

# A Children's Rights Perspective on the Participation of Juvenile Defendants in the Youth Court

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## Abstract

According to international children's rights law and standards, juvenile defendants should be given the opportunity to be heard in juvenile justice proceedings. Moreover, from developmental psychological research it can be concluded that young people who appear in court usually have a limited understanding of judicial procedures. Therefore, it is argued that juveniles need to be assisted in giving their views and in understanding juvenile justice proceedings. Insights from the children's rights and the developmental psychological perspective are taken as starting points in this study to formulate requirements for the effective participation of juvenile defendants. Moreover, this article presents an overview of youth court practices in 11 European countries in order to analyse the extent to which the requirements are fulfilled in practice.

## Keywords

juvenile justice – children's rights – youth court – participation – juvenile defendant

## Introduction

From the end of the 19<sup>th</sup> century onwards, a trend emerged in the Western world 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 youth courts, sentences and juvenile institutions (Sloth-Nielsen, 2001). Parallel to the

establishment of these new laws, separate criminal procedures for juveniles were developed as well. The idea grew that court procedures had to be different from those used in the adult criminal court, more attuned to the age and level of maturity of the juvenile defendant.

In recent years, more acknowledgement and attention has been given to hearing the views of children in different domains, such as in education, health care, family law and juvenile justice proceedings (see, for example, Cashmore and Parkinson, 2007; Kilkelly and Donnelly, 2011; Lundy, 2007; Thomas, 2007; De Winter, Kroneman and Baerveldt, 1999; De Winter and Noom, 2001). 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, amongst other things, the developing children's rights agenda (Sinclair, 2004). It will be argued in this article that the right to be heard as enshrined in article 12 of the UN Convention on the Rights of the Child (CRC)<sup>1</sup> has important implications for the treatment of juvenile defendants in juvenile justice proceedings.

In this article, first, the participation of juvenile defendants is considered from a children's rights perspective. Subsequently, the participation of juvenile defendants is approached from a developmental psychological perspective. This section is followed by requirements for the effective participation of juvenile defendants, seen from both perspectives. The final section of this article presents empirical findings of the practical realisation of these requirements across 11 countries in Europe.

### A Children's Rights Perspective

With regard to the participation of juvenile defendants in juvenile justice proceedings, key human rights conventions, standards and case law can be identified. The concept of participation in juvenile justice proceedings was introduced for the first time in rule 14.2 of the Beijing Rules (UN Standard Minimum Rules on the Administration of Juvenile Justice).<sup>2</sup> This rule provides that these proceedings should take place in 'an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely'. It can be argued that this provision has served as an example for the adoption of the right to be heard as formulated in article 12 of the CRC. The right to be heard lies at the heart of this study.

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1 GA Res. 44/25, 20 November 1989.

2 GA Res. 40/33, 29 November 1985.

### *The UN Convention on the Rights of the Child*

The CRC acknowledged the status of children under international law for the first time and granted them specific rights. 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 feature 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.

Article 12 forms one of the general principles of the CRC (see UN Committee on the Rights of the Child, 2003). The right to be heard 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). Article 12 places a duty upon the states parties to involve children in all matters that affect them (Van Bueren, 1995). 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. For example, article 12 (2), CRC provides that children should be given 'the opportunity to be heard in any judicial and administrative proceedings affecting the child'. This means that special procedures and guidelines should be created by the states parties to ensure the participation of, amongst others, juvenile defendants (see also UN Committee on the Rights of the Child, 1996). The procedural capacity of the child who is accused of committing an offence to be heard is given by this provision (Van Bueren, 1995). 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, 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 interest of the child is safeguarded in the procedure.

Article 40, CRC is of importance as well in light of this study. The international rules concerning juvenile justice proceedings have been 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 has strengthened the legal position of juvenile defendants by formulating several due process rights that apply to juvenile justice proceedings. Most of these due process rights are not child specific but apply to children as well as adults, 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). Second, article 40 (3)(a), CRC provides that a minimum age of criminal responsibility (MACR) should be established. The UN Committee on the Rights of the Child (2007) recommends that states parties should set the MACR at least at 12 years

of age and in case it is already set at a higher age, not to lower it. Third, article 40 (3), CRC encourages the creation of 'a separate and special juvenile justice system' (Liefwaard, 2008, 109). States are encouraged to provide juvenile defendants with specific treatment in a separate youth court, as part of separate juvenile justice proceedings.

The CRC is legally binding for the states parties (UN Committee on the Rights of the Child, 2003). Several scholars argue 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 and few control systems are in place (Freeman, 2007; Goldson and Muncie, 2012; Sloth-Nielsen, 2001). A positive development is the drafting of the Third Optional Protocol to the Convention on the Rights of the Child on a communications procedure,<sup>3</sup> which gives individual children the possibility to file complaints regarding violations of rights set forth in the CRC. The Protocol has entered into force on 14 April 2014. At the time of writing, 17 countries have ratified and another 32 have signed the Protocol. However, following the adoption of the CRC, several developments have taken place that have shaped the international children's rights framework concerning the participation of juvenile defendants. These developments will be highlighted in the following sections.

### *The UN Committee on the Rights of the Child*

The UN Committee on the Rights of the Child (the Committee) has given specific guidelines on the implementation of articles 40 and 12, CRC in its general comments nos. 10 and 12. The notion that child-centred procedures should be employed in a specialised youth court is thereby further substantiated.

The Committee (2007) states explicitly that 'the right to be heard is fundamental for a fair trial' (para. 44). It is assumed 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.<sup>4</sup> The procedural capacity of the minor is implied by this assumption. 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. Moreover, the Committee (2007) recommends the establishment of specialised divisions within the police, the courts, and

3 UN Document A/RES/66/138.

4 For the purpose of uniformity, the author has chosen to refer to persons with "he" or "him", while meaning "she" or "her" as well.

the prosecutor's office and to make specialised legal representation available for children. This means preferably to establish youth courts, but if this is not possible, at least to appoint specialised youth court judges.

In general comment no. 12, the Committee (2009) recommends that every judicial procedure concerning minors should be both 'accessible and child-appropriate' (para. 34). The meaning of this notion is further specified by indicating that attention needs to be paid to, *inter alia*, the provision and delivery of child-friendly information, appropriately trained staff, the design of courtrooms, the clothing of judges and lawyers, sight screens and separate waiting rooms. The views of juvenile defendants should be heard in any proceeding – throughout the entire juvenile justice process – and it should take place by means of a talk or dialogue, rather than a '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. Furthermore, the Committee (2007; 2009) makes a connection between expressing views freely and conducting juvenile justice proceedings behind closed doors. *In camera* hearings should be the rule and exceptions should be very limited. Moreover, the juvenile defendant should be properly informed about the outcome of the hearing and about the extent to which his views have played a role in the decision-making of the judge. The 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).

### *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 (the Court) (Cipriani, 2009; Kilkelly, 2008).

The Court delivered important decisions in the English *Bulger case* (1999)<sup>5</sup> with regard to the participation of juveniles in criminal proceedings. It ruled '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). The Court maintained the view that 'the formality and ritual of the Crown Court must at times have seemed incomprehensible and intimidating' (para. 86) and the 11-year-old defendant(s) had been 'unable to participate effectively in the criminal

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5 ECtHR, 16 December 1999, Appl. no. 24724/94 (Case of *T. v. the United Kingdom*).

proceedings against him and was, in consequence, denied a fair hearing ...' (para. 89). The Court concluded that the juvenile defendants had been denied a fair trial by prosecuting them in an adult criminal court and in public (para. 85).

The fact that court procedures should be adapted to the developmental stage of the juvenile defendant has been further interpreted in the case *s.c. versus the United Kingdom* (2004).<sup>6</sup> The Court explained in this case of an 11-year-old English defendant indicted to the Crown Court that article 6, ECHR does not imply that a juvenile defendant should understand every legal detail during the criminal trial (para. 29). Legal representation serves the purpose in this respect of informing and guiding the defendant through the trial. Furthermore, the Court decided that the defendant should have been tried in a specialised court, with adapted procedures, to have regard for his young age and low level of intellectual maturity (para. 35).

More recently, a 15-year-old Turkish young person also complained that he had been deprived of a fair trial, because he was not able to participate effectively.<sup>7</sup> The Court concluded that a '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 importance of the presence of a lawyer at the hearings was emphasised, because a lawyer could have assisted the defendant in his participation and could have contributed to a more effective participation.

### *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 on Child-Friendly Justice* (2010). These guidelines serve the purpose of giving 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 to make the procedures in the juvenile justice system more child-friendly. The guidelines provide probably one of the most extensive accounts of how child-friendly justice should be defined and substantiated in national juvenile justice systems.<sup>8</sup> The participation of juvenile defendants in juvenile justice proceedings has been given a prominent position in the guidelines.

6 ECtHR, 15 June 2004, Appl. no. 60958/00 (Case of *s.c. v. the United Kingdom*).

7 ECtHR, 20 April 2009, Appl. no. 70337/01 (Case of *Güveç v. Turkey*).

8 It should be noted that these recommendations are made for the 47 member states of the Council of Europe.

The term "child-friendly justice" encompasses, *inter alia*, '... respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings' (para. 11, c). It is emphasised in this document that providing information to juvenile defendants is of importance. Children should, for example, be informed of their rights, the juvenile justice system and its procedures, different procedural steps that have to be taken, the charges and the court dates. Other elements of child-friendly justice are that children should be heard in closed court sessions and that professionals working with children should be trained in communicating with children from different age groups. It is recommended that language should be used that children understand, that children should be able to be accompanied by their parents and that court sessions are adapted to the 'child's pace and attention span' (para. IV, art. 61). 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).

From the analysis of international children's rights law and standards it can be concluded that the implication of article 12, CRC for juvenile justice proceedings is such that juvenile defendants should be encouraged to give their views on the criminal case and that professionals in court should seriously consider these views. Moreover, participation presupposes that juvenile defendants understand what is happening during the judicial process. It can be argued that by employing specialised youth court procedures and by providing additional help to juvenile defendants, they are enabled to participate more effectively in juvenile justice proceedings.

### **A Developmental Psychological Perspective**

The international children's rights perspective can be further completed and concretised by insights drawn from developmental psychological theory and research. The participation of defendants in court is not only of importance for minors, but is of equal importance for adult defendants. However, juveniles are in the midst of their development towards maturity. Because of their incomplete cognitive and emotional development, it can be argued that juveniles need extra assistance in the exercise of their right to be heard. It is argued here that 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 adequate means to be able to express their views in the first place.

### *Juvenile Defendants' Understanding*

Developmental psychological research outcomes show that children around the age of 12 or 13 years 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 only accountable to their immediate environment: their parents, grandparents, teachers and sometimes neighbours. Furthermore, they lack experience with the law and the government. Children are unable to see the legitimacy of laws and legal procedures that 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. 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 and 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 youths 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 there are large differences between the developmental maturity of individual children. Some children are behind or ahead in their development, physically, cognitively, emotionally or morally. The pace at which adolescents tend to develop differs substantially between individuals and so age is a poor indicator of the capacities that young people possess to participate effectively in a trial. The trial-related knowledge of individual juveniles increases with age, although 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; Scott and Steinberg, 2008). Furthermore, the stress of having to appear before a judge and being sentenced in court can hamper young people's understanding of the procedures even more (Grisso, 2000).

### *Hearing Children's Views*

Next to the observation that juveniles have a limited understanding of juvenile justice procedures and therefore need to be assisted, empirical research also indicates that participation has several positive effects on children's development towards maturity and their understanding of the procedures in which they are involved.

Several studies indicate that children value being heard in cases that affect them. 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 (see also Kilkelly, 2010). Children 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 their life and this can be accomplished by hearing them directly. Kilkelly and Donnelly (2011) found similar results with regard to children's involvement in healthcare decisions. Children indicated that they preferred that healthcare 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 active participants in the decision-making process.

Besides the value that children themselves attach to being heard in court, scholars also highlight the importance of hearing the views of children, because of its positive effects. Active participation in decision-making processes may help children to understand and to accept the final decision, because the judge's decision is more readily 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 facilitates children 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 by the decision-maker. 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 because they are not being taken seriously by those adults (Lansdown, 2005, 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).

## Requirements for Effective Participation

The insights from the children's rights and the developmental psychological perspective are taken as starting points to formulate directives in order for young people to be enabled to participate effectively in juvenile justice proceedings. In this section five requirements with regard to hearing the views of juvenile defendants and four requirements contributing to their understanding of the proceedings will be presented.

### *Hearing the Views of Juvenile Defendants*

When examining the participation of juvenile defendants in the youth court more closely, it becomes apparent that a notable tension exists between the imposing setting of the court and the task of helping the young person to participate in the proceedings. The stern and aloof ambiance of court buildings is anything but easy to combine with direct and smooth contact with the young person and his family, who are usually in awe of the 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) and enabling them to participate in court proceedings.

In order effectively to hear the views of juvenile defendants, five requirements should be met: 1) creating a less formal setting in the courtroom; 2) using certain conversational techniques that are geared towards adolescents; 3) giving the juvenile defendant the opportunity 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.

The first two requirements are factors that can be seen as having an influence on the fulfilment of the latter three requirements. First, with regard to the setting of the youth court, it is important that the physical distance between parties is not too large and that juveniles are addressed in a positive manner (Archard and Skivenes, 2009; Saywitz *et al.*, 2010). Second, the effective participation of a juvenile defendant requires conversation techniques that incite the young person rather than deter him from telling his own story. The judge should avoid creating situations where he speaks too much as these will deter the young person from participating and contributing to the hearing. When the judge asks the young person questions, it is of importance that these questions are short, direct and preferably semi-open, and that they ask for an explanation and clarification (Delfos, 2005; Saywitz *et al.*, 2010). Third, an important task for youth court judges is to invite the young person to give his own account of what has happened and to show a willingness to listen to him (Delfos, 2005). Fourth, showing interest in the story and the observations of the young person,

by always asking one or more questions and going into detail, is equally of importance. Finally, actively engaging parents in the juvenile justice process increases the level of participation of the young person. It is crucial 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 and the judge should give them the opportunity to express their views regarding what has happened and the current situation of their child (see also Hepping and Weijers, 2011).

### *Juvenile Defendants' Understanding*

In order to improve juvenile defendants' understanding of court procedures, four requirements should be met: 1) explaining the purpose of the hearing, the procedures that are followed and the participants involved 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.

Concerning the young person's understanding of the procedures, the first requirement is that one needs to be conscious of the fact that adolescents have a limited understanding of what is happening at 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 (Griffiths and Kandel, 2000). Second, it is of importance to avoid judicial jargon or to explain such jargon when its use is inevitable (Griffiths and Kandel, 2000; Plotnikoff and Woolfson, 2002; Saywitz *et al.*, 2010). Third, it is crucial to justify the sentence that is imposed. The decision-maker should explain his judgment and sentence in explicit terms that are comprehensible to both the young person and his parent(s) (Archard and Skivenes, 2009; Cashmore and Parkinson, 2007). It is advisable to allow extra time to explain the grounds of the sentence, because this is important in light of the extent to which the young person accepts responsibility and understands the consequences of his behaviour. Fourth, an appeal can be made to the moral aspects of the case. The concrete consequences of the offence for victims and other important persons in the life of the young person and the responsibility of the young person for his deeds can be discussed. This can assist the young person in reflecting on his acts and give him directives for future behaviour.

In this study it was expected that the requirements for hearing juvenile defendants and enhancing their understanding of juvenile justice proceedings contribute to their effective participation. In the following section the application of these requirements in practice will be considered.

## The Participation of Juvenile Defendants in Europe

The participation of juvenile defendants has been studied in practice in 50 youth courts and other competent administrative bodies in juvenile justice<sup>9</sup> in 11 European countries, namely in Belgium, England and Wales, France, Germany, Greece, Ireland, Italy, the Netherlands, Scotland, Spain and Switzerland. Data has been collected by means of systematic observations of hearings and additional interviews with judges, prosecutors, lawyers and social workers. In total, the cases of 3,019 juvenile defendants were observed between 2005 and 2012. A more elaborate discussion of the methodology of this study can be found in Rap (2013).

In the final section of this article the empirical findings of this study will be presented. Special attention will be paid to the distinction between hearings held in classical courtrooms and hearings held in chambers (i.e. the office of the judge or other decision-maker).<sup>10</sup> Moreover, the distinction between juvenile justice systems that operate in the adversarial and the inquisitorial legal tradition will be considered as well.

### *Hearing the Views of Juvenile Defendants*

The layout of and the atmosphere in a courtroom influence the extent to which juvenile defendants can effectively participate in a youth court hearing. At one extreme, the Scottish children's hearings can be characterised as highly informal. In Scotland, children between 8 and 16 years of age who display delinquent behaviour cannot be found guilty of a crime<sup>11</sup> and no distinction is made between the causes of delinquency and other educational and developmental problems (see Kilbrandon Committee, 1964). As a consequence, children who commit an offence and children who are in need of care or protection are subject to the same means of disposal, i.e. welfare measures and no sanctions are applied (art. 83 (2), Children's Hearings (Scotland) Act 2011). The children's hearing takes place by means of a roundtable discussion, which creates an atmosphere in which communication between the different parties is enabled to a large extent. Generally, at the hearing only a limited number of people are

9 For example the Scottish children's hearings system (see for example, Burman *et al.*, 2010).

10 In total, the number of observed juveniles in chambers was 312 (10%) and the number of juveniles observed in formal court hearings was 2,707 (90%). 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.

11 In Scotland, the minimum age of criminal prosecution lies at 12, which means that children from 12 years of age and on can be transferred to the adult court (i.e. the Sheriff court or the High court) in case of a serious offence [s. 41A Criminal Procedure (Scotland) Act, 1995/s. 52 Criminal Justice and Licensing (Scotland) Act, 2010].

present, namely the three lay panel members (who decide about the imposition of a supervision measure), the young person and his parents, and a social worker. The expectation that the involvement of social workers contributes to the participation of the young person and his parents was substantiated by the observations of the children's hearings. It seems that the contribution of social workers to the hearing and attention for the personal circumstances of the young person contribute to their effective participation. One weakness of the children's hearing, though, is the fact that it 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.

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 British Isles and in the youth courts in, for example France, Germany, Greece and the Netherlands. The hearings are held in large, classical courtrooms, procedures are more 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.

The judge in chambers on the European continent, such as in Switzerland, Belgium, France 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 of social and physical distance between the participants, a limited number of people present and an informal atmosphere. These factors help the judge to hear the views of the young person. At the same time, a discussion regarding the delinquent behaviour and its consequences is not avoided by the judge.

A 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 slightly more attention paid to the training and education of the laypeople who lead the hearings, in child development and age-appropriate ways of communicating with children and their parents. In the other countries, much can be gained from training judges, prosecutors and lawyers in specific ways to promote better suited ways of communicating with juvenile defendants and parents.

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 are at the centre of the hearing. This was the case at the children's hearings in Scotland, the hearings in chambers in Switzerland

and France and youth court hearings in Switzerland, France, Germany and the Netherlands; 2) countries in which a dialogue between the juvenile defendant and the judge takes place, but where this dialogue is merely directed by the contribution and questions of the judge. This was observed at youth court hearings in Belgium, Greece 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. In countries in which the inquisitorial legal tradition is apparent, the judge personally hears the young person during the youth court hearing and engages in a dialogue with him.

In several countries a genuine reaction to the views of juvenile defendants was observed, most notably at the Scottish children's hearings, 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 actively to encourage the young person to give his views on the matter at hand and to react genuinely to his views. In the adversarial youth courts in England and Wales, Ireland, Scotland and Spain, genuine interest shown by the judge 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.

Finally, with regard to the participation of parents at the hearing, again the Scottish children's hearings can be seen as an example of best 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 considered in the decision-making process. This is the case in Switzerland as well. In countries on the European continent (but also England and Wales) parents are also involved during the youth court hearing. However, the role of parents in these countries remains rather small and the questions that are asked are mostly general by nature, concerning how the young person behaves at home or how he is doing at school. 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 (art. 42 (1), Criminal Procedure (Scotland) Act 1995) has as a result that parents are not given any role in the court hearing. Moreover, in

these youth courts parents are usually sitting somewhere at the back of the courtroom, which does not contribute to their opportunities to participate.

### *Juvenile Defendants' Understanding*

The Scottish children's hearings system and the Swiss hearings 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. 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 providing explanations to the young person with regard to what is taking place in court. It was observed that in case 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 observed as part of this study, a lawyer was always present.

Regarding the avoidance of the use of judicial jargon the adversarial/inquisitorial divide is noticeable as well, although less profound. England and Wales, by virtue of their lay magistrates, scores better on this point, whilst in the Netherlands, judicial jargon was used more often compared to its neighbouring countries on the European continent. Overall, at hearings in chambers on the European continent, the use of legal jargon is avoided the most.

Regarding clarification of the judgment and sentence, the categorisation of countries is not consistent 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 in general 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. 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.

Moreover, this part of the hearing was clearly used to give the young person a message to take home with regard to avoiding future delinquent behaviour.

Making an appeal 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.

### Conclusion

The Beijing Rules explicitly acknowledged for the first time that juvenile defendants should be able to participate and express their views freely in juvenile justice proceedings. This notion is further substantiated in article 12, CRC. From analysing international children's rights law and standards it becomes clear that juvenile defendants should be heard in juvenile justice procedures and that they should understand the general nature of the procedures in which they are involved and understand the outcomes of the youth court process.

From developmental psychological research it can be concluded that adolescents are not able fully to participate in a youth court hearing without the assistance and support of adults, because they have a limited understanding of the meaning of the process and of the attitude that is expected from them in court. Therefore, it has been argued that juveniles need additional assistance. Hence, requirements have been formulated to enhance effective participation, specifically for juvenile defendants. These requirements are classified under the notions hearing juvenile defendants and juvenile defendants' understanding.

From the empirical findings of this study it can be concluded that the requirements for hearing juvenile defendants are best met in the Scottish children's hearings system and in the juvenile justice system in Switzerland. In these countries hearing juveniles, giving a genuine reaction to their views and hearing parents, is carried out extensively. Conversely, in the youth courts in England and Wales, Ireland, Scotland and Spain, hearing juveniles and giving a genuine reaction occurs to a limited extent. Hearing the views of parents is only carried out more extensively at the Scottish children's hearings, in Switzerland and in the Netherlands.

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 well. Giving explanations, avoiding jargon and clarifying the judgment take place extensively in these countries. Addressing the consequences of the offence is only done to some or a limited extent in every country and, in general, nowhere does this take place extensively. 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.

Overall, it can be concluded that 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. The requirements of the effective participation of juvenile defendants as presented in this article serve the purpose of providing points of special interest when dealing with juvenile defendants in court. Professionals working in the youth courts 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 the 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 is therefore recommended that the UN Committee on the Rights of the Child 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 of juvenile justice exist, it is of importance to provide the states parties with more firm and concrete instructions on how to implement the right to be heard in a child-friendly manner. 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. It is recommended that the Committee formulates a general comment entirely devoted 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.

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