. It is of importance that lawyers are made aware of the importance of giving juvenile defendants enough room to express their views freely in the youth court and that they can contribute substantially to the overall understanding of the young person of the juvenile justice process, the procedures that are followed and the final outcome of the hearing.

9.7.5 Directions for the future

From the results of this study and the discussion topics that emanate from the results three recommendations will be made in this section for future research and policymaking.

- 1. The UN Committee on the Rights of the Child should formulate a General Comment concerning the implementation of article 12 CRC in juvenile justice*

First, it is recommended that the CRC Committee further substantiates the practical implementation of the right to be heard in juvenile justice procedures. Because of the large number of countries that have ratified the CRC and the fact that in these countries several different interpretations exist of the administration of juvenile justice, it is of importance to provide the states parties with more firm and concrete instructions on how to implement the right to be heard. This is especially of importance in light of the result that justice systems operating in the adversarial legal tradition are hardly able to ensure the effective participation of juvenile defendants. Therefore, it is recommended that the CRC Committee formulates a General Comment devoted entirely to the participation of children in ‘judicial and administrative proceedings’ (art. 12 (2) CRC) and gives special attention in this document to children who are in conflict with the law. More concrete directions can force states parties to reconsider their juvenile justice practice: Is the juvenile justice system just a copy of the adult criminal justice system with some minor adaptations or is a specialised and adapted juvenile justice system in place, in which the right to be heard is firmly grounded?

On the basis of this study it can be argued that General Comment no. 12 provides too narrow a basis for the implementation of the right to be heard in juvenile justice in practice. Article 12 (2) CRC, in which the right to be heard is provided for in judicial and administrative proceedings, is concretised in paragraphs 32 to 39 of the General Comment. Children in conflict with the law are specifically referred to; however, the recommendations are still very broad and open to interpretation (see for example the statement that ‘Proceedings must be both accessible and child-appropriate’ (para. 34), which is not further concretized by the Committee). The same can be said with regard to the five steps for the implementation of the right to be heard, which are not geared specifically towards the implementation of this right in juvenile justice (paras. 40-47). Furthermore, the child’s right to be heard in penal proceedings is elaborated upon in paragraphs 58 to 61. These paragraphs also contain rather broad statements, such as that the child should have the opportunity to be heard during every stage of the judicial process (para. 58), that the child should be properly informed (para. 60) and that hearings should be conducted behind closed doors (para. 61). Therefore, General Comment no. 12 can be considered to be too general and too brief with regard to the implementation of the right to be heard in juvenile justice procedures.

The CRC Committee should consider further developing the topics as discussed in the previous sections of this chapter, concerning the setting in which juvenile defendants should be heard, the manner in which juvenile defendants are involved in the juvenile justice procedures in the adversarial and inquisitorial legal tradition, whereby the Committee takes a stance with regard to the possibilities for implementing this right in the different legal traditions, and the role of decision makers and legal presentation in the practical implementation of the right to be heard. Moreover, what is lacking in General Comment no. 12 is due consideration for the notion of the evolving capacities of the child with regard to juvenile justice. The Committee should further develop this notion, taking note of scientific knowledge concerning adolescent development, with regard to adolescents’ understanding of juvenile justice procedures and the manner in which they can be heard most effectively. To put it in more concrete terms, the new and still to be formulated General Comment should dig deeper into topics such as the physical space in which hearings should take place, the presence of different participants

at the hearing, their physical position and their role, the actual fulfilment of the *in camera* principle, the role of the decision maker at the hearing and in the execution phase of the process, the role of a representative for the young person, the role that parents play in the process and the role the young person plays in the fulfilment of his right to be heard.

Moreover, the CRC Committee should monitor the actual implementation of these instructions in practice. In the concluding observations of the Committee as a response to the general reports of the states parties, the Committee should formulate concrete recommendations with regard to the implementation of the right to be heard in juvenile justice.

2. *Professionals working in the field of juvenile justice should be specialised and trained in the fulfilment of the right to be heard in juvenile justice*

Second, the specialisation of (legal) professionals in the field of juvenile justice has emerged as an important topic to be considered. In this study, it is argued that minors should be handled within a separate and adapted juvenile justice system, in order to take into account their age and level of maturity. A special system requires that professionals are specialists in the field of juvenile justice. In section 9.7.4 it has been argued that a lawyer does not necessarily have to be present at certain hearings which involve minor cases, but that requirements for child-friendly defence should be developed to which lawyers should adhere when they are involved in a juvenile justice case. Future research should also focus on the involvement of lawyers before and after the hearings in the youth court, i.e. to what extent they are in touch with the young person and his parents and provide them with information concerning the case.

Moreover, next to formulating requirements for child-friendly justice and child-friendly defence (see section 9.7.4), much more attention should be paid to educating and specialising every professional working in the field of juvenile justice. From this study it has become apparent that many professionals, such as judges, prosecutors and lawyers, hardly receive any training in child development and in communicating with adolescents in the juvenile justice setting. Especially in smaller jurisdictions or in rural areas, judges deal with all sorts of cases and they

are not specialised in dealing with juvenile defendants. Precisely because it is argued in this study that a lawyer does not necessarily have to be present at every hearing, it is of importance that every actor in the juvenile justice system is specialised. In order to enable juvenile defendants to participate effectively, the training and specialisation of professionals is much needed. Juvenile justice should not be seen as a training ground for working in the adult criminal justice system, but it should instead be seen as a separate field of expertise.

The specialisation of juvenile justice professionals is a topic that is highlighted in international children's rights law and standards as well. The governments of the states parties to the CRC are the first to be responsible for the implementation of the rights set forth in the Convention. The same holds true with regard to judgments of the European Court of Human Rights. The specialisation of legal professionals can, however, also be seen as a task of the professionals themselves. The manner in which legal professions are organised differs per country and so is the manner in which the specialisation of professionals in juvenile justice is or will be organised. It should be stressed, though, that states' governments bear the final responsibility for the professionalization and specialisation of judges, prosecutors, other decision makers and lawyers in the field of juvenile justice. Governments should therefore take action when professionals do not set up specialisation and training courses within their profession.

3. Minors should only be prosecuted in the juvenile justice system when they are at least 14 years old

Third, the CRC Committee (2007) has recommended that the minimum age of criminal responsibility should be at least 12 years of age and preferably a higher age. In this study it is shown that adolescents, generally, are capable of understanding what it means to come before a judge when they are 14 years of age or older. The countries included in this study employ lower age limits of between 8 and 18 years of age. Only in 4 out of the 11 countries is the MACR set at 14 years or higher. The final recommendation arising from this study is that only juveniles who are at least 14 years old should be prosecuted, because they are generally considered to be fit to stand trial.

On the basis of earlier studies it can be questioned whether young people below the age of 14 can understand the procedures and the judicial consequences of their behaviour at all. Moreover, in this study it is shown that legal professionals are by and large not specialised and additionally trained to enable the effective participation of juvenile defendants. Communicating with young people in the juvenile justice setting demands specific skills and abilities from legal professional. This is especially the case when one needs to communicate with young people who are still below the age of 14. It is therefore not realistic to assume that these young people can effectively participate in the juvenile justice system. For the effective participation of juvenile defendants a highly skilled judge and an adapted, more informal setting are needed. Although several best practices were observed in this study, still in many countries juvenile justice professionals are not thoroughly trained. As a consequence, it is virtually impossible for young people below the age of 14 to participate effectively in the youth court.

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Appendices

Appendix 1

Number of observed juveniles per country and setting

Table 1.1
Belgium

	<i>Antwerp</i>	<i>Bruges</i>	<i>Dendermonde</i>	<i>Ghent</i>	<i>Mechelen</i>	Total
Chambers – pre-trial	28			7		35 (30%)
Youth court	38	12	13	5	12	80 (70%)
Total	66	12	13	12	12	115 (100%)

Table 1.2
England & Wales

	<i>Liverpool</i>	<i>London</i>	<i>Sheffield</i>	Total
Youth court – hearing	192	11	111	314 (87%)
Youth court – trial	35	2	9	46 (13%)
Total	227	13	120	360 (100%)

Table 1.3
France

	<i>Evry</i>	<i>Grenoble</i>	<i>Paris</i>	<i>Toulouse</i>	Total
Chambers – pre-trial	24	4	19	8	55 (40%)
Youth court – trial	8	8	65	1	82 (60%)
Total	32	12	84	9	137 (100%)

Table 1.4
Germany

	<i>Bergisch-Gladbach</i>	<i>Berlin</i>	<i>Cologne</i>	<i>Munich</i>	<i>Weilheim</i>	Total
Chambers				23		23 (17%)
Youth court	27	15	20	32	7	101 (75%)
Youth court – full court	3	2		5		10 (8%)
Total	30	17	20	60	7	134 (100%)

Table 1.5
Greece

	<i>Athens</i>
Youth court – hearing ¹	271 (72%)
Youth court – summary trial	91 (24%)
Youth court – full court trial	16 (4%)
Total	378 (100%)

Table 1.6
Ireland

	<i>Dublin</i>	<i>Limerick</i>	<i>Tallaght</i>	<i>Total</i>
Youth court – hearing	417	10	10	437 (100%)
Total	417	10	10	437 (100%)

¹ Only juveniles accused of road traffic offences.

Table 1.7*Italy*

	<i>Bologna</i>	<i>Rome</i>	<i>Turin</i>	Total
Youth court – pre-trial	14		7	21 (30%)
Youth court – full court trial	13	30	4	47 (66%)
Youth court – appeal			1	1 (1%)
Unknown	2			2 (3%)
Total	29	30	12	71 (100%)

Table 1.8*The Netherlands*

	<i>North/East²</i>	<i>West³</i>	<i>South⁴</i>	Total
Chambers – pre-trial	50	107	11	168 (21%)
Youth court – trial	79	434	86	599 (75%)
Youth court – full court trial		22	8	30 (4%)
Total	129	563	105	797 (100%)

² Almelo, Arnhem, Groningen, Leeuwarden, Lelystad, Zutphen, Zwolle.

³ Alkmaar, Amsterdam, Haarlem, Rotterdam, The Hague, Utrecht.

⁴ Breda, Den Bosch, Roermond.

Table 1.9
Scotland

	<i>Airdrie</i>	<i>Glasgow</i>	<i>Hamilton</i>	Total
Youth court – hearing	150		152	302 (91%)
Youth court – probation review	7		3	10 (3%)
Youth court – trial	3		6	9 (3%)
Children’s hearing		10		10 (3%)
Total	160	10	161	331 (100%)

Table 1.10
Spain

	<i>Albacete</i>	<i>Madrid</i>	Total
Youth court – hearing	20	121	141 (82%)
Youth court – sentence review		30	30 (18%)
Total	20	151	171 (100%)

Table 1.11
Switzerland

	<i>Basel</i>	<i>Fribourg</i>	<i>Glarus</i>	<i>St. Gallen</i>	<i>Zürich</i>	Total
Chambers – prosecutor’s office	4		5	2	10	21 (24%)
Youth court – hearing		65				65 (74%)
Youth court – full court	1	1				2 (2%)
Total	5	66	5	2	10	88 (100%)

Appendix 2

Countries and cities

<i>Country</i>	<i>City</i>	<i>Period</i>	<i>Researcher</i>
Belgium	Antwerp	Sept. – Nov. 2007	De Kock
	Bruges	April – May 2012	Rap
	Dendermonde	Sept. – Nov. 2007	De Kock
	Gent	May 2012	Rap
	Mechelen	Feb. – May 2012	Rap
England & Wales	Liverpool	March – June 2009	Kool
	London	June 2012	Weijers
	Sheffield	Feb. – March 2000	Hokwerda
France	Evry	Nov. – Dec. 2009	De Vries
	Grenoble	June / Sept. 2012	Weijers; Rap
	Paris	Sept. – Oct. 2009	De Vries
	Toulouse	Oct. 2012	Rap
Germany	Bergisch-Gladbach	Spring 2008	Kurtovic
	Berlin	May 2011	Weijers
	Cologne	Spring 2008	Kurtovic
	Munich	April / Nov. 2012	Weijers, Rap
	Weilheim	April 2012	Weijers
Greece	Athens	March – May 2010	Fasoula, Papageorgiou, Zagoura
Ireland	Dublin	Nov. 08 – Jan. 2009	Hehemann, Willemsen
	Limerick	Jan. 2009	Hehemann, Willemsen
	Tallaght	Jan. 2009	Hehemann, Willemsen
Italy	Bologna	Sept. – Nov. 2010	Capitano
	Rome	Nov. – Dec. 2010	Capitano
	Turin	May 2012	Weijers
Netherlands	Alkmaar	April 2010	De Blois, Laseur, Van der Linden,

	March – May 2010 Jan. – June 2010	Rayhi Van Ham, Van der Kaaij, Prop, Ridder Rigters
Almelo	Jan. – April 2007 Winter 2008 – 2009	Van der Lelij, Seesing Dolmans
Amsterdam	March – April 2006 Jan. – April 2007 Nov. 08 – March 2009 Jan. – May 2009 Winter 2008 – 2009 Sept. – Dec. 2009	Hepping, Koetsier Van der Lelij, Seesing Bakker Van Vliet, Vos Dolmans De Leeuw, Veen
Arnhem	Jan. – April 2007	Van der Lelij, Seesing
Breda	March – April 2006 Jan. – April 2007 Winter 2008 – 2009 April 2010 March – April 2010	Hepping, Koetsier Van der Lelij, Seesing Dolmans De Blois, Laseur, Van der Linden, Rayhi Van Dijk, Van Lieshout, Moorthamer, Zwaan
Den Bosch	Jan. – March 2010 March – June 2010 March – April 2011	De Mik, Volkers Rigters Broeks, Govaarts, Krajenbrink, Mariet
Haarlem	Jan. – March 2010 March – April 2011	De Mik, Volkers Klok, Van Look, Nieuwland, Schol
Groningen	Jan. – May 2010	Van Veen
Leeuwarden	Jan. – May 2010	Van Veen
Lelystad	Jan. – May 2010 March – April 2011	Van Veen Hagens, Hartkamp, Heyker, Liefers
Roermond	March – April 2010	Ten Heggeler, De Laat, Van Schaik, de Vreede
Rotterdam	March – April 2006 Jan. – April 2007 Nov. 08 – March 2009 Jan. – May 2009 March – April 2010 Jan. – June 2010 March – June 2010	Hepping, Koetsier Van der Lelij, Seesing Bakker Van Vliet, Vos Ten Heggeler, De Laat, Van Schaik, de Vreede Kinik

			Rigters
	The Hague	Spring 2008 Jan. – March 2010 March – May 2010 April 2011	Hehemann De Mik, Volkers Van Ham, Van der Kaaij, Prop, Ridder Barendregt, Brouwer, Kahrimanovic, Tjon- A-Pauw
	Utrecht	Oct. – Nov. 2005 March – April 2006 Jan. – April 2007 Nov. 2007 Nov. 08 – March 2009 Jan. – May 2009 Winter 2008 – 2009 Jan. – June 2010 March – June 2010 Jan. – May 2011 March – April 2011 March – April 2012	Rap Hepping, Koetsier Van der Lelij, Seesing De Kock Bakker Van Vliet, Vos Dolmans Rigters Kinik Prop Harmsen, De Jongh, Smeenk, Wesselink Van Gils, Mekes, Sakoetoe, Noteboom
	Zutphen	March – April 2010	Van Dijk, Van Lieshout, Moorthamer, Zwaan
	Zwolle	Jan. – May 2010	Van Veen
Scotland	Airdrie	May – Aug. 2008	Rap
	Glasgow	July – Aug. 2008	Rap
	Hamilton	May – Aug. 2008	Rap
Spain	Albacete	April – June 2008	Dames
	Madrid	April – June 2008	Dames
Switzerland	Basel	March 2012	Rap
	Fribourg	Sept. – Dec. 2006	De Vries
	Glarus	April 2012	Rap
	St. Gallen	July 2012	Rap
	Zurich	March – April 2012	Rap

Appendix 3 Juvenile justice legislation per country

<i>Country</i>	<i>Legislation</i>	<i>English translation</i>
Belgium	<ul style="list-style-type: none"> -Wet betreffende de voorlopige hechtenis, 01.12.1990 -Wet van 8 april 1965 betreffende de jeugdbescherming, het ten laste nemen van minderjarigen die een als misdrijf omschreven feit hebben gepleegd en het herstel van de door dit feit veroorzaakte schade, 08.04.1965 -Strafwetboek, 15.10.1867 -Wetboek van Strafvordering, 07.12.1808 -Burgerlijk Wetboek, 13.09.1807 	<ul style="list-style-type: none"> -Law concerning pre-trial detention -Juvenile protection code (Jpc) -Criminal code (Cc) -Code of criminal procedure (Ccp) -Civil Code (CCiv)
England & Wales	<ul style="list-style-type: none"> -Serious Organised Crime and Police Act 2005 -Anti-Social Behaviour Act 2003 -Criminal Justice Act 2003 -Courts Act 2003 -Powers of Criminal Courts (Sentencing) Act 2000 -Crime and Disorder Act 1998 -Magistrates' Courts (Children and Young Persons) Rules 1992 -Criminal Justice Act 1991 -Children Act in 1989 -Prosecution of Offences Act 1985 -Police and Criminal Evidence Act 1984 (PACE) -Children and Young Persons Act 1933 	
France	<ul style="list-style-type: none"> -Code Pénal, 01.03.1994 -Code de Procédure Pénale, 02.03.1959 -Ordonnance n° 45-174 du 2 février 1945 relative à l'enfance délinquante, 02.02.1945 -Code Civil, 21.03.1804 	<ul style="list-style-type: none"> -Criminal code (Cc) -Code of criminal procedure (Ccp) -Juvenile criminal instruction (Jci) -Civil Code (CCiv)
Germany	<ul style="list-style-type: none"> -Jugendgerichtsgesetz, 04.08.1953 -Strafprozessordnung, 12.09.1950 	<ul style="list-style-type: none"> -Juvenile court code (Jcc) -Code of criminal procedure (Ccp)

	-Bürgerliches Gesetzbuch, 18.08.1896	-Civil code (CCiv)
Greece	-Presidential Decree no. 49/1979 - Ποινικού Κώδικα, 1950 - Κώδικας Ποινικής Δικονομίας, 1950	-Presidential Decree no. 49/1979, establishment, operation, tasks and responsibilities of youth court aid -Criminal code (Cc) -Code of criminal procedure (Ccp)
Ireland	-Criminal Justice Act 2006 -Children Act 2001	
Italy	-DPR 448/88 Approvazione delle disposizioni sul processo penale a carico di imputati minorenni, 22.09.1988 -Codice di Procedura Penale, 22.09.1988 -Costituzione della Repubblica Italiana, 22.12.1947 -Codice Civile, 16.03.1942 -RDL no. 1404, istituzione e funzionamento del tribunale per i minorenni, 20.07.1934 -Codice Penale, 19.10.1930	-Code of juvenile criminal procedure (Cjcp) -Code of criminal procedure (Ccp) -Italian Constitution -Civil code (CCiv) -Law no. 1404, establishment and operation of the youth court -Criminal code (Cc)
Netherlands	-Burgerlijk Wetboek -Wetboek van Strafvordering, 15.01.1921 -Wetboek van Strafrecht, 03.03.1881	-Civil code (CCiv) -Code of criminal procedure (Ccp) -Criminal code (Cc)
Scotland	-Children's Hearings (Scotland) Act 2011 -Antisocial Behaviour etc. (Scotland) Act 2004 -Children's Hearings (Scotland) Rules 1996 -Criminal Procedure (Scotland) Act 1995 -Children (Scotland) Act 1995 -Social Work (Scotland) Act 1968	
Spain	-Ley Orgánica 5/2000, de 12 de enero, reguladora de la responsabilidad penal de los menores, 12.01.2000 -Código Civil, 25.07.1889	-Juvenile criminal code (Jcc) -Civil Code (CCiv)
Switzerland	-Jugendstrafprozessordnung, 20.03.2009	-Code of juvenile criminal procedure (Cjcp)

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	-Jugendstrafgesetz, 09.10.2003	-Juvenile court code (Jcc)
	-Strafgesetzbuch, 21.12.1937	-Criminal code (Cc)
	-Zivilgesetzbuch, 10.12.1907	-Civil code (CCiv)

Appendix 4 In camera principle

<i>Always in camera</i>	<i>In camera, but exceptions possible</i>	<i>Always in public</i>
Belgium – chambers	England & Wales	Belgium – youth court
Greece	France	Scotland – youth court
Scotland – children’s hearing	Germany	
	Ireland	
	Italy	
	Netherlands	
	Spain	
	Switzerland	

Appendix 5 Observation list

Observation List Youth Court Hearing		No.
1. General information		
Observer:		City / court:
Start:	End:	Judge:
		Prosecutor:
Special circumstances:		
Description setting courtroom:		
- Name / function plates: YES / NO		
- Position juvenile defendant:		
- Position parents:		
2. Information – juvenile defendant		
Age:	Sex: M / F	Ethnicity:
Denying defendant: YES / NO / Partly		First Offender: YES / NO / Unknown
Type of hearing:		Pre-trial detention: YES / NO
Offence:		
3. People present		
	Present	Reason for absence
Judge		
Prosecutor		
Clerk		

Juvenile defendant			
Lawyer			
Parents / guardians	Father		
	Mother		
	Other:		
Other family members	Brother / Sister		
	Grandfather / Grandmother		
	Uncle / Aunt		
	Other:		
Experts	Probation service		
	Social work		
	Other:		
Witness			
Victim			
Interpreter			
Other			
4. Explanation – by judge			
Introduction of people present: YES / NO / Partly			
Explanation role / function people present: YES / NO / Partly			
Explanation structure / course hearing: YES / NO / Partly			
5. Understanding			
	Judge	Prosecutor	Lawyer
Pace (slow – fast)	1 2 3 4 5	1 2 3 4 5	1 2 3 4 5
Volume (soft – loud)	1 2 3 4 5	1 2 3 4 5	1 2 3 4 5
Articulation (indistinctly – exaggerated)	1 2 3 4 5	1 2 3 4 5	1 2 3 4 5
Intonation (friendly – stern)	1 2 3 4 5	1 2 3 4 5	1 2 3 4 5
Difficulty (too easy – too difficult)	1 2 3 4 5	1 2 3 4 5	1 2 3 4 5
Use of jargon (not – much)	1 2 3 4 5	1 2 3 4 5	1 2 3 4 5
Use of abbreviations (not – much)	1 2 3 4 5	1 2 3 4 5	1 2 3 4 5
Clarification (not – much)	1 2 3 4 5	1 2 3 4 5	1 2 3 4 5

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Check understanding juvenile	1 2 3 4 5	1 2 3 4 5	1 2 3 4 5
6. Content – Communication with juvenile defendant			
Use of the right to remain silent: YES / NO / Partly			
	Judge	Prosecutor	Notes
Discussion of offence	1 2 3 4 5	1 2 3 4 5	
Discussion of personal circumstances:			
• Home situation	1 2 3 4 5	1 2 3 4 5	
• School / education	1 2 3 4 5	1 2 3 4 5	
• Leisure time	1 2 3 4 5	1 2 3 4 5	
• Friends	1 2 3 4 5	1 2 3 4 5	
• Future plans juvenile	1 2 3 4 5	1 2 3 4 5	
Conversation techniques:			
• Showing interest	1 2 3 4 5	1 2 3 4 5	
• Follow-up questions	1 2 3 4 5	1 2 3 4 5	
• Open-ended questions	1 2 3 4 5	1 2 3 4 5	
• Showing sympathy	1 2 3 4 5	1 2 3 4 5	
• Complimenting	1 2 3 4 5	1 2 3 4 5	
• Encouraging	1 2 3 4 5	1 2 3 4 5	
Attitude:	Juvenile		
• Nervous	1 2 3 4 5		
• Anger / Frustration	1 2 3 4 5		
• Indifferent	1 2 3 4 5		
• Shy	1 2 3 4 5		
• Talkative	1 2 3 4 5		

7. Content – Communication with parents			
Moment parents are allowed to speak:			
- Duration +/-:			
- Content:			
- Other opportunities for parents to contribute to the hearing:			
	Judge	Prosecutor	Notes
Discussion of offence	1 2 3 4 5	1 2 3 4 5	
Discussion of personal circumstances:			
• Home situation	1 2 3 4 5	1 2 3 4 5	
• School / education	1 2 3 4 5	1 2 3 4 5	
• Leisure time	1 2 3 4 5	1 2 3 4 5	
• Friends	1 2 3 4 5	1 2 3 4 5	
• Future plans juvenile	1 2 3 4 5	1 2 3 4 5	
Conversation techniques:			
• Showing interest	1 2 3 4 5	1 2 3 4 5	
• Follow-up questions	1 2 3 4 5	1 2 3 4 5	
• Open-ended questions	1 2 3 4 5	1 2 3 4 5	
• Showing sympathy	1 2 3 4 5	1 2 3 4 5	
• Complimenting	1 2 3 4 5	1 2 3 4 5	
• Encouraging	1 2 3 4 5	1 2 3 4 5	
Attitude:	Parents		
• Nervous	1 2 3 4 5		
• Anger / Frustration	1 2 3 4 5		

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• Indifferent	1 2 3 4 5		
• Shy	1 2 3 4 5		
• Talkative	1 2 3 4 5		
8. Moral appeal upon juvenile defendant			
Moment of appeal by:			
- Judge:			
- Prosecutor:			
	Judge	Prosecutor	Notes
• Appeal upon sense of guilt	1 2 3 4 5	1 2 3 4 5	
• Appeal upon sense of responsibility	1 2 3 4 5	1 2 3 4 5	
• Appeal upon sense of remorse	1 2 3 4 5	1 2 3 4 5	
• Appeal upon sense of empathy (victim)	1 2 3 4 5	1 2 3 4 5	
• Appeal upon consequences for victim	1 2 3 4 5	1 2 3 4 5	
• Appeal upon sense of shame	1 2 3 4 5	1 2 3 4 5	
9. Judgment			
- Last word juvenile: YES / NO			
- Content last word:			
- Judgment:			
- Explanation choice of sanction(s): YES / NO / Partly			
- Explanation content of sanction(s): YES / NO / Partly			
- Reaction juvenile on judgment:			

Samenvatting

(Summary in Dutch)

In dit onderzoek staat de participatie van jeugdige verdachten in het jeugdstrafproces centraal. Dit onderwerp wordt benaderd vanuit kinderrechtelijk perspectief en ontwikkelingspsychologisch perspectief. Het doel van het onderzoek is tweeledig: 1) het formuleren van voorwaarden voor effectieve participatie van jeugdige verdachten en 2) het bestuderen van de participatie van jeugdige verdachten in de praktijk. Het eerste punt is onderzocht aan de hand van literatuur op het gebied van de internationale kinderrechten en de ontwikkelingspsychologie. Het tweede punt is onderzocht aan de hand van het bestuderen van de jeugdstrafrechtpraktijk in 11 Europese landen, namelijk in België, Duitsland, Engeland en Wales, Frankrijk, Griekenland, Ierland, Italië, Nederland, Schotland, Spanje en Zwitserland. De praktijk van de jeugdrechtspraak in deze landen is onderzocht door middel van observaties van jeugdstrafzittingen en interviews met betrokkenen bij het jeugdstrafproces. In totaal zijn de zaken van 3,019 jeugdige verdachten geobserveerd in 50 verschillende rechtbanken en andere administratieve afdelingsorganen.

Het internationaal kinderrechtelijk en het ontwikkelingspsychologisch perspectief

In de Beijing Rules (UN Standard Minimum Rules on the Administration of Juvenile Justice, 1985) is voor het eerste aandacht besteed aan de participatie van jeugdige verdachten in het strafproces. Het recht van jeugdige verdachten om gehoord te worden is vastgelegd in artikel 12 van het Internationaal Verdrag inzake de Rechten van het Kind [IVRK]. Het VN Comité voor de Rechten van het Kind heeft dit recht verder geconcretiseerd in de algemene commentaren nr. 10 en 12 (2007, 2009). Het Comité geeft aan dat het vrijelijk kunnen uiten van de eigen mening en het begrijpen van wat er gebeurt tijdens een jeugdstrafzitting fundamentele voorwaarden zijn voor een eerlijk strafproces voor jeugdige verdachten. Daarnaast stelt het Comité dat deze noties bijdragen aan de

effectieve participatie van de jeugdige in het strafproces. Ook het Europese Hof voor de Rechten van de Mens [EHRM] heeft belangrijke aanwijzingen gegeven met betrekking tot wat een eerlijk proces voor jeugdige verdachten moet inhouden. Een eerlijk proces houdt volgens het EHRM in dat de jeugdige in staat moet zijn effectief te kunnen participeren in het proces, met de hulp van een raadsman. Daarnaast moet het strafproces aangepast zijn aan de intellectuele capaciteiten en het ontwikkelingsniveau van de jeugdige verdachte. Het EHRM heeft daarnaast aangeraden dat minderjarigen alleen vervolgd worden in gespecialiseerde jeugdrechtbanken. Vanuit het kinderrechtelijk perspectief kan geconcludeerd worden dat artikel 12 IVRK veronderstelt dat jeugdige verdachten aangemoedigd moeten worden om hun persoonlijke mening te geven en dat professionals deze mening serieus in overweging dienen te nemen. Daarnaast veronderstelt participatie in het jeugdstrafproces dat de jeugdige begrijpt wat het jeugdstrafproces waarin hij betrokken is inhoudt.

De internationale kinderrechten kunnen verder aangevuld en geconcretiseerd worden met ontwikkelingspsychologische theorieën en onderzoeksuitkomsten. Adolescenten bevinden zich in een periode in hun leven waarin zij zich ontwikkelen richting de volwassenheid. De cognitieve en emotionele ontwikkeling zijn echter nog niet voltooid. Door de nog onvoltooide cognitieve en emotionele ontwikkeling van adolescenten is hun begrip van het strafproces niet optimaal. Uit diverse onderzoeken blijkt dat adolescenten pas vanaf 14 jaar in staat zijn te begrijpen wat het betekent om strafrechtelijk vervolgd te worden. Vanwege de onvoltooide ontwikkeling en het feit dat minderjarigen doorgaans weinig ervaring hebben met het omgaan met autoriteiten, hebben jeugdige verdachten extra hulp nodig in het verwezenlijken van hun recht om gehoord te worden in het strafproces. Naast de internationaal rechtelijke voorwaarden voor een eerlijk proces kunnen aan psychologische theorieën ook voorwaarden voor een eerlijk proces ontleend worden. Eén van deze theorieën is die betreffende de procedurele rechtvaardigheid (Tyler, 2003, 2006a). Tyler betoogt dat een aantal kenmerken van het strafproces kunnen bijdragen aan de perceptie van een verdachte dat hij op een eerlijk manier behandeld wordt. Procedurele rechtvaardigheid kan gedefinieerd worden aan de hand van de kwaliteit van het besluitvormingsproces in de rechtbank en de kwaliteit van de persoonlijke behandeling van de verdachte door professionals. Het

besluitvormingsproces wordt als eerlijker ervaren wanneer besluiten op een neutrale en onbevooroordeelde manier genomen worden. De persoonlijke behandeling wordt als eerlijker ervaren wanneer de verdachte de mogelijkheid heeft om zijn eigen verhaal te vertellen en zijn mening te geven. Uit onderzoek op dit terrein blijkt dat het kunnen participeren in het strafproces bijdraagt aan het ervaren van een eerlijk besluitvormingsproces en een eerlijke behandeling.

Op basis van dit (ontwikkelings)psychologisch perspectief kan gesteld worden dat jeugdige verdachten speciale hulp en aandacht nodig hebben om effectief te kunnen participeren in het strafproces en om het proces als rechtvaardig te kunnen ervaren. In dit onderzoek wordt betoogd dat advocaten en ouders hierin een speciale rol kunnen vervullen. De advocaat kan de jeugdige verdachte voorafgaand aan en tijdens de rechtszitting ondersteunen door het geven van uitleg over de te volgen procedures, juridische terminologie, de aanklacht, wat er van de jeugdige verwacht wordt tijdens het proces en wat hij kan verwachten met betrekking tot de uitkomst van de zaak. Ouders kunnen een belangrijke bijdrage leveren aan het verlenen van emotionele ondersteuning aan de jeugdige. Daarnaast draagt het horen van ouders tijdens strafproces bij aan de participatie van de jeugdige, omdat de jeugdige zich serieus genomen zal voelen wanneer zijn ouders eveneens gehoord worden door de rechter.

Geconcludeerd kan worden dat de effectieve participatie van jeugdige verdachten van belang is omdat het recht om gehoord te worden een fundamenteel recht van het kind is. Daarnaast draagt participatie bij aan het begrip van de jeugdige verdachte van het strafproces en het ervaren van procedurele rechtvaardigheid. Op basis van deze aannamen zijn in dit onderzoek concrete voorwaarden voor effectieve participatie geformuleerd.

Voorwaarden voor effectieve participatie

Om de effectieve participatie van jeugdige verdachten te bewerkstelligen moeten de jeugdrechter en andere professionals werkzaam in de jeugdrechtbank bepaalde taken op zich nemen. Deze taken hebben te maken met het horen van jeugdige verdachten en het bijdragen aan het begrip van jeugdige verdachten van het strafproces.

Met betrekking tot het horen van jeugdige verdachten is het allereerst van belang om een geschikte omgeving (setting) te creëren waarin de jeugdige wordt gehoord. De sfeer in de rechtszaal mag streng zijn, maar moet wel toegankelijk zijn. Dit wil zeggen dat jeugdigen en hun ouders in de gelegenheid gesteld moeten worden om te kunnen communiceren met de overige actoren in de rechtszaal. Ten tweede is het van belang dat de jeugdrechter getraind is in het gebruik van gesprekstechnieken die hem helpen om op een adequate wijze met adolescenten te communiceren. De derde voorwaarde betreft het geven van gelegenheid aan de jeugdige verdachte om zijn kant van het ten laste gelegde naar voren te brengen. Ten vierde is het van belang dat er serieus geluisterd wordt naar het eigen verhaal van de jeugdige en dat zijn mening serieus in overweging genomen wordt. Tenslotte moeten ouders actief betrokken worden bij de jeugdstrafprocedure.

Wat betreft het begrip van de jeugdige van het jeugdstrafproces is de eerste voorwaarde voor effectieve participatie dat uitleg wordt gegeven aan de jeugdige over het doel van de zitting, de volgorde van de procedures die gevolgd worden en de rol van de verschillende aanwezigen. Ten tweede is het van belang om juridisch jargon zoveel mogelijk te vermijden en terminologie uit te leggen wanneer het gebruik daarvan onvermijdelijk is. Ten derde is het van belang dat de rechter er in zijn uitspraak op let dat hij zijn beslissing uitdrukkelijk motiveert en wel op een wijze die voor de jeugdige en zijn ouders begrijpelijk is. Tenslotte helpt het doen van een appel op de morele kant van de zaak de jeugdige te beseffen wat de gevolgen zijn van zijn gedrag en verantwoordelijkheid te nemen voor zijn daden.

Algemene kenmerken en actoren

Om de context te begrijpen waarin jeugdige verdachten gehoord worden zijn in dit onderzoek drie algemene kenmerken beschreven van de jeugdstrafrechtssystemen in de 11 onderzochte landen. Daarnaast zijn de actoren die participeren in het jeugdstrafproces beschreven.

Het eerste kenmerk van het jeugdstrafrechtstelsel betreft de minimum en maximum leeftijdsgrens voor vervolging volgens het jeugdstrafrecht. De minimumleeftijd voor strafrechtelijke vervolging ligt in zeven landen bij 12 jaar of hoger. In de overige vier landen ligt de

minimumgrens lager dan 12 jaar. De bovengrens van het jeugdstrafrecht is in alle landen 18 jaar, behalve in Schotland waar deze 16 jaar is.

Het tweede kenmerk betreft de relatie tussen het jeugdstrafrecht en het jeugdbeschermingsrecht. In een aantal landen bestaat er een nauwe samenwerking tussen beide rechtsgebieden. In België en Schotland bestaat een welzijnssysteem, waarin zowel jeugdigen die verdacht worden van een strafbaar feit als jeugdigen die hulp of bescherming nodig hebben behandeld worden. In een aantal landen bestaat er een grotere afstand tussen beide rechtsgebieden wat tot gevolg heeft dat er in het jeugdstrafrechtssysteem meer nadruk wordt gelegd op het ten laste gelegde delict en de sanctie die daarop volgt en minder op het bieden van hulp aan de jeugdige.

Het derde kenmerk betreft de strafrechtstraditie waarbinnen het jeugdstrafrechtssysteem geplaatst kan worden: de inquisitoire of de accusatoire strafrechtstraditie. In de inquisitoire traditie staat de dialoog tussen de rechter en de jeugdige verdachte centraal tijdens de rechtszitting. Het dossier vormt de basis van het strafproces en niet al het bewijs wordt mondeling gepresenteerd aan de rechter tijdens de zitting. Dit is wel het geval in de accusatoire traditie. Het strafproces in deze traditie wordt niet gehouden op basis van een dossier dat toegankelijk is voor alle partijen. De zitting draait om twee gelijke partijen: de aanklager en de verdediging. De rechter overziet het gehele proces en heeft geen actieve rol. In het algemeen kan gesteld worden dat de Angelsaksische landen veel kenmerken laten zien van de accusatoire strafrechtstraditie. Op het Europese continent is de inquisitoire traditie dominant. Het is van belang om hierbij op te merken dat in geen enkel jeugdstrafrechtssysteem een puur inquisitoire of puur accusatoire traditie te vinden is, maar dat er vele mengvormen bestaan. Structurele verschillen tussen jeugdstrafrechtssystemen, veroorzaakt door de dominante strafrechtstraditie, zijn echter wel zichtbaar.

De rol die verschillende actoren, te weten de politie, de officier van justitie, de rechter, hulpverleners en ouders, spelen in het strafproces heeft invloed op de mate waarin en de manier waarop jeugdige verdachten kunnen participeren in het proces. In het algemeen kan gesteld worden dat er talrijke verschillen bestaan tussen de 11 landen, in de manier waarop vormgegeven wordt aan de rollen van deze actoren.

Met betrekking tot de rol van de politie kan gesteld worden dat alleen in Engeland en Wales, Ierland en Nederland de politie de mogelijkheid heeft om jeugdzaken zelfstandig af te doen. De officier van justitie kan in alle landen zaken zelfstandig af doen, met uitzondering van Ierland en Italië. Vervolgens zijn in ieder land advocaten betrokken bij het jeugdstrafproces. Echter, dit geldt niet in ieder land voor alle fasen van het proces. In alle landen worden jeugdstrafzaken ook op het niveau van de rechtbank afgedaan. In een aantal landen op het Europese vasteland speelt de gespecialiseerde jeugdrechter een actieve rol in alle fasen van het proces. In de Angelsaksische landen heeft de rechter een meer passieve rol in het jeugdstrafproces. In de meeste jeugdstrafrechtssystemen spelen ook hulpverleners een rol. De invulling van hun rol hangt echter af van hun positie ten opzichte van de rechtbank: zijn zij direct verbonden aan de rechtbank of maken zij onderdeel uit van een aparte organisatie. De rol van ouders verschilt eveneens in de 11 landen. In alle landen kunnen ouders civielrechtelijk aansprakelijk gesteld worden voor de schade die is aangericht door hun minderjarige kind. In sommige landen kunnen ouders ook strafrechtelijk vervolgd worden voor een delict gepleegd door hun kind. In de meeste landen worden ouders geacht aanwezig te zijn bij de behandeling van de strafzaak tegen hun kind.

In welke mate wordt er voldaan aan de voorwaarden voor effectieve participatie?

In 11 Europese landen is onderzocht in hoeverre voldaan wordt aan de voorwaarden voor effectieve participatie van jeugdige verdachten. Hierbij is onderscheid gemaakt tussen zittingen die op het kantoor van de jeugdrechter plaatsvinden en zittingen die in een formele rechtszaal plaatsvinden.

Het horen van jeugdige verdachten

Met betrekking tot de eerste voorwaarde voor effectieve participatie – de setting waarin de jeugdstrafzitting plaatsvindt – kan gesteld worden dat de Schotse *children's hearing* het beste voldoet aan deze voorwaarde. De zitting vindt plaats in een kleine ruimte en een beperkt aantal deelnemers zit aan een ronde tafel. In deze setting is het voor de jeugdige verdachte zeer goed mogelijk te participeren. De zitting heeft echter geen streng

karakter: er worden geen kritische of vermanende opmerkingen gemaakt met betrekking tot het gepleegde delict. Op het Europese vasteland zijn jeugdigen het beste in staat om te participeren tijdens de zittingen bij de jeugdrechter op zijn kantoor in landen zoals België, Frankrijk, Nederland en Zwitserland. In deze landen schroomt men niet ook het delict te bespreken, naast de ruime aandacht die er bestaat voor de persoonlijke omstandigheden van de jeugdige. De jeugdstrafzittingen in de Angelsaksische landen zijn veel minder gericht op de participatie van jeugdige verdachten. De setting wordt gekenmerkt door een grote rechtszaal, een aanzienlijke fysieke en sociale afstand tussen de jeugdige en zijn ouders en de professionele actoren en het gebruik maken van formele procedures.

Aan de tweede voorwaarde voor effectieve participatie – het gebruik maken van specifieke gesprekstechnieken – wordt in vrijwel alle landen zeer weinig aandacht besteed. De indruk bestaat dat alleen in het Schotse *children's hearings system* meer aandacht bestaat voor het opleiden en trainen van de panel leden, die de zittingen leiden. In enkele andere landen bestaan er wel bijscholingscursussen voor jeugdrechters, officieren van justitie en advocaten, maar deze zijn niet zo uitgebreid en wijdverbreid als het geval is in Schotland.

Op basis van de observaties van de jeugdstrafzittingen kunnen drie groepen landen onderscheiden worden, wat betreft het horen van de jeugdige verdachte. 1) Landen waar het verhaal van de jeugdige en het bespreken van zijn persoonlijke omstandigheden centraal staan tijdens de zitting. Dit is het geval tijdens *children's hearings* in Schotland en in Duitsland, Frankrijk, Nederland en Zwitserland. 2) Landen waar een dialoog weliswaar plaatsvindt tussen de jeugdrechter en de jeugdige, maar waar de rechter duidelijk de leiding neemt. De jeugdige krijgt alleen de gelegenheid om op de vragen van de rechter te antwoorden en heeft minder de ruimte om vrijelijk zijn mening te uiten. Dit is geobserveerd in België, Griekenland en Italië. 3) Landen waar het verhaal van de jeugdige nauwelijks gehoord wordt. Dit is geobserveerd in jeugdrechtbanken in Engeland en Wales, Ierland, Schotland en Spanje. Geconcludeerd kan worden dat de accusatoire strafrechtstraditie in de laatste groep landen een belangrijke invloed heeft op het feit dat jeugdigen nauwelijks persoonlijk gehoord worden door de rechter.

In de landen waar jeugdige verdachten actief aangemoedigd worden hun eigen verhaal naar voren te brengen, volgt doorgaans ook een serieuze reactie op hun bijdrage. In rechtbanken in landen waar de accusatoire traditie dominant is, is geobserveerd dat een serieuze reactie doorgaans ontbreekt, omdat de jeugdige doorgaans niet gehoord wordt door de rechter.

Met betrekking tot het horen van ouders laat de Schotse children's hearing wederom een goed voorbeeld zien. Ouders worden tijdens de zitting actief betrokken en bevraagd, omdat zij gezien worden als belangrijke informatiebron met betrekking tot het welzijn van hun kind. De mening van ouders wordt daarom altijd meegenomen in het besluitvormingsproces. In de meeste andere landen zijn ouders doorgaans wel aanwezig tijdens de zitting, maar is hun rol zeer gering.

In het algemeen kan geconcludeerd worden dat de voorwaarden die betrekking hebben op het horen van de jeugdige verdachte het beste nageleefd worden in het Schotse children's hearings system en in het Zwitserse jeugdstrafproces. In Engeland en Wales, Ierland, Schotland en Spanje worden de voorwaarden in veel mindere mate nageleefd en is het voor jeugdige verdachten maar in geringe mate mogelijk effectief te participeren in het proces.

Het begrip van jeugdige verdachten

Met betrekking tot de eerste voorwaarde – het geven van uitleg – is er een duidelijk verschil geconstateerd tussen landen waar de inquisitoire traditie en landen waar de accusatoire traditie dominant is. De Schotse children's hearing en de Zwitserse jeugdstrafzitting voldoen het beste aan deze voorwaarde: er wordt veel uitleg gegeven aan de jeugdige door de persoon die de zitting leidt. Daarnaast valt op dat tijdens zittingen die op het kantoor van een jeugdrechter (of andere actor belast met het afdoen van de zaak) plaatsvinden meer uitleg wordt gegeven dan tijdens zittingen in een rechtszaal. De informele sfeer, de kleinere fysieke afstand tussen de verschillende deelnemers en het beperkt aantal aanwezigen lijken bij te dragen aan het geven van uitleg aan de jeugdige. In de jeugdrechtbanken in de accusatoire strafrechtstraditie wordt zeer weinig uitleg gegeven. In de landen die tussen deze twee extremen in liggen, speelt de advocaat een belangrijke rol in het geven van uitleg aan de jeugdige verdachte, voorafgaand aan en na afloop van de zitting. Daarnaast vervullen ook

hulpverleners en rechters een belangrijke rol in het geven van uitleg tijdens de zitting, al verschilt de mate waarin dit gebeurt per land.

Wat betreft het vermijden van jargon valt op dat dit het meest geobserveerd is in landen waar de inquisitoire traditie dominant is en waar zittingen op het kantoor van de rechter gehouden worden.

Met betrekking tot het geven van uitleg omtrent de uitspraak kan gesteld worden dat er niet beter aan deze voorwaarde wordt voldaan in landen waar de inquisitoire traditie dominant is. In landen waarin de uitspraak nauwelijks wordt toegelicht door de rechter (met name de Zuid-Europese landen en Ierland) speelt de advocaat een belangrijke rol in het geven van uitleg aan de jeugdige verdachte na afloop van de zitting. Opvallend is het feit dat tijdens zittingen op het kantoor van de rechter veel meer aandacht wordt besteed aan het uitleggen van de uitspraak in vergelijking met zittingen in een rechtszaal.

Tot slot kan gesteld worden dat een moreel appel op de jeugdige in de 11 landen op zeer uiteenlopende wijze plaatsvindt. Er zijn daarbij geen opvallende verschillen waargenomen tussen zittingen op kantoor of in de rechtszaal en tussen de twee strafrechtstradities. De gevolgen van het gedrag van de jeugdige worden met name besproken in Engeland en Wales, Griekenland, Nederland en Italië. Tijdens de Schotse children's hearing en de Zwitserse jeugdstrafzittingen werd een moreel appel op de jeugdige nauwelijks geobserveerd.

In het algemeen kan geconcludeerd worden dat ook de voorwaarden die betrekking hebben op het bijdragen aan het begrip van de jeugdige verdachte het beste nageleefd worden in het Schotse children's hearings system en in het Zwitserse jeugdstrafproces. In de Ierse jeugdrechtbank lijkt men het minste te voldoen aan deze voorwaarden voor effectieve participatie.

Conclusies

De belangrijkste conclusies die uit dit onderzoek naar voren komen zijn de volgende. Ten eerste kan gesteld worden dat de empirische resultaten laten zien dat de children's hearings in Schotland en de jeugdstrafzittingen in Zwitserland het beste lijken te voldoen aan de voorwaarden voor effectieve participatie. De zittingen in deze landen kunnen dan ook aangewezen worden als *best practices*.

Ten tweede blijkt uit dit onderzoek dat de setting waarin een jeugdstrafzitting plaatsvindt een belangrijke invloed heeft op de mate waarin jeugdige verdachten kunnen participeren. Twee aspecten van de setting kunnen daarbij uitgelicht worden. Ten eerste blijkt dat het wel of niet dragen van een toga (en eventueel een pruik) verschilt per land. Er kan geconcludeerd worden dat het dragen van een toga (en een pruik) waarschijnlijk niet bijdraagt aan de effectieve participatie van jeugdige verdachten, maar in hoeverre het de effectieve participatie van jeugdigen echt in de weg staat is op basis van de resultaten van dit onderzoek niet vast te stellen. Ten tweede kan geconcludeerd worden dat zittingen op een kantoor – dat wil zeggen een kleinere ruimte waarin iedereen op gehoorafstand van elkaar plaats heeft en iedereen elkaar duidelijk kan zien – in grotere mate bijdragen aan de effectieve participatie van jeugdigen dan zittingen in een klassieke rechtszaal. De intieme en informele setting van deze zittingen faciliteert de jeugdrechter in het voldoen aan de voorwaarden voor effectieve participatie.

Ten derde kan op basis van dit onderzoek vastgesteld worden dat er in de jeugdrechtbanken in de accusatoire strafrechtstraditie – in Engeland en Wales, Ierland, Schotland en in zekere mate ook in Spanje – niet voldaan kan worden aan de voorwaarden voor effectieve participatie. De voorwaarden veronderstellen een actieve rol van de rechter tijdens het strafproces, waarin hij de jeugdige hoort en betreft bij het besluitvormingsproces. In het accusatoire strafproces heeft de rechter echter een passieve rol en is hij niet in de gelegenheid om de jeugdige actief te horen. De aanklager en de advocaat van de verdachte zijn de actieve partijen in het proces en de jeugdige krijgt nauwelijks de gelegenheid om te participeren.

Ten vierde blijkt uit dit onderzoek dat jeugdige verdachten in een aantal landen gehoord worden door dezelfde rechter in verschillende fasen van het strafproces. Dit betekent dat hun recht op een onafhankelijke rechter, zoals vastgelegd in onder andere het IVRK, niet altijd gewaarborgd is. Vanuit pedagogisch perspectief kan echter gesteld worden dat het zien van dezelfde rechter tijdens verschillende fasen in het strafproces belangrijke voordelen heeft. De jeugdige is meer vertrouwd met de rechter, de rechter heeft meer kennis over de persoonlijke omstandigheden van de jeugdige en zijn familie en langduriger toezicht door één rechter houdt in dat de jeugdige ook tijdens het uitvoeren van

een sanctie met dezelfde rechter te maken heeft. Hoewel de betrokkenheid van één rechter belangrijke voordelen laat zien, wordt in dit onderzoek echter betoogd dat het recht op een onafhankelijke rechter gewaarborgd moet worden voor jeugdigen. Dit houdt in dat zij te allen tijde om een onafhankelijke rechter moeten kunnen verzoeken tijdens het strafproces.

Tot slot is in dit onderzoek stil gestaan bij het verlenen van bijstand door een advocaat aan de jeugdige verdachte. Er is vastgesteld dat jeugdigen niet in alle landen en in alle fasen van het strafproces bijgestaan worden door een advocaat. In dit onderzoek wordt betoogd dat dit niet noodzakelijk een probleem vormt, wanneer het gaat om lichte zaken waarin alleen een zeer lichte sanctie opgelegd kan worden. In dat geval kan de effectieve participatie van de jeugdige voldoende gewaarborgd worden door de overige actoren in het strafproces en is voor de participatie van de jeugdige de aanwezigheid van een advocaat niet noodzakelijk. Vanuit strafrechtelijk oogpunt is het echter van belang dat jeugdige verdachten in ernstiger zaken altijd worden bijgestaan door een advocaat, om zo een eerlijk proces te waarborgen. Voorwaarde is dat de advocaat voldoende geschoold en gespecialiseerd is op het gebied van het jeugdstrafrecht.

Drie aanbevelingen

Op basis van de resultaten van dit onderzoek kunnen drie aanbevelingen gedaan worden. Ten eerste wordt aan het VN Comité voor de Rechten van het Kind geadviseerd om een algemeen commentaar te formuleren met betrekking tot de specifieke implementatie van artikel 12 IVRK in het jeugdstrafproces. De huidige algemene commentaren nr. 10 en 12 zijn te algemeen en breed geformuleerd met betrekking tot het jeugdstrafproces. Het Comité wordt aangeraden zich te buigen over de discussiepunten die in de conclusie van dit onderzoek naar voren zijn gebracht.

De tweede aanbeveling betreft het feit dat professionals die werkzaam zijn binnen het jeugdstrafrecht geschoold worden in de concrete implementatie van het recht van jeugdige verdachten om gehoord te worden. Professionals moeten gespecialiseerd zijn in het werken met minderjarigen om effectieve participatie mogelijk te maken. Dit houdt in dat zij (bij)geschoold moeten zijn op het gebied van het jeugdstrafrecht, de ontwikkelingspsychologie en het communiceren met adolescenten.

Samenvatting

De laatste aanbeveling betreft het feit dat minderjarigen enkel vanaf 14 jaar vervolgd moeten kunnen worden. Op basis van ontwikkelingspsychologisch onderzoek kan gesteld worden dat jeugdigen jonger dan 14 jaar in het algemeen niet in staat zijn om het strafproces voldoende te begrijpen. Effectieve participatie van jeugdige verdachten is alleen mogelijk wanneer de ontwikkeling van de jeugdige een bepaald niveau bereikt heeft en dat is in het algemeen vanaf 14 jaar het geval.

Biography

Stephanie Rap (1984) holds a Bachelor of Science and a Master of Science degree in Pedagogical sciences and a Master of Arts degree in Criminology (cum laude), obtained at Utrecht University. During her studies she paid particular attention to juvenile delinquency and juvenile law and she joined the interdisciplinary – law and social sciences – research group conducting international comparative research in youth courts. From November 2009 to May 2011 she was employed as a junior researcher at the Willem Pompe Institute for Criminal Law and Criminology at Utrecht University. This resulted in the publication ‘*The youth court hearing: a pedagogical perspective. The communication between youth court judge and juvenile defendant*’, which was commissioned by the Dutch Council for the Judiciary. From July 2011 onwards Stephanie was appointed as a PhD student at the department of Pedagogical and Educational Sciences and the Willem Pompe Institute. She conducted research in youth courts in the United States, Scotland, the Netherlands, Switzerland, Belgium, France and Germany. She published on topics such as juvenile law and comparative juvenile justice. In addition, she taught courses in the minor programme *Youth and Criminality*.

Publications

- Rap, S. (). A children's rights perspective on the participation of juvenile defendants in the youth court. (Manuscript submitted for review)
- Rap, S. (). The participation of social services in youth justice systems in Europe. (Manuscript submitted for review)
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