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Age Limits in Law: Between Behavioural Science and Human Rights

Frank Weerman & Jolande uit Beijerse*

Keywords: age limits, behavioural science, human rights, age, juvenile justice

Age is one of the most important factors shaping our lives and societies. As babies and children, we are dependent on parents or caretakers. As we grow older, we go to school and follow-up education, develop cognitively and emotionally and become increasingly autonomous. Later in life, we may get jobs, start families and take on responsibilities of all kind. At the end of our lives, we may have become wiser, but we also usually take a step back in our responsibilities as we retire and our physical condition becomes weaker. Therefore, many societal institutions and social arrangements are focused on certain ages or stages in life, and this is also reflected in law. In various legal areas, there are rules and procedures that are applicable only to certain ages as they are related to varying responsibilities, levels of cognition or socio-emotional capacities to make and understand decisions. Age plays a role in judicial decisions regarding culpability or sanctions and regarding qualification for certain services or rights. In accordance with human rights conventions, there are even special areas of law that are devoted to certain age groups, for example juvenile justice for young offenders or care proceedings in family law.

How age should matter in judicial decisions and at what age the age limits should be set is a complicated issue. It can be approached from different legal angles, including arguments drawn from legal philosophy about responsibility, autonomy, accountability, and protection. But also empirical insights on how young people develop into responsible and autonomous adults need to be taken into account. These insights can be drawn from a wider array of behavioural scientific disciplines, including biology, developmental psychology and the neurosciences. For example, there is an ongoing discussion on the judicial consequences of new insights from studies in neuropsychology showing that brain development still continues until the age of 25. Some scholars argue that this needs to be taken into account in criminal justice decision-making. At the same time, research in developmental psychology shows that adolescents and also chil-

dren seem to be more able to make balanced and reasonable decisions about their own family situation, their health and their identity than often assumed, which may have important implications for their position in civil law and voting procedures. The interplay between empirical insights from behavioural science and legal arguments means that the question of whether and how age should matter in law is best served with a multidisciplinary perspective.

Despite the progress in the behavioural sciences, it is often difficult to determine the age at which individuals have reached certain levels of cognition and responsibility that are needed to take autonomous decisions and the age at which they can be held accountable for crimes and be punished as adults. This may even differ from person to person and between social categories or between cultures. For this reason, there is a lot of space for discussion. Age limits in law are seldomly uncontested: policymakers and legal scholars often disagree on the age limits that suit the situation the best. As a result, differences in age limits and other legal arrangements related to age exist between countries and sometimes between jurisdictions. Age limits also differ between areas of law, such as criminal law, family law, civil law and labour law.

In this special issue, we bring together seven articles that deal with various age limits and age considerations in several areas and disciplines: international law, youth justice and criminal law, civil law and family law, voting rules, European labour law and health law. Authors from different countries were asked to write a contribution on age limits in legal areas and to include a discussion based on a combination of normative arguments, comparative analyses and empirical insights on human development. This has resulted in a varied thematic issue that starts with two overarching contributions. The first one is that of Rap, Schmidt & Liefwaard, which reflects on the fundamental principles and practical application of age limits in several legal areas, based on international children's rights law. The authors focus on the UN Convention on the Rights of the Child (UNCRC), in which protection as well as participation and autonomy are central issues. They observe an inconsistent application of age limits and conclude that the UN Committee on the Rights of the Child struggles to provide comprehensive guidance, resulting in open norms and leeway to set age limits based on practical and political reasons. The second overarching contribution is a comparative analysis of Leenknecht, Put &

* Frank Weerman is endowed professor Youth Criminology at the Erasmus School of Law and senior researcher at the NSCR (Netherlands Institute for the Study of Crime and Law Enforcement). Jolande uit Beijerse is associate professor Criminal Law and Criminal Procedure at the Erasmus School of Law.

Veckmans, in which age limits within the youth justice systems of six different countries are analysed. These include the Netherlands, Northern Ireland and New Zealand, with a low minimum age of criminal responsibility, and Belgium, Austria and Argentina, with a high minimum age of criminal responsibility. The comparison shows that the systems of age limits are far more complex than just lower and upper age limits and that within the justice systems there are several other relevant age limits, such as court age limits and detention institution age limits. The authors end their contribution with a proposal for a coherent conceptual framework on age limits in youth justice.

The next two contributions focus on current developments and discussions on legal age limits in the Netherlands. The contribution of Bruning and Peper shows that in Dutch family (civil) law, there is a tortuous jungle of age limits, exceptions and limitations regarding children's procedural rights. The authors focus on the lower legal age limit for the right of children to be heard according to Article 12 UNCRC and argue that the current age of 12 in Dutch civil law should at least be lowered to the age of eight. They suggest that based on empirical research with a neuropsychological perspective, the best option would be to individually determine the child's competency in each case. On the other hand, they argue that fixed legal age limits have the advantage of a clear system. Instead of organising a system for individual assessments, a system in which the judge can focus on inviting all children from a certain age to be heard in court would be preferable. In a sense, the contribution of Prop, Van der Laan, Barendregt & Van Nieuwenhuizen evaluates a system in which an opposite direction was chosen. In 2014 the Netherlands broadened the possibility to impose a youth sanction on offenders aged 18 to 22, for young offenders with behavioural problems and developmental stages that would fit juvenile justice better than adult criminal law. But in this law the Dutch government opted for the burden of an individual assessment in each case instead of bringing all young adult offenders to the Youth Court. The authors show that the young adult offenders that were selected committed more offences of a serious nature compared with young adults sentenced with adult sanctions and that the nature of the problems of this selected group was in line with what was intended by this proceeding. However, it is unclear to what extent they were also less developed mentally. The authors observe that the concept of maturity remains elusive and difficult to assess in legal practice and call for more research in this regard.

The last three contributions refer to age limits in three totally different legal areas. Peto addresses the issue of the minimum age for the right to vote and extensively addresses insights from empirical developmental psychology to show that by the age of 16 (if not earlier) individuals have developed all the cognitive components of autonomy, although various other capacities are still evolving. Respect for autonomy requires granting political rights, including the right to vote for this age group.

Ter Haar provides a complete overview of how the European Court of Justice (CJEU) has handled age discrimination regarding employment and labour law. Her qualitative analysis shows that the CJEU seems to follow a 'complete life view' when judging these cases and that an unequal distribution of resources over the course of the life of an individual, or different ages, can be acceptable. The last contribution of Horton is on age limits in healthcare in the United Kingdom, where the National Health Service determines access to a range of health interventions, including infertility services and cancer screening and treatment. The article explores the compatibility of some of the age barriers with UK anti-discrimination law, which has prohibited age discrimination in the provision of public services, including healthcare. Age considerations in care have become even more pressing since the Covid-19 crisis has affected particularly older people and has put pressure on the available health resources.

All in all, this issue shows how insights derived from non-legal disciplines like philosophy and developmental (neuro-) psychology are used to determine legal age limits. At the same time, it also illustrates that even if those insights are clear (which is not always the case), setting legal age limits is still a very complicated process.

One complicating factor is that the way in which age limits in legal systems are set differs from system to system, with far-reaching consequences in practice. Youth justice provides a telling example of this (as illustrated by the contribution by Leenknecht et al. in this issue). When the age limit for being tried as an adult is set at 18, it is still a question whether the system starts from the age at the date of the trial or at the date of the offence. That makes a big difference because it can sometimes take a year or longer before the trial takes place. Most systems use the date of the offence – but then the problem remains that committing a crime one day before the 18th birthday leads to completely different sanctions than one day later: a more education-focused youth sanction or an adult sanction with the possibility of life imprisonment. This is one of the reasons why some systems (including the one from the Netherlands; see also the contribution by Prop et al.) created the possibility for ages 18-21 to qualify for youth sanctions and for ages 16-18 to qualify for adult sanctions. These exceptions clearly illustrate that the legislature should not follow rigid age limits, whether based on insights from behavioural science or not, but always respect the human rights perspective and legal principles. With regard to this, it is noteworthy that the first exception (18-21 years old tried as juveniles) is in accordance with the UNCRC but that the second exception (16- and 17 years old tried as adults) is not.

Another example of the complex relationship between insights from behavioural science and legal age limits is that a balance is needed between clarity and predictability, on the one hand, and a tailored approach, on the other. From a (neuro-)psychological perspective the best option would be to individually determine the adolescent's or child's competency in each case because the

psychological and neurological development differs from person to person. But from the juridical principle of legality, legal age limits should be clear in the law, and defendants should not be dependent on assessments by a psychologist to be brought to court. This would mean that in youth justice or in family law, it might be better if all children from a young age are heard in court and if all young adult offenders are brought to the Youth Court so that they get a fair chance with a judge who eventually takes the decisions that affect their lives instead of a behavioural scientist.

A last example of the complexity of the subject of this special issue is the apparent contradiction between different legal areas in the consequences of insights from behavioural sciences. In this issue, arguments based on developmental and cognitive psychology and the neurosciences lead to a plea to lower the age to vote to 16 and the age to be heard in court even to 8. At the same time, findings from the behavioural sciences are used to argue that it is necessary to raise the age to qualify for a youth sanction to 23.

However, from a human rights perspective, there is no contradiction. All arguments raised in this issue relate to the extension of rights: the right to vote, the right to be heard and the right to qualify for a youth sanction. In the end, then, setting the right age limits seems to be a matter of combining empirical insights from the behavioural sciences with applying recommendations based on human rights.

Safeguarding the Dynamic Legal Position of Children: A Matter of Age Limits?

Reflections on the Fundamental Principles and Practical Application of Age Limits in Light of International Children's Rights Law

Stephanie Rap, Eva Schmidt & Ton Liefwaard*

Abstract

In this article a critical reflection upon age limits applied in the law is provided, in light of the tension that exists in international children's rights law between the protection of children and the recognition of their evolving autonomy. The main research question that will be addressed is to what extent the use of (certain) age limits is justified under international children's rights law. The complexity of applying open norms and theoretically underdeveloped concepts as laid down in the UN Convention on the Rights of the Child, related to the development and evolving capacities of children as rights holders, will be demonstrated. The UN Committee on the Rights of the Child struggles to provide comprehensive guidance to states regarding the manner in which the dynamic legal position of children should be applied in practice. The inconsistent application of age limits that govern the involvement of children in judicial procedures provides states leeway in granting children autonomy, potentially leading to the establishment of age limits based on inappropriate – practically, politically or ideologically motivated – grounds.

Keywords: age limits, dynamic legal position, children's rights, maturity, evolving capacities

1 Introduction

The United Nations Convention on the Rights of the Child (CRC) departs from the presumptions that children are independent rights holders and that, because of their development and particular dependency and vulnerability, they require specific rights assuring treatment with humanity and respect for human dignity and in a manner that takes into account their age and maturity.¹ Several scholars have noted the tension within the

CRC between protecting children on the one hand and on the other hand recognising children's evolving autonomy, which is, among others, reflected in the right to participate in diverse settings and decisions affecting them.² The adoption of the CRC and the subsequent international and regional developments in international children's rights law have resulted in a comprehensive and multi-layered legal framework, under which children are defined as persons under the age of eighteen (see Art. 1 CRC) and are entitled to rights that safeguard their protection (against violence, exploitation and unlawful interference with private life, integrity and liberty), access to quality services and provisions (e.g. education, health care, social security, adequate standard of living, leisure and play) and participation.³ The inherent tension between protection and evolving autonomy becomes apparent when taking a closer look at the guidance that is given to CRC states parties regarding the implementation of certain rights in different contexts. The CRC deliberately enshrines norms and principles that are open and vague, in order to accommodate differences between states parties and to facilitate adaptation to different (legal) contexts.⁴ The principle of the best interests of the child (Art. 3(1) CRC) – one of the assumed guiding principles of the CRC, acknowledging its relevance for the interpretation and implementation of all other rights⁵ – is an example

African Journal on Human Rights 401 (1995); N. Cantwell, 'The Origins, Development and Significance of the United Nations Convention on the Rights of the Child', in S. Detrick (ed.), *The United Nations Convention on the Rights of the Child. A Guide to the "Travaux préparatoires"* (1992) 19.

* Stephanie Rap is assistant professor in children's rights at the Department of Child Law, Leiden Law School, the Netherlands. Eva Schmidt is PhD candidate at the Department of Child Law, Leiden Law School, the Netherlands. Ton Liefwaard is Vice-Dean of Leiden Law School and holds the UNICEF Chair in Children's Rights at Leiden University, Leiden Law School, the Netherlands.

1. CRC, preamble; J. Sloth-Nielsen, 'Ratification of the Convention on the Rights of the Child: Some implications for South African Law', 11 *South*

2. N. Peleg, 'Illusion of Inclusion: Challenging Universalistic Conceptions in International Children's Rights Law', 24 *Australian Journal of Human Rights* 326, at 328-329 (2018); S. Varadan, 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child', 27 *The International Journal of Children's Rights* 306, at 322 (2019); G. Lansdown, *The Evolving Capacities of the Child* (2005), at 5.
3. U. Kilkelly and T. Liefwaard, 'International Children's Rights: Reflections on a Complex, Dynamic, and Relatively Young Area of Law', in U. Kilkelly and T. Liefwaard (eds.), *International Human Rights of Children* (2019) 617; K. Arts, 'Twenty-Five Years of the United Nations Convention on the Rights of the Child: Achievements and Challenges', 61 *Netherlands International Law Review* 267 (2014).
4. T. Liefwaard, *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards* (2008).
5. UN Committee on the Rights of the Child, *General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests*

of such a vague and open norm, which is flexible but difficult to interpret and implement in practice at the same time.⁶ Also, the concepts of giving due weight to the views of the child in accordance with his or her age and maturity (Art. 12(1) CRC) and the evolving capacities of the child (Art. 5 CRC) are subject to diverse interpretations and are criticised for giving little guidance to states and professionals in practice.⁷ Tobin signals the lack of consensus on the meaning of particular children's rights and on the balance between protection and autonomy that needs to be established.⁸ Hollingsworth explains that the law should aim to provide the child with capacities for developing full autonomy and into a fully autonomous rights holder.⁹ In light of this, children are seen as human beings in development, which distinguishes them from adults and merits their special treatment by the law. It is important to note that the CRC itself lacks thorough theoretical foundation¹⁰ and that, as will be discussed below, the guidance provided by the UN Committee on the Rights of the Child (CRC Committee) is not always clear or consistent. However, it is evident that under international children's rights law, children are entitled to a dynamic legal position that develops along with their age and increasing maturity and that this particular position is often expressed in domestic law through the imposition of different age limits. The dynamic legal position and the corresponding fluid concepts are thus, in practice, combined with more static notions such as age limits.

Taken as a Primary Consideration (Art. 3, para. 1) (CRC/C/GC/14) (2013), para. 1.

6. See for instance M. Freeman, *A Commentary on the United Nations Convention on the Rights of the Child, Article 3: The Best Interests of the Child* (2007).
7. See for example A. Daly, 'No Weight for "Due Weight"? A Children's Autonomy Principle in Best Interest Proceedings', 26 *The International Journal of Children's Rights* 61 (2018); K. Hanson, 'Children's Participation and Agency When They Don't "Do the Right Thing"', 23 *Childhood* 471 (2016); E.K.M. Tisdall, 'Children and Young People's Participation: A Critical Consideration of Article 12', in W. Vandenhole, E. Desmet, D. Reynaert and S. Lembrechts (eds.), *Routledge International Handbook of Children's Rights Studies* (2015) 185; T. Liefwaard, 'Juvenile Justice from an International Children's Rights Perspective', in W. Vandenhole, E. Desmet, D. Reynaert and S. Lembrechts (eds.), *Routledge International Handbook of Children's Rights Studies* (2015) 234.
8. J. Tobin, 'Understanding a Human Rights Based Approach to Matters Involving Children: Conceptual Foundations and Strategic Considerations', in A. Invernizzi and J. Williams (eds.), *The Human Rights of Children: From Visions to Implementation* (2011) 61, at 78; see also K. Hanson, 'Schools of Thought in Children's Rights', in M. Liebel, K. Hanson, I. Saadi and W. Vandenhole (eds.), *Children's Rights from Below: Cross-Cultural Perspectives* (2012) 63, at 70.
9. K. Hollingsworth, 'Theorising Children's Rights in Youth Justice: The Significance of Autonomy and Foundational Rights', 76 *The Modern Law Review* 1046, at 1060 (2013).
10. J. Tobin, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation', 23 *Harvard Human Rights Journal* 1 (2010); Tobin (2011), above n. 8; M. Freeman, 'Why It Remains Important to Take Children's Rights Seriously', 15 *The International Journal of Children's Rights* 5, at 10 (2007); M. Freeman, 'Taking Children's Rights More Seriously', 6 *International Journal of Law and the Family* 52, at 59 (1992); J. Eekelaar, 'The Emergence of Children's Rights', 6 *Oxford Journal of Legal Studies* 161, at 170-171 (1986); Hanson, above n. 8; K. Hanson and N. Peleg, 'Waiting for Children's Rights Theory', 28 *International Journal of Children's Rights* 15 (2020).

This raises the question, To what extent is the use of (certain) age limits justified under international children's rights law?

This article provides a critical reflection upon age and age limits, in light of the tension between protecting children and recognising their evolving autonomy under international children's rights law. This article, first, reflects on the position of children and their evolving capacities within the CRC, as the key instrument of international children's rights law. Subsequently, the practical application of age limits is attended to by providing various case studies of how age limits are established by states parties in different legal contexts (namely, in juvenile justice, family law and care proceedings and migration law). The article concludes with some observations and reflections on the justification for the use of age limits under international children's rights law.

2 The Perspective of the CRC on Children and Evolving Capacities

The CRC can be characterised as a game changer as an instrument of international human rights law that recognises children as rights holders in the first place.¹¹ The question as to what extent children have human rights and fundamental freedoms now seems superfluous.¹² The CRC grants children additional or special rights that recognise their special status as being dependent, vulnerable or in need of special protection.¹³ Moreover, the CRC provides guidance regarding the enjoyment of rights. Article 5 CRC acknowledges, on the one hand, the child as rights holder who is entitled to enjoy his or her rights. At the same time, this core provision of the CRC recognises parents or others responsible for the child (including members of the extended family) as the ones who have the right, responsibility and duty to provide 'appropriate direction and guidance in the exercise by the child of the rights recognized in the CRC'. This direction and guidance must be given, however, in a manner that respects the child's 'evolving capacities'. With the introduction of the child's 'evolving capacities', Article 5 CRC reflects an attempt by the international legal community to capture the biological fact that children develop and mature over time and that this has implications for the role of the child's legal representative, in a provision of international law.¹⁴

11. See Freeman (2007), above n. 10; J. Tobin, 'Introduction: The Foundation for Children's Rights', in J. Tobin (ed.), *The UN Convention on the Rights of the Child: A Commentary* (2019) 2.

12. G. van Bueren, *The International Law on the Rights of the Child* (1995).

13. See e.g. Art. 19 CRC (protection against all forms of violence in a care setting) and Art. 31 CRC (right to leisure and play).

14. The CRC has, in a way, defined childhood as the period of time in which a person becomes 18 years of age, see Art. 1 CRC. This is not meant to serve other than as the age range to which the CRC is appli-

The drafters of the CRC have chosen to include the concept of evolving capacities as the solution to the tension between the recognition of the need to protect the child and of the growing autonomy of the child. Consequently, the CRC can be seen as an instrument that recognises children as both in need of protection and as human beings with independent rights that they should be able to exercise in accordance with their development.¹⁵ On the basis of a comprehensive analysis of Article 5 CRC, Varadan concludes that in the three decades that have passed since the adoption of the CRC, the notion of evolving capacities has been given much broader meaning, in particular, by the CRC Committee, with – among others – more than eighty references in nineteen of the General Comments.¹⁶ As Varadan notes,

[I]t would appear that the Committee has introduced a broader principle of evolving capacities under the UNCRC that ... informs ... the interpretation and implementation of the Convention as a whole.¹⁷

Its meaning has thus been extended beyond the mere implications for the role of parents and others legally responsible for the child.

The notion of ‘evolving capacities’ can be seen as crucial to the conception of children and their rights under international law.¹⁸ Prior to the adoption of the CRC, the protection of family autonomy and the rights of parents with regard to the upbringing of their children had already been well established in various instruments of international law.¹⁹ The phrasing in Article 5 CRC, where it is stated that adults should provide appropriate direction and guidance in the exercise by the child of his or her rights, makes clear that this direction and guidance should be provided in a manner that respects the rights of the child.²⁰ Varadan describes this as ‘a somewhat radical departure from the traditional parent-child relationship, in which parents were the primary rights-holders and the child was a passive recipient of protection and care’.²¹

The emphasis placed by the CRC Committee on the notion of evolving capacities has also had implications for the establishment of age limits and has, in fact, been used as a policy principle by the CRC Committee to encourage both the recognition of children’s increasing autonomy and the establishment of (minimum) age laws in different areas.²² However, this has led to an inconsistent framework of (minimum) age limits that varies

across legal fields and settings. The most fundamental age limit that can be found in the CRC, arguably, is in Article 1, which defines a child as ‘every person under the age of 18’, although exceptions can apply. For example, in General Comment No. 4,²³ the CRC Committee states,

States parties need to ensure that specific legal provisions are guaranteed under domestic law, including with regard to setting a minimum age for sexual consent, marriage and the possibility of medical treatment without parental consent. These minimum ages should be the same for boys and girls ... and closely reflect the recognition of the status of human beings under eighteen years of age as rights holders, in accordance with their evolving capacity, age and maturity.²⁴

In General Comment No. 20, the CRC Committee states that minimum legal age limits should be introduced that recognise the right of adolescents to take increasing responsibility in decision making, for example, ‘in respect of health services or treatment, consent to adoption, change of name or applications to family courts’.²⁵ However, the CRC Committee also asks states to allow exceptions to those minimum age limits: ‘In all cases, the right of any child below that minimum age and able to demonstrate sufficient understanding to be entitled to give or refuse consent should be recognized’.²⁶ With respect to the right to be heard (Art. 12 CRC), the CRC Committee actually *discourages* states parties from introducing age limits – in law or in practice – because it would restrict the child’s right to be heard.²⁷ With regard to this right, the CRC Committee states that ‘[b]y requiring that due weight be given in accordance with age and maturity, Article 12 makes it clear that age alone cannot determine the significance of a child’s views’.²⁸ Contrarily, in other areas, significantly stricter guidance is given with respect to establishing age limits. In General Comment No. 20, for example, the CRC Committee

reaffirms that the minimum age limit should be eighteen years for marriage, recruitment into the armed forces, involvement in hazardous or exploitative work and the purchase and consumption of alco-

able, but it resonates with many domestic legal systems as well with other human rights instruments; T. Liefwaard, ‘Juveniles in Transition from Juvenile Justice to Adult Criminal Justice’, in R. Loeber, M. Hoeve, N.W. Slot and P. van der Laan (eds.), *Persisters and Desisters in Crime from Adolescence into Adulthood: Explanation, Prevention and Punishment* (2012) 159.

15. Peleg, above n. 2, at 6; Varadan, above n. 2, at 5.

16. Varadan, above n. 2, at 308; see also Lansdown, above n. 2.

17. Varadan, above n. 2, at 329.

18. *Ibid.*, at 307.

19. See for example *ibid.*; Lansdown, above n. 2, at 5.

20. Varadan, above n. 2, at 319-320; Lansdown, above n. 2, at 5-6.

21. *Ibid.*, at 307.

22. *Ibid.*, at 326-327.

23. The General Comments are authoritative, yet non-binding, recommendations made by the CRC Committee about how to implement certain provisions of the CRC.

24. UN Committee on the Rights of the Child, *General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child (CRC/GC/2003/4)* (2003), para. 5.

25. UN Committee on the Rights of the Child, *General Comment No. 20 on the Implementation of the Rights of the Child During Adolescence (CRC/C/GC/20)* (2016), para. 39.

26. UN Committee on the Rights of the Child (2016), above n. 25, para. 39.

27. UN Committee on the Rights of the Child, *General Comment No. 12: The Right of the Child to be Heard (CRC/C/GC/12)* (2009), paras. 21, 31.

28. UN Committee on the Rights of the Child (2009), above n. 27, para. 85.

hol and tobacco, in view of the degree of associated risk and harm.²⁹

Notwithstanding this seemingly absolute minimum age limit, in an earlier joint general recommendation with the UN Committee on the Elimination of Discrimination against Women, some leeway was provided to allow a lower minimum age limit for marriage:

When a marriage at an earlier age is allowed in exceptional circumstances, the absolute minimum age must not be below sixteen years, the grounds for obtaining permission must be legitimate and strictly defined by law and the marriage must be permitted only by a court of law upon the full, free and informed consent of the child or both children, who must appear in person before the court.³⁰

Another example is that the CRC Committee advocates for fourteen as the minimum age of criminal responsibility (MACR), although it also commends states that have a higher minimum, such as fifteen or sixteen years of age.³¹ The CRC Committee has based this recommendation on scientific research on child and adolescent brain development. The explicit requirement to establish an MACR (Art. 40(3)(a) CRC) reflects the wish to protect children below a certain age from involvement in the justice system because of its potential harmful effects as well as the recognition of the responsibility of children for their behavior from a certain age onwards.³² Thus, Article 5 CRC, although originally meant to regulate the position of parents and other legal representatives in relation to the enjoyment of rights by the child, has been acknowledged as a key provision defining the legal status of children under international children's rights law. It reflects the child's development, evolving capacities and growing autonomy. It consequently gives guidance on how to strike a balance between protection on the one hand and participation and autonomy on the other hand. However, the approach of the CRC Committee with regard to capacities of children seems inconsistent, both substantively (see, for instance, the different options for the minimum age of marriage) and procedurally. As far as the latter is concerned, the CRC Committee renounces the use of age limits with regard to the right to be heard, since such limits can easily be used against children's participation (i.e. as a restriction). At the same time, the CRC Committee provides recommendations for specific age limits in order to pro-

tect certain groups of children and prevent legal uncertainty and/or arbitrary treatment.

3 Practical Perspectives on Age Limits

Children's actual involvement in judicial proceedings and the legal capacity that is assigned to them is generally tied to age limits that are enshrined in domestic law. In the European Union (EU), children's capacity to take legal action or invoke judicial proceedings in their own right varies widely across, and within, member states.³³ In half of the EU member states, children depend on legal representatives and/or guardians (usually parents) to bring a case before a court in civil and administrative proceedings. Also, minimum age limits are applied, ranging from twelve to sixteen years, to regulate the right of children to act in legal proceedings. Kennan and Kilkelly conclude that a selective and restrictive approach to the procedural rights of children has an impact on practice, because children are reliant on adults and their legal actions to vindicate their rights.³⁴ The EU Fundamental Rights Agency (FRA) has concluded, in a recent overview of age limits in EU member states, that the right of children to be heard in legal proceedings varies remarkably among and within states as well, and across different areas of law (e.g. family, criminal and asylum and immigration law).³⁵ Todres has drawn similar conclusions on the basis of his analysis of the concept of maturity and age limits as applied in the United States in different legal areas. The legal construct of maturity is applied inconsistently in the law, across and within certain issues related to children.³⁶ For the purposes of this article, however, the analysis will be directed mostly to the European context.

In this section, case studies are presented of the various age limits that states apply in different areas of law, namely, in juvenile justice, family law and care proceedings and migration law. This section serves the purpose of providing examples of age limits that are set and the purposes these serve. It is not aimed at providing an exhaustive overview of all age thresholds within a certain area of law.

29. UN Committee on the Rights of the Child (2016), above n. 25, para. 40.

30. UN Committee on the Elimination of Discrimination against Women and UN Committee on the Rights of the Child, *Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination Against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices (CEDAW/C/GC/31-CRC/C/GC/18)* (2014), para. 55 sub f.

31. UN Committee on the Rights of the Child, *General Comment No. 24 (2019), Children's Rights in the Child Justice System (CRC/C/GC/24)* (2019), paras. 21-22.

32. See UN Committee on the Rights of the Child (2019), above n. 31, para 6(c).

33. N. Kennan and U. Kilkelly, *Children's Involvement in Criminal, Civil and Administrative Judicial Proceedings in the 28 Member States of the EU* (2015), <https://publications.europa.eu/en/publication-detail/-/publication/c3cd307f-ff03-4010-b322-dcf7063403c5>; E. Jansen, 'De eigen(aardige) procesbevoegdheid van de minderjarige', 30 *Nederlands Juristenblad* 2177 (2016).

34. Kennan and Kilkelly (2015), above n. 33.

35. FRA, *Children's Rights and Justice. Minimum Age Requirements in the EU* (2018), <https://fra.europa.eu/en/publication/2018/minimum-age-justice>.

36. J. Todres, 'Maturity', 48 *Houston Law Review* 1107 (2012).

3.1 Age Limits in Different Areas of Law

3.1.1 Juvenile Justice

In the area of juvenile justice several age limits are of relevance, namely, the MACR, the age of criminal majority and, in some countries, specific age limits for deprivation of liberty or other sanctions. Moreover, states sometimes apply exceptions to the applicable age limits, for example, in case of serious crimes.³⁷

Globally, the MACR differs substantially between countries, with some African and Asian countries and states within the United States that do not have a legal MACR and others that have an MACR starting as low as seven years and until eighteen years.³⁸ In Europe, the overall average MACR is thirteen years, ranging from ten in England and Wales to eighteen years in, for example, Belgium.³⁹ However, in some countries, children below the MACR may be prosecuted in case of a serious offence. For example, in Ireland, minors from the age of ten can be transferred to the adult court in the case of certain serious offences (s. 75 Children Act 2001). Arthur has characterised the English low MACR as taking 'a simplistic functionalist perspective' that fits into a punitive model that is focused on the offence alone and not on the social situation of the child.⁴⁰

Another possibility is that children who are above the MACR are not considered criminally responsible in certain circumstances. In these countries, the *doli incapax* principle (the principle of discernment) applies.⁴¹ The *doli incapax* presumption holds that children under a certain age, but above the formal MACR, are not capable of committing a crime, until proven otherwise. As a consequence, most children will not be prosecuted because they are deemed not to be criminally responsible.⁴² In France, for example, where formally no MACR is laid down in law, children below the age of ten can be found capable of discernment when they have committed an offence, but only protective and educational measures can be imposed in that case (Art. 122-8 Code Pénal). The judge has the discretion to assess and determine whether the child can be held criminally responsi-

ble at any age and from the age of thirteen criminal sanctions can be applied (Art. 2 Ordonnance n° 45-174 du 2 février 1945 relative à l'enfance délinquante).⁴³

At the other end of the spectrum, most countries have set the age of criminal majority at the age of eighteen. Scotland is a notable exception to this rule, where young people from the age of sixteen are held fully criminally responsible.⁴⁴ Other countries also apply exceptions to this rule, in case of serious crimes, prosecuting minors below the age of eighteen in an adult court (e.g. England and Wales and Ireland from the age of ten) or applying adult sentences (e.g. the Netherlands, France and Belgium from the age of sixteen). In some countries, exceptions are made for young adults between eighteen and twenty-one or twenty-three years of age, who can be dealt with according to the juvenile criminal law and/or receive mitigated sentences (e.g. Germany, Austria, the Netherlands).⁴⁵ Some recent developments in this regard, such as raising the upper age limit for young adults eligible to be dealt with in the juvenile justice system in the Netherlands from twenty-one to twenty-three, have been informed by insights from developmental or neuropsychological research.⁴⁶ Such evidence-based developments in shifting age limits can be contrasted with developments in other countries, where the MACR or the age of criminal majority is lowered to apply adult criminal law to juveniles as part of a more repressive approach towards juvenile delinquency.⁴⁷ This highlights the need to address the various arguments underlying age limits, which will be further discussed in the subsequent section.

Finally, some countries have set age limits for the application of certain sentences, most notably, detention. Generally, in Europe, the minimum age for detention is the same as the MACR,⁴⁸ but in Switzerland, for example, children can only be detained from the age of fifteen, although the MACR is ten (Art. 22-25 Jugendstrafgesetz, 9 October 2003). In France, a multi-staged sanctioning system exists: below the age of ten children can be found capable of discernment, but only protective and educational measures can be imposed (Art. 122-8 Code Pénal), children between ten and thirteen

37. UN Committee on the Rights of the Child (2019), above n. 31, para. 25; See also N. Lynch, 'Human Rights for "Hard Cases": Alternatives to Imprisonment for Serious Offending by Children and Youth', in E. Stanley (ed.), *Human Rights and Incarceration* (2018) 153.

38. D. Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (2009).

39. I. Weijers and T. Grisso, 'Criminal Responsibility of Adolescents: Youth as Junior Citizenship', in J. Junger-Tas and F. Dünkel (eds.), *Reforming Juvenile Justice* (2009) 45; European Commission, *Summary of Contextual Overviews on Children's Involvement in Criminal Judicial Proceedings in the 28 Member States of the European Union* (2014), <https://publications.europa.eu/en/publication-detail/-/publication/78efc2f4-746e-485c-9c18-9d2509deeedf>.

40. R. Arthur, 'Exploring Childhood, Criminal Responsibility and the Evolving Capacities of the Child: The Age of Criminal Responsibility in England and Wales', 67 *Northern Ireland Legal Quarterly* 269, at 273 (2016).

41. European Commission, above n. 39.

42. K. Hollingsworth, 'Responsibility and Rights: Children and Their Parents in the Youth Justice System', 21 *International Journal of Law, Policy and the Family* 190 (2007); Cipriani, above n. 38; T. Crofts, 'Reforming the Age of Criminal Responsibility', 46 *South African Journal of Psychology* 436 (2016).

43. Cipriani, above n. 38.

44. L. Francoz-Terminal, 'La spécificité de la réponse 1a l'acte de délinquance du mineur en Angleterre et en Écosse', in Y. Favier and F. Ferrand (eds.), *La justice des mineurs en Europe. Une question de spécialité?* (2011) 91.

45. K. Zeijlmans, T. Sipma and A.M. van der Laan, *De aparte bejegening van jongvolwassen daders in het (jeugd)strafrecht: Een internationale vergelijking* (2019); E.P. Schmidt, S.E. Rap and T. Liefwaard, 'Young Adults in the Justice System: The Interplay Between Scientific Insights, Legal Reform and Implementation in Practice in the Netherlands', *Youth Justice* (online first 6 January 2020).

46. S. Matthews, V. Schiraldi and L. Chester, 'Youth Justice in Europe: Experience of Germany, the Netherlands, and Croatia in Providing Developmentally Appropriate Responses to Emerging Adults in the Criminal Justice System', 1 *Justice Evaluation Journal* 59 (2018); see for some critical reflections on this development Schmidt, Rap and Liefwaard, above n. 45.

47. See for an overview <https://archive.crin.org/en/home/what-we-do/policy/stop-making-children-criminals/states-lowering-age-criminal-responsibility.html> (last visited 8 July 2019).

48. FRA (2018), above n. 35.

years of age can only receive an educational measure or educational sanction (Art. Ordonnance n° 45) and criminal sanctions can be imposed on children from the age of thirteen, with the exception of community service, which can only be imposed from the age of sixteen, when minors are allowed to be engaged with paid labour (Art. 20-5 Ordonnance n° 45; Art. 122-8 Code Pénal).

3.1.2 Family Law and Care Proceedings

Age limits also apply in the area of family law and child protection, for example, with regard to the legal capacity of children to act in proceedings and the age from which children are involved and heard in judicial proceedings. Kennan and Kilkelly conclude from their review of EU member states that provisions aiming at ensuring access to judicial proceedings for children ‘tend to be more rigorous in the areas of family law and placement in care than in other areas of law’.⁴⁹ One explanation for this is that the decisions made by the courts in these cases directly concern the life of children, for example, in the case of custody and living arrangements, mandatory supervision or out-of-home placement. Recent research in the Netherlands shows that no explicit purpose of hearing children in family law proceedings is indicated in the Dutch law, but judges indicate that the main goal is to give children the opportunity to tell their story.⁵⁰ Mol concludes from her comparative legal study involving New South Wales, Australia, South Africa, France and the Netherlands that capability requirements of children in family law proceedings ‘take on all shapes and sizes’.⁵¹ The author focusses on the question whether children are provided with a (legal) representative in family law proceedings and on which factors the appointment of a representative depends. In some of these jurisdictions, in order to have a representative appointed children must have capability or should have reached a certain age; for example, in the Netherlands, only children from the age of twelve can have a separate legal representative in care and supervision order proceedings. In other jurisdictions, the appointment of a representative depends on the lack of capability or young age of the child (e.g. New South Wales). In French family law proceedings, equal to the juvenile justice system, the principle of *capable de discernement* (capable of discernment) applies, and the judge has the discretion to determine whether the child is capable of being heard, for example. In general, children from the age of seven are considered capable to participate in proceedings.⁵² Also, in England and Wales, children have

to prove their understanding to be able to participate and give their views in family law proceedings.⁵³

FRA has recently analysed children’s right to be heard in adoption, placement (assigning a child to a suitable place to live) and divorce and custody cases in EU member states and concludes that in fewer than half of the member states children are heard without applying any age restrictions or other requirements.⁵⁴ Twelve member states have laid down specific age limits for children to be heard, ranging from ten to fourteen years in divorce and custody and adoption cases and ten to sixteen years in placement in care proceedings. Even within countries different age limits apply in different proceedings, and the child’s consent to such decisions is not always necessary. In adoption cases, for example, only twelve member states ask for a child’s own consent, three of which do not apply minimum age requirements.⁵⁵ Naturally, in family law and care proceedings, the age of majority is generally set at eighteen. However, as is the case in the field of juvenile justice, calls are made to extend care arrangements past the age of eighteen, to provide young care leavers with the opportunity to receive care and protection until they have reached full independence. For example, in the Netherlands it is possible since 2018 for young people to stay in (state-funded) foster care until the age of twenty-one, and youth care arrangements can be extended until the age of twenty-three.⁵⁶

3.1.3 Migration Law

Age limits are applied in the field of migration law as well. For example, countries apply different age limits with regard to the legal capacity of children to apply for asylum and the age from which children are heard by the immigration authorities. Drywood has observed that within the EU – at least under the first phase of the Common European Asylum System (CEAS) – age thresholds were used to control migration flows by limiting the rights of older children in asylum legislation and family reunification.⁵⁷ Nowadays, in all member states, unaccompanied children can act as a sponsor in the family reunification procedure, except in the United Kingdom, but quotas are still set by countries and procedures can take a very long time.⁵⁸

When children arrive in a country in the company of their parents, the parents usually apply for asylum for themselves and their underage children and children are not allowed to apply for asylum on their own. However,

49. Kennan and Kilkelly (2015), above n. 33, at 5.

50. M.R. Bruning, D.J.H. Smeets, K.G.A. Bolscher, J.S. Peper and R. de Boer, *Kind in proces: van communicatie naar effectieve participatie. Het hoorrecht en de procespositie van minderjarigen in familie- en jeugdzaken* (2020), at 185, 238.

51. C. Mol, ‘Children’s Representation in Family Law Proceedings. A Comparative Evaluation in Light of Article 12 of the United Nations Convention on the Rights of the Child’, 27 *The International Journal of Children’s Rights* 66, at 88 (2019).

52. J.-L. Rongé (2008) and D. Attias (2012) in Mol, above n. 51.

53. Arthur, above n. 40.

54. FRA (2018), above n. 35.

55. *Ibid.*

56. M.R. Bruning, T. Liefwaard, M.M.C. Limbeek and B.T.M. Bahlmann, *Verplichte (na)zorg voor kwetsbare jongvolwassenen? Onderzoek naar de juridische mogelijkheden voor (verplichte) hulp aan kwetsbare jongvolwassenen na kindbescherming* (2016).

57. E. Drywood, ‘Challenging Concepts of the “Child” in Asylum and Immigration Law: The Example of the EU’, 32 *Journal of Social Welfare and Family Law* 309 (2010).

58. Coram Children’s Legal Centre, *Migrant Children’s Project FACT SHEET: Family Reunion* (2017a), https://www.childrenslegalcentre.com/wp-content/uploads/2017/05/Family_reunion_May.2017.final_.pdf.

in five EU member states, accompanied children have the right to make an application on their own behalf when they are twelve years or older (in the Netherlands; moreover, in this country, they are required to from the age of fifteen), fourteen years (in Bulgaria, Hungary and Romania) or fifteen years (in Greece), respectively. Belgium, Denmark, Portugal and the United Kingdom extend this right to all children, because they have not defined a minimum age limit.⁵⁹

Children who arrive in a country alone can also lack the legal capacity to apply for asylum as a consequence of age limits laid down by countries. In fourteen EU member states, unaccompanied children cannot independently apply for asylum and they therefore need a legal representative until they are 18.⁶⁰ Ten other EU member states have not set any age limit and other countries have set the same age limit as for accompanied children (see the previous paragraph). This means that children below that age depend on a representative to file the asylum application.⁶¹

With respect to children applying for asylum, different age limits are applied to hearing children in the procedure as well. In ten EU member states specific age limits are laid down for hearing children in asylum cases, ranging from six to eighteen years. In nine other member states, courts decide on an ad hoc basis whether or not to provide children with the opportunity to be heard.⁶² For example, in the United Kingdom, all unaccompanied children from the age of twelve are interviewed by the immigration authorities and children below the age of twelve can be interviewed if they are willing and found to be mature enough.⁶³ In the Netherlands, unaccompanied children from the age of six are heard, in a child-friendly interview room and by a specially trained immigration officer. Accompanied children are in principle always heard from the age of fifteen, because they have to file their own asylum application.⁶⁴

From this (limited) overview of age limits as applicable in three different areas of law, it can already be concluded that states vary widely in the application of age

limits and the assignment of legal capacity to children. A plethora of diffuse laws and regulations can be identified, which show how between areas of law different standards are applied. Often, age limits are used to involve or exclude children in different legal systems on different grounds. Sometimes children are excluded categorically to protect them (e.g. in family or care proceedings); sometimes they are included, on the basis of their presumed accountability (e.g. juvenile criminal law) or for information-gathering purposes (e.g. in migration law).

4 Discussion and Conclusions

The underlying proposition of the CRC is that children require specific rights and protections that acknowledge their age and (im)maturity and that, at the same time, they should be acknowledged as participants and agents, entitled to be empowered through participatory rights, evolving autonomy and legal capacity to exercise their rights.⁶⁵ Naturally, age limits are inherently tied to a specific view on children: they can be seen as vulnerable and in need of protection (leading to, for example, the establishment of minimum age limits for the exercise of certain rights or not holding them accountable for their behavior in criminal law procedures), while in other cases they are seen as (increasingly) capable and autonomous (for example, in terms of their participation in judicial procedures). This has different implications, particularly, for states parties as the primary duty bearers under international children's rights law. First, this implies a balancing exercise between the protection of children and their empowerment and participation.⁶⁶ Second, this requires a reflection upon the concepts of age, development, maturity, evolving capacities and growing autonomy, which play a pivotal role within the CRC framework.⁶⁷ The CRC aims to resolve the tension between the need to protect and the need to empower children through the notion of evolving capacities. In practice, however, the more fluid notions underlying the CRC are regulated by states parties through the more static concepts of age and age limits.

In this contribution, the central issue revolves around the question, To what extent is the use of (certain) age limits justified under international children's rights law? The reasons for the involvement of children in judicial proceedings vary widely among legal fields and different countries and can be underpinned by scientific evid-

59. FRA (2018), above n. 35; FRA, *Mapping Minimum Age Requirements with Respect to the Rights of the Child in the EU. Asylum Applications for Accompanied Children* (2017a), <https://fra.europa.eu/en/publication/2017/mapping-minimum-age-requirements/asylum-accompanied>.

60. FRA, *Mapping Minimum Age Requirements Concerning the Rights of the Child in the EU. Asylum Applications for Unaccompanied Children* (2017b), <http://fra.europa.eu/en/publication/2017/mapping-minimum-age-requirements/asylum-unaccompanied>.

61. FRA (2018), above n. 35; see also D. Rosani, 'Unaccompanied Asylum-Seeking Children as Rights Holders: Theory and Reality in the EU Legal System in the Case of Age Assessment and Applications for International Protection', in P. Rodrigues, M. Klaassen, S. Rap and T. Liefwaard (eds.), *Safeguarding Children's Rights in Immigration Law* (2020) 41.

62. FRA (2018), above n. 35.

63. Coram Children's Legal Centre, *Migrant Children's Project FACTSHEET: Claiming Asylum as a Child* (2017b), https://www.childrenslegalcentre.com/wp-content/uploads/2016/10/Claiming-asylum-as-a-child-August2017.final_.pdf.

64. Dutch House of Representatives, *Vluchtelingenbeleid* (2004), at 14, <https://zoek.officielebekendmakingen.nl/kst-19637-824.pdf> (last visited 8 July 2019).

65. The right to be heard can be found in several provisions of the CRC; more generally, participation is provided for in Arts. 13 (freedom of expression), 14 (freedom of thought, conscience and religion) and 15 (freedom of association), and specifically regarding different contexts, in Arts. 9(2) (separation from the parents), 21(a) (adoption), 23(1) (children with disabilities), 31(1) (cultural activities), 37(d) (deprivation of liberty) and 40(2)(b)(iv) (juvenile justice).

66. T. Liefwaard, 'Child-Friendly Justice: Protection and Participation of Children in the Justice System', 88 *Temple Law Review* 905 (2016).

67. The concepts of age, maturity, development and capacities play a role in Arts. 5, 6, 12, 14, 18, 23, 27, 28, 31, 32, 37, 38 and 40 CRC.

ence, political arguments or ideological preferences.⁶⁸ This also shows the variety of conceptualisations and definitions states and legal fields attach to childhood and the presumed capacities of children. The CRC provides rather open norms, such as ‘evolving capacities’ and ‘due weight’, which gives states considerable leeway in how they involve children in judicial procedures. Distinguished children’s rights scholars, such as Freeman and Eekelaar, have advocated that limitations to children’s autonomy rights should be well substantiated, for example, with due reference to the protection of their unhindered development.⁶⁹ In addition, the CRC Committee has made numerous recommendations on the establishment of certain age limits in attempting to provide guidance to member states and at the same time has advocated for flexibility and the possibility of applying exceptions to the norm, in case that would benefit the child. This has led to a rather inconsistent and scattered image of age limits under the CRC. The diverging views and perspectives of the CRC Committee find their basis in the inconclusive guidance provided by the CRC provisions themselves and, admittedly, do not make it simple for states parties to establish age limits in conformity with the international children’s rights framework.

As stated earlier, age limits can sometimes act as a protection for children, for example, from being prosecuted and convicted in the adult criminal justice system, by providing them with mandatory legal support and by providing legal certainty about whether they are granted legal capacity and other entitlements.⁷⁰ Refraining from laying down age limits in law could lead to legal uncertainty for children, because decision makers would then be given the discretion to decide whether children are capable enough to act in a legal procedure. This is one reason why the CRC Committee is not in favour of applying the *doli incapax* principle in juvenile justice proceedings.⁷¹ On the other hand, age limits are also arbitrary, restrictive and rigid in the sense that they can exclude children from certain legal proceedings when no exceptions to the age threshold can be or are made in practice. This means that age limits can restrict the participation of children in judicial proceedings and categorically exclude children when they fall below the set age limit. Alternatively, age limits can establish legal obligations for children to participate without decision makers being in the position to make an individualised assessment of the capacities of the child to be heard in the procedure.⁷²

68. Hanson, above n. 8, at 68-69. See also A.O. Cohen, R.J. Bonnie, K. Taylor-Thompson and B.J. Casey, ‘When Does a Juvenile Become an Adult: Implications for Law and Policy’, 88 *Temple Law Review* 769, at 769 (2016).

69. Eekelaar, above n. 10, at 170-171; Freeman (1992), above n. 10, at 68.

70. Crofts, above n. 42; Arthur, above n. 40; C. McDiarmid, ‘After the Age of Criminal Responsibility: A Defence for Children Who Offend’, 67 *Northern Ireland Legal Quarterly* 327 (2016); Hollingsworth (2007), above n. 42.

71. UN Committee on the Rights of the Child (2019), above n. 31, paras. 26-27.

72. It should be borne in mind that participation in judicial proceedings can also have harmful consequences for children, for example, when they

are not involved in an appropriate and child-friendly manner. This may lead to traumatic experiences and secondary victimisation. See L. Darmanaki Farahani and G.L. Bradley, ‘The Role of Psychosocial Resources in the Adjustment of Migrant Adolescents’, 12 *Journal of the Pacific Rim Psychology* 1 (2018); E. Chase, ‘Security and Subjective Wellbeing: The Experiences of Unaccompanied Young People Seeking Asylum in the UK’, 35 *Sociology of Health and Illness* 858 (2013); J.A. Quas and G.S. Goodman, ‘Consequences of Criminal Court Involvement for Child Victims’, 18 *Psychology, Public Policy, and Law* 392 (2012).

On the basis of the analysis presented, our tentative conclusion is that states apply age limits not seldomly on the basis of practical, political or ideological arguments. While age limits are often indispensable to provide legal professionals guidance and the child involved legal certainty, they should be scrutinised to establish whether they – and especially the aims underlying them – are in line with international children’s rights law, leaving room for the child’s autonomy when possible and providing protection when necessary. At this time, an overarching view on the evolving autonomy of the child as rights holder, having legal capacity, is largely lacking. This may partly be the result of the inconclusive guidance provided by the CRC Committee on this point. The dynamic legal position of children, influenced by their development and level of maturity, should be acknowledged and applied more consistently by the CRC Committee, as well as individual states parties, to provide a dynamic and coherent perspective on children’s growing autonomy while at the same time safeguarding their legal protections and entitlements.⁷³ This should lead to a well-thought through balance between protection and participation of children.

Indeed, this is not a simple task. A positive development that has taken place in this regard – and will hopefully gain force at both the national and international level – is the more frequent reference by the CRC Committee to scientific insights on the development of children when recommending certain age limits (e.g. in the justice system).⁷⁴ However, a principled stance by states in how and the extent to which children are seen as being different from adults, with a different legal status and special rights, is needed as well in order to develop a consistent approach towards children, their potential and the role of the law therein.⁷⁵ In general, the arguments and aims underlying certain age limits should be made explicit in order to promote an evaluation of age limits on the basis of the international children’s rights framework. Moreover, states should analyse the existing opportunities to secure access to justice, and consequently grant children (effective) remedies, so children can challenge the way they are being treated. This can increase their level of autonomy⁷⁶ and ensure that

are not involved in an appropriate and child-friendly manner. This may lead to traumatic experiences and secondary victimisation. See L. Darmanaki Farahani and G.L. Bradley, ‘The Role of Psychosocial Resources in the Adjustment of Migrant Adolescents’, 12 *Journal of the Pacific Rim Psychology* 1 (2018); E. Chase, ‘Security and Subjective Wellbeing: The Experiences of Unaccompanied Young People Seeking Asylum in the UK’, 35 *Sociology of Health and Illness* 858 (2013); J.A. Quas and G.S. Goodman, ‘Consequences of Criminal Court Involvement for Child Victims’, 18 *Psychology, Public Policy, and Law* 392 (2012).

73. See also Varadan, above n. 2, at 333.

74. See also the positive evaluation of the increased use of developmental research by American lawmakers in E.S. Scott and C. Huntington, ‘Conceptualizing Legal Childhood in the Twenty-First Century’, *Columbia Public Law Research Paper No. 14-633* (2019).

75. Hollingsworth (2013), above n. 9.

76. See also T. Liefwaard, ‘Access to Justice for Children: Towards a Specific Research and Implementation Agenda’, 27 *The International Journal of Children’s Rights* 195 (2019).

states can be held accountable vis-à-vis children and their rights.

Age Limits in Youth Justice: A Comparative and Conceptual Analysis

Jantien Leenknecht, Johan Put & Katrijn Veeckmans*

Abstract

In each youth justice system, several age limits exist that indicate what type of reaction can and may be connected to the degree of responsibility that a person can already bear. Civil liability, criminal responsibility and criminal majority are examples of concepts on which age limits are based, but whose definition and impact is not always clear. Especially as far as the minimum age of criminal responsibility (MACR) is concerned, confusion exists in legal doctrine. This is apparent from the fact that international comparison tables often show different MACRs for the same country. Moreover, the international literature often seems to define youth justice systems by means of a lower and upper limit, whereas such a dual distinction is too basic to comprehend the complex multilayer nature of the systems. This contribution therefore maps out and conceptually clarifies the different interpretations and consequences of the several age limits that exist within youth justice systems. To that extent, the age limits of six countries are analysed: Argentina, Austria, Belgium, the Netherlands, New Zealand and Northern Ireland. This legal comparison ultimately leads to a proposal to establish a coherent conceptual framework on age limits in youth justice.

Keywords: youth justice, age limits, minimum age of criminal responsibility, age of criminal majority, legal comparison

1 Introduction

Age limits in youth justice systems are essential to determine what type of reaction a juvenile offender can be subject to. International legal doctrine traditionally distinguishes between the minimum age of criminal responsibility (MACR) and the age of criminal majority (ACM) to define the scope of the youth justice system. Whereas the ACM is fixed at the age of 18 in almost every country,¹ much more diversity can be found with regard to the MACR, as proven by the several age limits

tables in the international comparative literature.² In past years, efforts have been made to clarify what the MACR and its implications are and how it should be distinguished from the ACM.³ However, other relevant age limits exist within a youth justice system that restrict the number of possible reactions, determine the maximum duration or severity of a reaction or determine which court or institution is competent. A dual distinction between the MACR and the ACM is therefore too simple to comprehend the complex multilayer nature of youth justice systems. Moreover, international comparative tables sometimes show different MACRs for the same country,⁴ which suggests that the concept of ‘criminal responsibility’ is interpreted in different ways and the ambiguity remains.

This contribution analyses the age limits of six countries with divergent age limits. Three countries, two of which are European and one non-European, were selected because they have a low MACR according to the prevailing comparative tables: the Netherlands, Northern Ireland and New Zealand. The other three selected countries, also two European and one non-European, have a high MACR according to those tables: Belgium, Austria and Argentina. By mapping out and conceptually clarifying the different interpretations and consequences of the several age limits within these countries, the article aims to achieve greater clarity and conceptual coherence with regard to age limits in youth justice systems. This article therefore builds, to some extent, on the more extensive comparative approach that is used in the comparative analyses in F. Dünkel, J. Grzywa,

F. Imkamp (eds.), *Jeugdstrafrecht in internationaal perspectief* (2008), at 270.

2. D. Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (2009), at 187-224; F. Dünkel, J. Grzywa, P. Horsfield and I. Pruin (eds.), *Juvenile Justice Systems in Europe: Current Situation and Reform Developments – Vol. 4* (2011), at 1847; Weijers and Imkamp, above n. 1, at 271; M.F. Aebi, M.M. Tiaogo and C. Burkhardt, 'SPACE I – Council of Europe Annual Penal Statistics: Prison populations. Survey 2015.' (2016), at 57, http://wp.unil.ch/space/files/2017/04/SPACE_I_2015_FinalReport_161215_REV170425.pdf.
3. Cipriani, above n. 2; L.S. Abrams, S.P. Jordan and L.A. Montero, 'What Is a Juvenile? A Cross-National Comparison of Youth Justice Systems', 18(2) *Youth Justice* 111-130 (2018).
4. In the following comparative tables, for instance, the Belgian MACR is 18, 16 or 12 respectively: Dünkel et al., above n. 2, at 1793; N. Hazel, 'Cross-national Comparison of Youth Justice' (2008), at 30, https://dera.ioe.ac.uk/7996/1/Cross_national_final.pdf; Cipriani, above n. 2, at 191. The same tables set the Estonian MACR at 7, 14 and 16 respectively: Cipriani, above n. 2, at 197; Dünkel et al., above n. 2, at 1793; Hazel, above n. 4, at 31.

* Jantien Leenknecht is PhD Fellow of the Research Foundation Flanders (FWO) at KU Leuven, Institute of Social Law and Leuven Institute of Criminology. Johan Put is Full Professor at KU Leuven, Institute of Social Law and Leuven Institute of Criminology. Katrijn Veeckmans is PhD Fellow at KU Leuven, Institute of Social Law and Leuven Institute of Criminology.

1. OECD – Social Policy Division – Directorate of Employment, Labour and Social Affairs, 'PF1.8 Legal age threshold regarding transition from childhood to adulthood' (2016), at 1-2, www.oecd.org/els/family/PF_1_8_Age_threshold_Childhood_to_Adulthood.pdf; I. Weijers and

P. Horsfield and I. Pruin (eds.), *Juvenile Justice Systems in Europe: Current Situation and Reform Developments – Vol 4* (2011) 1539–1898. However, this article zooms in only from one particular point of view, namely age limits, and goes beyond merely analysing the differences between national systems to introduce a conceptual framework.

The limited size of the article is inevitably accompanied by choices that result in restrictions of the scope and, consequently, content limitations. First of all, this contribution examines what we call ‘offence-oriented reactions’, which are reactions that can be imposed from general criminal law or youth justice⁵ law to common offences. Reactions from administrative, civil or youth care law are consequently excluded from the scope of this article because they do not react to common offences or do not primarily aim at reacting to the offence but at treating the underlying issues of the juvenile offender. Second, the focus in this article is on the age limits of youth justice systems and therefore does not go into detail on the legal and technical conditions that accompany them.⁶ The relevant legal provisions are always mentioned, so the reader can carefully consult the conditions to be fulfilled. Lastly, this contribution is an exploratory study that exposes the multilayered structure of age limits and, accordingly, proposes a new classification. However, the new classification has been tested only in six, albeit diverse, countries, so a verification in additional countries will be indispensable to check the accuracy of the framework and to refine it where necessary.

2 Comparison of Age Limits Across Six Countries

2.1 The Netherlands

Unlike many other countries, no separate statutory regulation on youth justice exists in the Netherlands. Instead, the *Wetboek van Strafrecht* (Penal Code, hereinafter PC) and the *Wetboek van Strafvordering* (Code of Criminal Procedure, hereinafter CCP) formulate deviating provisions for juvenile offenders,⁷ under which minors from the age of 12 at the time of the offence can

be prosecuted.⁸ With regard to minors who commit an offence under the age of 12, an irrebuttable presumption of irresponsibility exists. The behaviour of such minors is dealt with under youth care law, because they are considered to have ‘growing and parenting problems, psychological problems and disorders’. The Dutch legislature deliberately chose to link the lower limit to criminal prosecution, and not to criminal investigation, because he still wants it to be possible that investigative actions are carried out with regard to minors who are suspected of having committed a crime, even if they have not reached the age of 12.⁹ That is why Article 487 CCP allows police officers *inter alia* to arrest and interrogate a minor or to enter and search his or her place.¹⁰

The general provisions of adult criminal law apply as soon as the person has reached the age of 18 years at the time of the offence.¹¹ However, there are two exceptions to this principle.¹² First, Article 77b PC enables the youth court judge to impose a sentence from the general criminal law instead of one of the deviating reactions in the youth justice provisions, but with the exclusion of life imprisonment.¹³ In addition to the condition that a minor must be at least 16 years old at the time of the commission of the offence, the provisions sets out three alternative criteria for lowering the upper limit: the seriousness of the offence committed, the personality of the offender or the circumstances under which the offence was committed.¹⁴ Even though a minor becomes subject to the provisions of substantive criminal law under this exception, the rules of investigation, prosecution and trial are still those of youth justice.¹⁵

The second exception is the extended application of the deviating provisions on youth justice to persons aged between 18 and 23 years (the ‘young adults’) at the time of the offence.¹⁶ The criminal court judge can use this possibility when one of two alternative criteria is met, namely the personality of the offender or the circumstances under which the offence was committed. Again, the exception relates only to the type of reactions available to the judge and not to the procedural rules applicable, except for the mandatory personal appearance of the young adult at the trial.¹⁷ This means that the young adult is still tried in accordance with the common criminal procedure provisions but is subject to one of the reactions provided in the youth justice provisions, which is then executed in a young offenders institution.

5. UN Committee on the Rights of the Child, ‘General Comment No. 24 (2011), Replacing General Comment No. 10 (2007) on Children’s Rights in Juvenile Justice’, at 4, <https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf>. Youth justice refers to legislation, norms and standards, procedures, mechanisms and provisions, institutions and bodies specifically applicable to children considered as offenders. Although the UNCRC still uses the notion ‘juvenile justice’, it acknowledges and encourages the trend towards using terms such as ‘youth justice’ and ‘child justice’.

6. Whenever expressions such as ‘between the age of 10 and 14’, ‘from 10 until 14 years old’ or ‘a child aged from 10 to 14’ are used, only the ages 10, 11, 12 and 13 are included. The age that is mentioned last, *in casu* 14, is excluded.

7. A.M. van Kalmthout and Z. Bahtiyar, ‘The Netherlands’, in F. Dünkel, J. Grzywa, P. Horsfield and I. Pruin (eds.), *Juvenile Justice Systems in Europe: Current Situation and Reform Developments – Vol. 2* (2011) 911, at 912.

8. Art. 77a PC; Art. 486 CCP; J. uit Beijerse, *Jeugdstrafrecht: Beginselen, wetgeving en praktijk* (2019), at 48; Weijers and Imkamp, above n. 1, at 267.

9. uit Beijerse, above n. 8, at 49.

10. G. De Jonge, ‘The Netherlands’, in V. Patané (ed.), *European Juvenile Justice Systems* (2007) 425, at 427; Cipriani, above n. 2, at 209.

11. Art. 77a PC.

12. Weijers and Imkamp, above n. 1, at 267.

13. Art. 77b(2) PC.

14. Art. 77b(1) PC.

15. Art. 488(2) CCP; uit Beijerse, above n. 8, at 54.

16. Art. 77c PC.

17. uit Beijerse, above n. 8, at 59 and 68; van Kalmthout and Bahtiyar, above n. 7, at 937.

Nevertheless, both the HALT measure¹⁸ and community service¹⁹ can be imposed only on juvenile offenders who have not reached the age of 18 at the time of the offence.

The existence of these two exceptions indicates that the Dutch legislature is convinced that young people do not all develop at the same pace²⁰ and that therefore a fixed upper limit for applying youth justice reactions is not an accurate reflection of reality. That is why the boundary between the youth justice system and the adult justice system was eased as from 1 April 2014, with the introduction of adolescent criminal law (ACL) for persons between 16 and 23 years old.²¹ Youth justice and criminal justice continue to exist side by side, so ACL is not a separate, new form of criminal law, but merely creates a closer link between the two systems and stimulates a flexible use of both systems.²² By adapting the conditions of youth justice reactions and increasing the emphasis on forensic advice provided by forensic experts, the judge has more possibilities to take into account the adolescent's stage of development and therefore impose a more appropriate reaction.²³

Article 77(h) PC lists all reactions that can be imposed when a minor is tried on the basis of the youth justice system. The reactions are not linked to specific age requirements, which means that they can be imposed on minors from the age of 12. The duration of custodial sentences, on the other hand, may depend on age. Juvenile offenders under 16 years old can be subject only to custodial sentences with a maximum duration of one year, whereas the maximum duration for 16- and 17-year-olds is two years.²⁴ Both sentences are served in a young offenders institution.²⁵ In addition, a person may be subject to a measure of 'placement in a judicial institution for young offenders' (PIY-measure). This measure can be compared to an in-patient of hospital order for adults²⁶ and is therefore accompanied with strict, cumulative conditions.²⁷ The PIY-measure lasts for a period of three years,²⁸ but the public prosecutor can ask for an extension of two years, up to a maximum of seven years.²⁹

2.2 Northern Ireland

Under youth justice, minors in Northern Ireland can be called to account for their actions at a very young age, as is typical of common law systems. Section 3 of the Criminal Justice (Children) (Northern Ireland) Order (hereinafter CJO), more specifically, provides for an irrebuttable presumption that children under the age of 10 cannot be guilty of an offence. The criminal behaviour of minors under the age of 10 can only be the subject of measures under child welfare legislation, namely the Children Order 1995.³⁰ In that case, the child has to be 'in need' or is 'likely to suffer significant harm'.³¹

The upper limit has been raised from the age of 17-18 since the Justice (Northern Ireland) Act (hereinafter JA) of 2002.³² That means that persons 18 and over are tried and punished in accordance with adult criminal law provisions. Northern Ireland does not have any exceptions that raise the upper age limit with regard to young adults. However, the upper limit can be lowered in the very exceptional case that a minor has been charged with homicide or has been co-accused with an adult.³³ Although rare, it is therefore possible for a minor to be transferred to an adult court and consequently be subject to adult criminal law from the age of 10. However, in the case of co-accusation with an adult, the juvenile offender can be tried in the adult court only as far as the guilt is concerned, since the case is referred back to the youth court for sentencing when he or she is found guilty.³⁴

In terms of sentencing practices, young adults between 16 and 21 (and exceptionally 24) years old who have been sentenced to imprisonment on the basis of a young offenders centre order have to serve their custodial sentence in an adapted detention institution, namely a young offenders centre.³⁵ The maximum duration of detention in a young offender centre is four years, but when the young adult reaches 21 years of age, he may be transferred to an adult prison.³⁶ The person is in any case automatically transferred to adult prison at the age of 24.³⁷ In addition, minors between 10 and 17 years old can be subject to a juvenile justice centre order and are committed to a juvenile justice centre to serve their cus-

18. Ministerie voor Veiligheid en Justitie, 'Adolescentenstrafrecht: Aanpak met perspectief' (2014), at 7, https://wegwijzerjeugdenvveiligheid.nl/fileadmin/user_upload/Bestanden/Onderwerpen/Adolescentenstrafrecht/Brochure-adolescentenstrafrecht.pdf.

19. Art. 77l(4) PC.

20. Ministerie voor Veiligheid en Justitie, above n. 18, at 5.

21. Wet van 27 november 2013 in verband met de invoering van een adolescentenstrafrecht, *Stb.* 2013, 485.

22. Ministerie voor Veiligheid en Justitie, above n. 18, at 6.

23. L.J.C. Prop, A.M. van der Laan, C.S. Barendregt, M.G.C.J. Beerthuisen and Ch. van Nieuwenhuizen, 'Adolescentenstrafrecht: Kenmerken van de doelgroep, de strafzaken en de tenuitvoerlegging' (2018), at 75, https://www.wodc.nl/binaries/Cahier%202018-9_2460g_Volledige%20tekst_tcm28-328944.pdf.

24. Art. 77i PC; van Kalmthout and Bahtiyar, above n. 7, at 913.

25. Art. 8(e) Beginselenwet Justitiële Jeugdinstellingen.

26. van Kalmthout and Bahtiyar, above n. 7, at 946.

27. Art. 77s(1) PC.

28. Art. 77s(7) PC.

29. Arts. 77t(1) and (2) PC.

30. X, 'A Review of the Youth Justice System in Northern Ireland' (2011), at 21, <https://restorativejustice.org.uk/sites/default/files/resources/files/Report%20of%20the%20Youth%20Justice%20System%20in%20Northern%20Ireland.pdf>; D. O'Mahony, 'Northern Ireland', in F. Dünnkel, J. Grzywa, P. Horsfield and I. Pruin (eds.), *Juvenile Justice Systems in Europe: Current Situation and Reform Developments – Vol. 2* (2011) 957, at 961.

31. Section 17, 50 62, 63, 65 66, 129 Child Order 1995.

32. Section 63 JA *juncto* scheme 11, section 17 JA. Section (2) (2) CJO now defines an adult as 'a person who has attained the age of 18' and a child as 'a person who is under the age of 18'.

33. Section 29 (1) CJO; O'Mahony, above n. 30, at 976.

34. Section 29 (2) (b) (ii) and 32 CJO.

35. Section 5 (1) Treatment of Offenders Act (Northern Ireland) 1968.

36. Section 5 (1) (ii) Treatment of Offenders Act (Northern Ireland) 1968; O'Mahony, above n. 30, at 971.

37. Section 8 (1) and (2) Treatment of Offenders Act (Northern Ireland) 1968.

todial sentence.³⁸ This is also the case for 17-year-olds in two specific situations.³⁹ The duration of a juvenile justice centre order is six months to two years.⁴⁰ In case the court has made a custody care order with regard to a minor, the use of detention in a juvenile justice centre is restricted to juvenile offenders at least 14 years old.⁴¹ Children between 10 and 14 years old who are subject to a custody care order are accommodated in the child care system instead.⁴²

Finally, the application of certain reactions under the Northern Irish youth justice system requires a certain minimum age. Community services and probation, for example, can be imposed only on juvenile offenders aged 16 or older.⁴³ Moreover, the level of fines is higher for minors who have reached the age of 14,⁴⁴ and the child only has to pay the fine itself, instead of his or her parent or guardian, from the age of 16.⁴⁵

2.3 New Zealand

As a former British colony, the legislation of New Zealand is remarkably influenced by the laws of the UK.⁴⁶ Following the English laws, the age below which a child cannot be convicted of an offence was set at 7 in New Zealand.⁴⁷ However, in 1961 (post colonisation) it was raised to 10 years.⁴⁸ Offenders were considered minors until the age of 17 only until recently:⁴⁹ the upper age limit was revised to 18 years since the Children's and Young People's Well-being Act 1989 (CYW Act) was passed on 13 July 2017 and came into force on 1 July 2019.⁵⁰

In the youth justice system of New Zealand a conceptual distinction is used: 'children' are defined as those under the age of 14. Minors between the age of 14 and 18 are called 'young persons'.⁵¹ In general, children are subject to the care and protection provisions of the CYW Act, while young persons are covered by the youth justice provisions.⁵² The youth justice system in New Zealand has a threefold structure.

1. According to section 21 of the Crimes Act, minors under the age of 10 cannot be convicted of an offence. Children below that age are dealt with

under the care and protection system.⁵³ A broad definition of 'a child or young person in need of care and protection' is given in section 14 CYW Act.

2. Likewise, children between the age of 10 and 14 cannot be charged with a crime. However, this presumption of irresponsibility can be rebutted when 'he or she knew that the act or omission was wrong or that it was contrary to law'.⁵⁴ This second category of minors consists of two subcategories.⁵⁵ First of all, children aged 10 and 11 can be prosecuted only in case of murder or manslaughter. After the pre-trial in the youth court, a child charged with one of the aforementioned offences is sentenced in an adult criminal court (high court) according to adult law.⁵⁶ The second subcategory consists of children of 12 or 13 years of age, who can be prosecuted not only for murder or manslaughter, but also for other serious offences. Again, the trial of children charged with murder and manslaughter takes place in high court, whereas children prosecuted for other serious offences are sentenced in a youth court.⁵⁷ When the aforementioned conditions are not fulfilled and the presumption of irresponsibility cannot be rebutted, children who commit a crime are covered by the care and protection system.⁵⁸

3. The third group consists of offenders between 14 and 18 years old. These young persons can be charged with any criminal offence under the youth justice system, except for (a) murder and manslaughter, (b) some serious offences for which the minor asks trial by jury, (c) when the minor is charged jointly with another person and will have a trial by jury and (d) for traffic offences not punishable by imprisonment. With regard to these four types of offences, a minor between the age of 14 and 18 is automatically tried in an adult court (district or high court) and receives an adult sentence.⁵⁹ Apart from this automatic transfer, a judicial transfer is possible as well: the youth court has the discretion to decide whether or not to transfer a 15-year-old or a 14-year-old who committed certain serious offences (other than the four aforementioned offences) to the district court or high court.⁶⁰ In adult court, the young age of the offender can be considered as a mitigating circumstance.⁶¹ On reaching the age of 18, offenders will always be held responsible in adult criminal courts under adult criminal law.

38. Section 13 (1) (a) CJO.

39. Section 39 (3A) CJO.

40. Section 39 (2) CJO.

41. Section 44A (8) and 44C (1) CJO.

42. D. O'Mahony and C. Campbell, 'Mainstreaming Restorative Justice for Young Offenders through Youth Conferencing: The Experience of Northern Ireland', in J. Junger-Tas and S. H. Decker (eds.), *International Handbook of Juvenile Justice* (2006) 93, at 99.

43. Section 3C (2) CJO; X, above n. 30, at 26.

44. Section 34, 41 (2) (a) and 44F (3) and (4) CJO.

45. Section 35 (1) and 41 (2B) CJO.

46. A. Morris, 'Youth Justice in New Zealand', 31 *Crime & Justice* 243, at 246 (2004).

47. *Ibid.*, at 247.

48. Section 21 Crimes Act, No. 43.

49. Section 272 Children, Young Persons and Their Families Legislation Act 1989, No. 3.

50. Section 272 CYW Act.

51. Section 2 (1) CYW Act.

52. A.J. Becroft, 'Children and Young People in Conflict with the Law: Asking the Hard Questions', (57) *Juvenile & Family Court Journal* 1, at 8 (2006); Morris, above n. 46, at 260.

53. Section 14 CYW; Becroft, above n. 52, at 8.

54. Section 22 of the Crimes Act.

55. Section 272 CYW Act.

56. Section 272(2) and 275 (2)(b) CYW Act; F. Chye, 'When Children Kill: The Age of Criminal Responsibility and Criminal Procedure in New Zealand', 2 *New Zealand Law Students Journal* 837, at 841 (2012).

57. Section 272 (2A) and 272A CYW Act.

58. Becroft, above n. 52, at 8.

59. Section 272, 273 and 275 CYW Act.

60. Section 283(o) and 285(6) CYW Act.

61. Section 9(2)(a) Sentencing Act 2002.

Since the New Zealand youth justice system is focused on diversion, family participation in decision-making, restorative justice and victim involvement, the youth court is less influential than in other countries.⁶² The set of reactions, which are called ‘orders’ to restrain the stigmatising effect of a sanction, seems rather mild. Moreover, the imposed orders expire when the minor attains the age of 19.⁶³ Children or young persons who are subject to a ‘supervision with residence order’ are detained in a specialised youth justice residence,⁶⁴ while (exceptionally) minors who are transferred to adult court can be detained in prison.⁶⁵ A supervision with residence order can be imposed for a minimum of three months and no longer than six months. Finally, an order to pay the costs of the prosecution needs to be executed only by the minor, instead of his parents, from the age of 16.⁶⁶

2.4 Belgium

Belgium is a federal state, consisting of three communities: the Flemish, French and German-speaking Community.⁶⁷ Until recently, youth justice was mainly a federal competence, regulated by the *Jeugdbeschermingswet* (Youth Protection Act).⁶⁸ However, due owing to the sixth state reform of 2014, the communities have been empowered to regulate the judicial reaction (nature, criteria, content and hierarchy) towards juvenile delinquency on their territory.⁶⁹ The procedural issues remain a competence of the federal state.⁷⁰ In concrete terms this means the Flemish, French and German-speaking Community as well as the Common Community Committee of Brussels (CCC)⁷¹ can enact their own legislation regarding youth justice. Since the German-speaking Community has not yet issued its own legislation in this regard, this article will focus on the decrees of the Flemish and French Community and the statute of the CCC.

On 15 February 2019 the *Jeugddelinquentiedecreet* (Flemish Decree on Juvenile Delinquency, hereinafter Flemish Decree) was ratified.⁷² The Flemish Decree applies to minors who are at least 12 years old at the time of the offence.⁷³ By virtue of an irrefutable pre-

sumption of irresponsibility,⁷⁴ children under the age of 12 can be covered by the youth care system only if they are in an ‘alarming situation’.⁷⁵

The upper limit is set at 18 years, so offenders aged 18 or older are held responsible under adult criminal law.⁷⁶ However, there are some exceptions to this general rule:

- Offenders aged 16 or 17 can be transferred to a special chamber of the youth court,⁷⁷ where he or she is treated according to adult criminal law. Certain conditions must be fulfilled before the (regular) youth court can decide whether or not the minor should be transferred.⁷⁸
- When a minor aged 16 or 17 commits a traffic offence, he or she will automatically be prosecuted in adult criminal court, except when the latter considers a reaction based on the Flemish Decree more adequate or when this traffic offence is connected to another offence.⁷⁹

As far as the possible reactions to the offence are concerned, custodial measures or sentences are always executed in specialised institutions. They can be imposed only on offenders who were at least 14 years old at the time of the offence (even 16 with respect to the custodial sentence ‘long detention’). Only exceptionally can these reactions apply to minors aged 12 or 13 at the time of the offence.⁸⁰ At the age of 23, the measures or sanctions imposed by the youth court are terminated.⁸¹ Again, this should be nuanced: the duration of the ‘long detention’ reaction depends on the age of the offender, causing a layered system in which an offender aged 12 or 13 at the time of the offence can be subject to long detention for a maximum of two years, a 14- or 15-year-old for a maximum of five years and a 16- or 17-year-old for a maximum of seven years.⁸² Consequently, a long detention imposed on an offender aged 17 at the time of the offence can be carried out until the age of 25. In addition, the long detention reaction can be combined with preventive custody of (maximum) ten years, which begins as soon as the long detention is finished.⁸³ The preventive custody takes place in a youth facility.

The French community adopted the *Décret portant le code de la Prévention, de l’Aide à la jeunesse et de la Protection de la Jeunesse* (Decree on Prevention, Youth Aid and Youth Protection) on 18 January 2018 (French Community Decree, hereinafter FCD).⁸⁴ Contrary to the Flemish Decree, the FCD remains silent on the lower age limit. Even more so, article 101 (4) rules that minors under the age of 12 at the time of the offence can

62. A. Morris and G. Maxwell, ‘Reforming Juvenile Justice: The New Zealand Experience’, 77(2) *The Prison Journal* 125, at 127 (1997).
 63. Section 296 CYW Act.
 64. Section 283(n), 311, 361(h) and 365 CYW Act.
 65. Section 18 Sentencing Act 2002.
 66. Section 283 (e) and (f) CYW Act.
 67. Art. 2 Federal Constitution of 17 February 1994.
 68. Wet van 8 April 1965 betreffende de jeugdbescherming.
 69. E. Dumortier, J. Christiaens and A. Nuytiens, ‘Belgium’, in S.H. Decker and N. Marteache (eds.), *International Handbook of Juvenile Justice* (2016) 239, at 240.
 70. *Ibid.*
 71. Brussels is a bilingual territory (Dutch-speaking and French-speaking). The powers concerning this territory are divided between the Flemish Community, the French Community and the Common Community Committee. Regarding juvenile justice, it is the Common Community Committee that has the jurisdiction to enact legislation.
 72. Decreet van 15 februari 2019 betreffende het jeugddelinquentierecht; J. Put and J. Leenknecht (eds.), *Het Vlaamse jeugddelinquentierecht* (2019).
 73. Art. 2(10) and Section 4(1) Flemish Decree.

74. Art. 4(2) Flemish Decree.
 75. Art. 2(1)(54) Decree integral youth care.
 76. Art. 2(10) Flemish Decree.
 77. Serious offences will be dealt with in the court of assizes.
 78. Art. 38 Flemish Decree.
 79. Art. 5 Flemish Decree.
 80. Arts. 35, 36 and 37 Flemish Decree.
 81. Art. 6 Flemish Decree.
 82. Art. 37 Flemish Decree.
 83. Art. 37(8) Flemish Decree.
 84. Décret du 18 janvier 2018 portant le code de la prévention, de l’aide à la jeunesse et de la protection de la jeunesse.

be subject to certain provisional measures (supervision, guidance and specialised guidance). As regards the final measures, article 109 states that a child below the age of 12 can be subject only to the measure of reprimand. These two provisions indicate that a child below the age of 12 can be held criminally responsible, but the FCD does not specify what the ultimate lower age limit should be, so that the latter remains undefined.

With regard to the upper age limit, the FCD states that it applies to offenders below the age of 18.⁸⁵ The two exceptions of the Flemish Decree concerning the upper age limit can also be found in the FCD (i.e. transfer to a special chamber of the youth court⁸⁶ and traffic offences⁸⁷).

As to the measures to be imposed, custodial sentences (which are executed in specialised institutions) can be applied only if the minor was aged 14 or older at the time of the offence.⁸⁸ Only exceptionally can a 12- or 13-year-old be detained.⁸⁹ Provisional measures can be imposed or upheld until the offender is 20 years old.⁹⁰ The final measures continue to be carried out until the age of 18, and exceptionally until the age of 20.⁹¹

The *Ordonnantie betreffende de Jeugdhulpverlening en Jeugdbescherming* of the CCC (Statute on Youth Care and Child Protection)⁹² was ratified on 16 May 2019 and applies to offenders who are at least 12 years old at the time of the offence.⁹³ As in the Flemish Decree, an irrebuttable presumption of irresponsibility exists towards children under the age of 12,⁹⁴ and once the age of 18 has been reached, the offender is tried in the adult criminal court.⁹⁵ Likewise, the same exceptions as in the Flemish Decree and the FCD concerning the transfer of 16- or 17-year-olds to a special chamber of the court⁹⁶ and traffic offences⁹⁷ apply in Brussels.

Again, there are some age limits concerning the reactions on the criminal offence. First, not every judicial reaction is applicable to offenders of 12 years. For instance, custodial sentences can be imposed when the minor is at least 14 years old (in exceptional circumstances when the minor is 12 or 13 years old),⁹⁸ whereas working with a view to paying damages to the victim can be ordered only when the child is at least 15 years old.⁹⁹ Furthermore, imposing or upholding provisional measures is possible until the age of 20.¹⁰⁰ Final measures, on the other hand, last until the minor turns 18.

85. Art. 55-56 FCD.

86. Art. 125 FCD.

87. Art. 56 FCD.

88. Arts. 124(2) and (3) FCD.

89. Art. 124(4) FCD.

90. Art. 101 FCD.

91. Art. 110 FCD.

92. Ordonnantie van 16 mei 2019 betreffende de jeugdhulpverlening en jeugdbescherming.

93. Art. 17(2) CCC statute.

94. *Ibid.*

95. Art. 18 CCC statute.

96. Art. 89 CCC statute.

97. Art. 19 CCC statute.

98. Arts. 73, 74, 85 and 86 CCC statute.

99. Arts. 77 and 81 CCC statute.

100. Art. 65 CCC statute.

However, the measures can exceptionally sustain until the offender reaches the age of 23.¹⁰¹ The decision of a reprimand, lastly, is possible any time, regardless of the age of the offender.¹⁰²

2.5 Austria

Austrian youth justice is regulated by a separate law, i.e. the *Jugendgerichtsgesetz* (Juvenile Court Act, hereinafter JCA), but the *Strafgesetzbuch* (Penal Code, hereinafter PC) and the *Strafprozessordnung* (Code of Criminal Procedure, hereinafter CCP) apply when the JCA does not provide for a specific youth justice rule. Influenced by Soviet law,¹⁰³ the provisions of the JCA apply to minors between 14 and 18 years old.¹⁰⁴ As a consequence, minors under the age of 14 are not punishable¹⁰⁵ and can only be subject to measures under the *Bundes Kinder- und Jugendhilfegesetz* (Children and Youth Services Act, hereinafter CYSA), which apply if the welfare of the child is not guaranteed with regard to the care and upbringing.¹⁰⁶ Although minors may, in principle, be prosecuted for their committed offence from the age of 14, there are two exceptions on the basis of which such a minor remains unpunished. The first exception is the so-called ‘delayed maturity’, when the minor is not yet mature enough to see the injustice of the act or to act in accordance with insight.¹⁰⁷ The second exception concerns minors who commit an offence before reaching the age of 16 but have no serious fault on their part and against whom no special reasons exist for the application of the youth justice system in order to prevent recidivism (‘moderate misdemeanours’).¹⁰⁸ The Austrian youth justice system therefore applies in a gradual manner according to the minor’s capacity to assess the consequences of his or her actions.

The upper limit on the other hand, is strictly set at the age of 18.¹⁰⁹ This means that minors can under no circumstances be subject to adult criminal law; no system of transfer to adult criminal law exists. Concomitantly, the maximum duration of custodial sentences in the youth justice system is much higher: as a general rule, the maximum sentences under adult criminal law are reduced by half,¹¹⁰ but life imprisonment is replaced by a custodial sentence of 1 to 15 years for minors aged at least 16 or of 1 to 10 years for minors between 14 and 16 years old at the time of the offence.¹¹¹ An imprisonment from 10 to 20 years is also replaced by a detention from 6 months to 10 years.¹¹² The age at which a convict starts to serve his or her custodial sentence is decisive in determining whether he is covered by the juve-

101. Art. 78 CCC statute.

102. Art. 79 CCC statute.

103. Cipriani, above n. 2, at 109.

104. Section 1(1) and (2) JCA.

105. Section 4(1) JCA.

106. Section 1(4) CYSA.

107. Section 4(2) (1) JCA.

108. Section 4(2) (2) JCA.

109. Weijers and Imkamp, above n. 1, at 279.

110. Section 5(4) JCA.

111. Section 5(2) JCA.

112. Section 5(3) JCA.

nile or adult detention system.¹¹³ Only convicts that have not reached the age of 18 are incarcerated in an institution for juvenile detention. However, persons up to 22 years old can also begin to serve their sentence in a juvenile detention centre, if no negative or other detrimental effects on juvenile convicts is to be expected.¹¹⁴ In certain circumstances, the convict can even remain subordinated to juvenile detention until he or she turns 24 in order to serve his or her sentence, but under no circumstances later than the age of 27.¹¹⁵ In the latter case, the person has to be transferred to a regular prison. Since the upper limit was lowered from 19 to 18 years old in 2001, a separate criminal law for persons between 18 and 21 years old ('young adults') was created as a compensation.¹¹⁶ The compensation is, however, limited to declaring most of the procedural provisions applicable to young adults and does not constitute substantive law regulations for this age group.¹¹⁷ Young adults are consequently still subject to the range of sentences of adult criminal law as laid down in the PC. Section 34 PC nevertheless refers to section 19 JCA, which states that young adults cannot be subject to custodial sentences exceeding a duration of 15 years. As a consequence, custodial sentences exceeding a duration of 15 years and life imprisonment are excluded as a possible penalty. Moreover, section 36(1)(1) PC includes the commission of an offence between the ages of 18 and 21 as a mitigating circumstance.

Austria has no separate institutionalised youth court, which means that youth cases are dealt with under district courts or regional courts for criminal matters.¹¹⁸ Within these courts, however, departments for youth cases have been established. They are composed of specialised judges and prosecutors and deal with offences committed by 14- to 21-year olds.¹¹⁹ Section 30 JGG, more specifically, stipulates that the judges and prosecutors in charge of a youth case must have pedagogical skills and some expertise with regard to psychology and social work. In addition, where a court of lay judges or a jury is to decide on the youth case, there always has to be a judge who is or has been active in the teaching profession, as educators or in public or private child and youth welfare or youth care.¹²⁰ The type of court and its composition (single judge or professional and lay judges) that deals with the specific case depends on the qualification of the offence and the possible reaction according to the JGG.¹²¹ The regional court, for

instance, adjudicates cases as a jury court with regard to offences committed by persons under the age of 21.¹²²

2.6 Argentina

Argentina has enacted legislation that (partly) regulates the status, rights and obligations of minor delinquents, despite the lack of a formal, separate youth justice system.¹²³ The main sources that concern juvenile offenders are *Ley 22.278 Régimen Penal de la Minoridad* (Act 22.278 on Youth Justice)¹²⁴ and *Ley 26.061 Protección Integral de los Derechos de Niños, Niñas y Adolescentes* (Act 26.061 on Integral Protection of the Child).¹²⁵ Awaiting a formal and specialised youth justice system, which is the aim of the four-year plan 'Justicia 2020' (*infra*), these acts are still in force.

Section 1 of Act 22.278 prescribes that children below the age of 16 who commit a criminal offence are not punishable. Likewise, offenders aged 16 or 17 cannot be prosecuted, except when they commit offences that are punishable with prison sentences of two years or more.¹²⁶ The sanction applied is the one that is provided for in the adult PC.¹²⁷ The youth court (which has jurisdiction concerning offences committed by offenders aged 16 or 17 at the time of the offence)¹²⁸ can also decide not to impose a sentence at all or to reduce the sanction to the penalty that an adult would receive in case of attempt.¹²⁹ Moreover, the sanction imposed can be executed only from the moment that the offender turns 18 and after he or she has been subject to at least one year of 'protective treatment'.¹³⁰ Persons who have reached the age of 18 can be prosecuted for any crime, are fully subject to adult criminal law and are sentenced by the criminal court.¹³¹

Section 6 of Act 22.278 states custodial sentences (for which there is no maximum duration¹³²) shall be executed in specialised institutions, but as soon as the offender reaches the age of majority (18) he or she is transferred to adults prisons to serve the rest of the sentence. However, considering the fact that a sanction imposed on an offender who was a minor at the time of the offence can be executed only from the age of 18, section 6 is without value. The logical explanation for this con-

V-46, <https://www.law.kuleuven.be/isr/omgevingsanalyse-volledig-rapport-1>.

122. Section 27 JGG.

123. Abrams et al., above n. 3, at 118; R.M. Pages, 'Infancia, adolescencia, delito y sistema penal en Argentina', 5 *Misión Jurídica: Revista de derecho y ciencias sociales* 71, at 73 (2012).

124. Act 22.278 of 20 August 1980, Régimen Penal de la Minoridad.

125. Act 26.061 of 29 September 2005, Protección Integral de los Derechos de Niños, Niñas y Adolescentes.

126. Section 2 of Act 22.278.

127. A.M. Giorgio and C. López Bernis, *Medidas alternativas a la pena de prisión: la probación* (2005), at 107.

128. Section 28 Código Procesal Penal (Criminal Procedural Code).

129. Ministry of Justice and Human Rights of Argentina, Secretary of Human Rights Argentina and Unicef Argentina, *Privados de Libertad. Situación de Niños, Niñas y Adolescentes en la Argentina* (2006), at 34; Abrams et al., above n. 3, at 118.

130. Section 4 of Act 22.278.

131. Abrams et al., above n. 3, at 119.

132. Hazel, above n. 4, at 62.

113. K. Bruckmüller, A. Pilgram and G. Stummvoll, 'Austria', in F. Dünkel, J. Grzywa, P. Horsfield and I. Pruin (eds.), *Juvenile Justice Systems in Europe: Current Situation and Reform Developments – Vol. 1* (2011) 41, at 85.

114. Section 55(3) (1) JCA.

115. Section 55(3) (2) JCA.

116. K. Bruckmüller, 'Austria: A Protection Model', in J. Junger-Tas and S. H. Decker (eds.), *International Handbook of Juvenile Justice* (2006) 263, at 264; Weijers and Imkamp, above n. 1, at 281.

117. Section 46a JCA; Bruckmüller et al., above n. 113, at 43.

118. Bruckmüller et al., above n. 113, at 57.

119. Bruckmüller, above n. 116, at 228-229.

120. Section 28 JGG.

121. E. Coutteel, K. Herbots, S. Lembrechts, J. Put, N. Sporen, and A. Versweyvelt, 'Rapport 5. Jeugdrechtssystemen in vergelijking' (2015), at

tradition is that section 6 dates from the time that the age of majority was still 21.

The main problem in the current Argentine legal system is the broad discretion of judges concerning children below the age of 16 (as a remainder of the old theory of the *situación irregular*).¹³³ When those children commit an offence, formally a penalty cannot be imposed because of the legal presumption of lack of criminal responsibility. However, section 1 of Act 22.278 shows that when a minor has been abandoned and is indigent, is in ‘material or moral danger’ or has behavioural problems, a deprivation of liberty is justified (as a measure of ‘protection’) until the age of majority (18).¹³⁴ This ‘protective confinement’ is often used as a hidden punishment.¹³⁵ Act 26.061 had the intention to resolve this problem by making a clear distinction between minors in a vulnerable situation and minors who commit offences, but this practice nevertheless still exists.¹³⁶

At the time of writing this article, Argentina is in a transitional period. As mentioned previously, the Argentine way of dealing with juvenile offenders has been criticised.¹³⁷ Justicia 2020, a project of the ministry of justice aiming to lead to major changes in Argentine legal policy, wants to resolve the criticisms.¹³⁸ The main goals of Justicia 2020 regarding youth justice are the establishment of a separate youth justice system that meets human rights and the provision of an adequate reaction to children in conflict with the law.¹³⁹ In order to reach these goals, Argentina plans to lower the age below which a person cannot be prosecuted from 16 to 15 years old, although 15-year-old offenders could be punished only when they commit a crime that is punishable with a term of imprisonment of fifteen years or more. The old system would continue to exist regarding 16- and 17-year-old offenders (i.e. offences that are punishable with prison sentences of two years or more).

3 Findings: Five Relevant (Clusters of) Age Limits in Youth Justice Systems

The analysis of age limits in six diverse countries shows that a youth justice system is composed of many more age limits than just a lower and upper limit, which,

133. Abrams et al., above n. 3, at 118.

134. Section 3 of Act 22.278; Ministry of Justice and Human Rights of Argentina, Secretary of Human Rights Argentina and Unicef Argentina, above n. 129, at 34; M. Beloff, ‘Los adolescentes y el sistema penal. Elementos para una discusión necesaria en la Argentina actual’, 1 *Revista Jurídica de la Universidad de Palermo* 97, at 102 (2005).

135. Inter-American Commission on Human Rights. Rapporteurship on the Rights of the Child, *Justicia juvenil y derechos humanos en las Américas* (2011), at 16.

136. Section 19 concerning deprivation of liberty and section 27 concerning minimum guarantees.

137. Beloff, above n. 134, at 102.

138. <https://www.justicia2020.gob.ar/eje-penal/sistema-penal-juvenil/>.

139. *Ibid.*

moreover, are not even the same in all circumstances. Five types of age limits can be identified that are relevant to determine how a juvenile offender’s offence is reacted upon, some of which can also be subject to derogations. The categories of age limits are first described in neutral terms, using examples from the analysed youth justice systems, and subsequently a specific term and definition are proposed for each type of age limit.

3.1 Lower Age Limit

3.1.1 Findings

First of all, all six systems appear to have an age below which a minor may under no circumstances be addressed within the framework of youth justice or criminal justice: they cannot be imposed on an offence-oriented reaction due to an irrebuttable presumption of irresponsibility. That lower age limit is fixed at 10 in Northern Ireland and New Zealand, at 12 in the Netherlands, the Flemish Community and Brussels, at 14 in Austria, and at 16 in Argentina. In the French Community of Belgium, on the contrary, the lower age limit remains undefined. The FCD only stipulates that offenders under the age of 12 can be subject to four specific non-custodial reactions, but these possibilities concern reaction age limits (*infra* under c)) and not the lower age limit of the youth justice system.

The temporal point of reference is always the age at the time of the commission of the offence. However, the terminology used to indicate what is possible once a minor has reached the under age limit, varies widely from one country to another. In the Netherlands, such a minor can be prosecuted,¹⁴⁰ in Northern Ireland he can become guilty of an offence,¹⁴¹ in New Zealand he can be convicted of an offence,¹⁴² in Brussels he can be responsible for his acts¹⁴³ and in Austria¹⁴⁴ and Argentina¹⁴⁵ he can be punished from that age onwards. While these systems define a specific consequence of their lower age limit, albeit a different consequence in each one of them, the Flemish Decree does not indicate a specific point of reference. Instead, it links the application of the whole youth justice system to reaching the under age limit, since it states to apply to minors, who are persons between 12 and 18 years old.¹⁴⁶ As mentioned previously, the FCD is silent on the lower age limit and, as a consequence, on the point of reference as well.

Minors who commit an offence under the specified lower age limit are subject to the national youth welfare law or civil law. Each of the countries requires the minor to be in a state of need (of protection) or to have certain behavioural or psychological problems before one of the welfare or civil measures can be imposed. If so, these measures may even include deprivation of liberty and are, in the worst case, used as a hidden punishment.

140. Art. 486 CCP.

141. Section 3 CJO.

142. Section 21 Crimes Act, No. 43.

143. Art. 17(2) CCC statute, *a contrario*.

144. Section 4(1) JCA.

145. Section 1 and 2 Law 22.278 on Youth Justice.

146. Art. 2(10) *juncto* Art. 4(1) Flemish Decree.

The latter appears to be the case in Argentina and is considered to be an inevitable consequence of the high lower age limit.¹⁴⁷ This shows that the establishment of a separate youth justice system and a lower age limit are not sanctifying, nor does it guarantee that no other (implicit) offence-oriented reactions exist. One should therefore not be fixated on age limits, but also, and even more, take account of the consequences. After all, interventions based on another system can be equally intrusive and, moreover, offer a lower level of legal protection.

Since we define the lower age limit as the age following from which it is possible that a minor's offence is reacted upon under youth justice or criminal justice, albeit only for one type of offence, there is no case in which that age limit is lowered any further. It is, however, not inconceivable that minors under that age limit may nevertheless already be the subject of investigative measures under the youth justice system. That can, for example, be the case when the perpetrator of the committed offence is not yet known and the authorities are therefore not aware of his or her age. It is, however, only the Dutch legislature that expresses and regulates this possibility.¹⁴⁸

In some countries, on the other hand, the lower age limit can be raised depending on the offence committed and/or the moral condition of the minor. Under New Zealand youth justice it is legally possible to prosecute a 10- or 11-year-old, and hence the aforementioned lower age limit of 10, but only in case of murder or manslaughter and if the minor is aware of the illegality of his behaviour. For serious offences other than murder or manslaughter, the lower age limit is set at 12 years, but the condition of awareness of illegality remains. It is only at the age of 14 that a minor can be prosecuted in any case, regardless of the seriousness of the offence committed or the accountability of the minor. As a consequence, the lower age limit can be raised up to 14 years when none of the two aforementioned conditions are met. In Austria, the lower age limit of 14 can be raised to 16 in case of moderate misdemeanours, i.e. offences for which the minor does not have serious fault and for which there is no need to prevent recidivism through youth justice. In addition, the delayed maturity of a minor can make him indefinitely exempt from prosecution under youth justice, and the minor can therefore *in extremis* be prosecuted and punished only from the age of 18, when the criminal justice system principally applies.

3.1.2 Proposal for Clearer Terminology

The lower age limit is defined in this article as the age below which an offence-oriented reaction on a minor can under no circumstances be imposed owing to an irrebuttable presumption of irresponsibility. This definition is in line with the requirement of article 40 (3) (a) of the Convention on the Rights of the Child, that the

state parties should establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law. The lower age limit as described in chapter 3.1.1 of this article can therefore be identified as what is generally called the minimum age of criminal responsibility or the MACR. However, we believe that many of the interpretation issues around the MACR arise from the concept itself, which uses the term 'criminal responsibility'. Since all six countries have or are working on a youth justice system that is different from their criminal justice system, the reference to criminal responsibility to define the lower age limit causes confusion. It might be more accurate to use 'the minimum age of youth justice responsibility' (MAYR) as an expression of the lower age limit, since it indicates the moment from when on a minor can be addressed within the framework of youth justice. And even with this refinement, the internal points of reference will still be different: as noted above, prosecution, conviction, guilt, responsibility and punishment are five possibilities, and that only within six analysed countries. In case a youth justice system provides for the possibility to raise the MACR/MAYR related to the type of the committed offence and/or the moral condition of the minor, we introduce the obvious term 'raised MACR/MAYR'.

Minimum age of criminal responsibility (MACR)/

Minimum age of youth justice responsibility (MAYR)

The age, at the time of the offence, from which on a minor can be imposed an offence-oriented reaction under the youth justice system

Related concept: raised MACR/MAYR

3.2 Upper Age Limit

3.2.1 Findings

The second traditional age limit set by the countries is the upper age limit of their youth justice system. It is the age from which on a person is, in general, no longer subject to the youth justice provisions but is automatically held accountable under the adult criminal justice system. In all six systems analysed, the upper limit is fixed at the age of 18, which confirms the observation in the international literature that there is more or less an international consensus in this regard.¹⁴⁹

In the majority of the countries analysed, there is an exception that lowers the upper age limit. In the Netherlands and Belgium, minors can be transferred to the adult criminal justice system from the age of 16, albeit under strict conditions. Whereas the transfer in the Netherlands concerns only the application of the substantive criminal provisions, and consequently the possible reactions of the youth judge to the committed offence, the transfer in Belgium also implies that the

147. Abrams et al., above n. 3, at 118-119.

148. Art. 487 CCP.

149. Cipriani, above n. 2, at 158.

minor is tried in accordance with the adult criminal procedure.¹⁵⁰ In both countries, the decision to transfer a minor to the criminal justice system is at the discretion of the youth judge, except in the case of traffic offences in Belgium, where the transfer takes place automatically. In Northern Ireland and New Zealand, the upper age limit can be lowered all the way down to the lower age limit, which is 10 in both countries. Northern Ireland allows for the application of criminal law provisions to a minor only in the case of homicide or to determine guilt in the case of co-accusation with an adult, after which the minor is remitted to a youth court. Likewise, in New Zealand, minors between 10 and 14 can be tried in accordance with adult criminal law only in case of murder or manslaughter. With regard to minors between 14 and 18, there is an automatic transfer to the criminal court in four specific cases, and a discretionary decision of the youth court in other (serious) cases. With the exception of the latter case, and contrary to the Netherlands and Belgium, the upper age limit is automatically lowered in these two countries when certain conditions are fulfilled.

Finally, Austria and Argentina do not lower their upper age limit under any circumstances. It is no coincidence that they are also the two countries that adopt the adult criminal sentences in their youth justice system, albeit with some restrictions. The four other countries, in contrast, provide for adapted youth justice measures with relatively low maximum sentences. As a compensation, they use a flexible upper limit, which allows them to invoke criminal justice in serious cases, when no answer can be found within their youth justice system.¹⁵¹

As far as raising the upper age limit is concerned, only the Netherlands and Austria have developed a policy regarding young adults who commit an offence after the age of 18. In the Netherlands, the ‘adolescent criminal law’ applies to persons up to 23 years old, whereas Austria provides for some adaptations for persons who have not reached the age of 21. It is, however, still the Dutch criminal court and not the youth court that applies these youth justice provisions. The Dutch ACL therefore implies that only the substantive provisions of the youth justice systems are used with regard to young adults, except for the HALT measure and community service. In Austria, on the other hand, the application of youth justice to young adults is restricted to procedural provisions, because young adults are still subject to the range of sentences of adult criminal law. As a consequence, none of the six countries have established a full-fledged young adult justice system.

3.2.2 Proposal for Clearer Terminology

As concerns the upper age limit, less confusion exists compared with the lower age limit: the age from which on a person is, in general, held accountable under the adult criminal justice system is unambiguously called the age of criminal majority (ACM). However, in all six

analysed countries, exceptions to the general ACM exist: downwards, upwards or in both directions. The lowering of the ACM, on the one hand, can either be automatic or depend on a judicial decision. That is why we suggest terming this exception ‘the advanced ACM’, since minors are potentially subject to adult criminal law before they have reached the ACM, which is 18 in these six countries. The raising of the ACM, on the other hand, could be considered a delay in addressing adults under the criminal justice system. This exception could therefore be called ‘the delayed ACM’.

Age of criminal majority (ACM)

The age, at the time of the offence, from which on a person can be imposed an offence-oriented reaction under the criminal justice system

Related concepts: advanced ACM; delayed ACM

3.3 Lower and Upper Age Limit for Certain Reactions

3.3.1 Findings

Apart from the lower and upper age limit, all six countries have set at least one reaction-based age limit, either an age limit from which certain reactions can be imposed or an age limit until which reactions can last. Three of them have introduced one or more age limits from when a reaction can be imposed, while four of them adopted one or more upper age limits regarding certain reactions.

Whereas in the Netherlands, New Zealand and Austria the general lower age limit of youth justice applies for the imposition of all kind of reactions, Northern Ireland, Belgium and Argentina have set some specific limits. First of all, Northern Ireland sets the minimum age for community services and probation at 16 years. The three Belgian systems introduced a lower age limit regarding custodial sentences, which can be imposed only from the age of 14 (or even 16) onwards, whereas their MACR/MAYR is 12 (or undefined in the French Community). Only exceptionally can a minor be subject to a custodial sentence from the age of 12, which is the same as the MACR/MAYR in the Flemish Community and Brussels. These higher under age limits show that custodial sentences are given a specific place in the set of possible reactions and confirm the *last resort*-nature of detention of minors.

In addition, the Brussels’ CCC stipulates that working for the purpose of paying damages can be ordered only when the offender has turned 15. The French Community, on the other hand, in which the MACR/MAYR is undefined, has adopted some implicit reaction-based under age limits. The FCD states that offenders under the age of 12 can be subject only to certain provisional, non-custodial measures, and only to a reprimand as far as final measures are concerned. This means that the age of 12 is the lower age limit for all the other measures.

150. J. Put, *Handboek Jeugdbeschermingsrecht* (2015), at 299.

151. Weijers and Imkamp, above n. 1, at 278.

Finally, Argentina is a peculiar case: although the lower age limit of youth justice is set at 16, the reactions imposed are only executable when the offender reaches the age of 18 and after the offender has been subject to at least one year of ‘protective treatment’. The result of the protective treatment is taken into account in the decision whether or not to execute the reaction imposed. In other words, a minor, i.e. a person under 18 years old, can never be subject to the execution of an offence-oriented reaction in Argentina. These findings demonstrate that the lower age of youth justice is not all-inclusive or determinative and needs to be complemented with other age limits.

As to the upper age limit for reactions, the Flemish Community in particular, has a striking feature. Its general upper age limit is set at 23, but there is a specific age limit for custodial sentences. Long detention can be applied until the age of 25, and in combination with preventive custody of 10 years, an offender who was a minor at the time of the offence can even be detained until the age of 35. In other words, this custodial sentence can last until the offender is almost twice as old as the ACM of the Flemish Community, which is 18.

Another example that shows that not only the lower and upper age limits of youth justice are important is Austria. Austria provides four different upper ages for custodial sentences – 18, 22, 24 and 27 – as an ultimate upper limit. In the Netherlands, the maximum duration of a PIY-measure (which is also a custodial sentence) is seven years, which means the offender can be detained until he or she is 30 years old in case the ACL system is applied. Similar to the systems of the Flemish Community and Austria, the upper age limit of custodial reactions is rather high compared with the ACM (18), which points out, once again, the special nature of these reactions.

New Zealand, on the other hand, is rather consistent: apart from the ACM, which is 18, the upper age limit for reactions (custodial sentences included) is 19. As a consequence, supervision with residence orders has a short and limited duration. In order to cope with this low age-border that separates children from adults, serious offences committed by a minor are tried in adult court, where his young age can be considered as a mitigating circumstance.

In the French Community and in Brussels a distinction in age limits is made between provisional and final measures. In both regions the provisional measures end at the age of 20 and the final measures expires at the age of 18, with an exception upwards (20 in the French Community and 23 in Brussels). A reprimand can be imposed at any age.

3.3.2 Proposal for Clearer Terminology

These findings demonstrate that a youth justice system cannot be reduced to a system consisting of a lower and an upper limit and that the duo MACR/MAYR and ACM is an unsatisfactory dichotomy. The foregoing examples show that the under and upper age limits for certain reactions are influential as well. This third type

of age limits has been unexplored territory until now.¹⁵² Because of the relevance of this category of age limits in legal practice, it should be recognised as a distinct and individual age limit. The age limit for certain reactions can be unified in one comprehensive term, namely the ‘reaction age limit’ (RAL). The lower age limit for certain reactions should be called the ‘lower reaction age limit (lower RAL)’, whereas for the upper age limit for certain reactions the label ‘upper reaction age limit (upper RAL)’ is suitable.

Reaction age limits (RAL)

Related concept: Lower RAL

The age, at the time of the offence, from which on a certain offence-oriented reaction can be imposed to a minor under the youth justice system

Related concept: Upper RAL

The age, at the time of the execution of the reaction, until which offence-oriented reactions last under the youth justice system

3.4 Age Categories Within Reactions

3.4.1 Findings

Now that we have discussed the reaction-based lower and upper age limits, a fourth age category arises. Five out of the six countries examined have adopted certain age limits within reactions.

The Netherlands, Northern Ireland, the Flemish Community and Austria have set up a layered system for custodial sentences depending on the age of the offender. In the Netherlands minors between the age of 12 and 16 can be subject only to a custodial sentence of twelve months, whereas on offenders aged 16 or older a custodial sentence with a maximum duration of 24 months can be imposed. The same goes for Austria: children aged 14 but less than 16 can get a custodial sentence with a maximum duration of ten years, while offenders aged 16 and 17 can be subject to sentences of fifteen years. In Northern Ireland the maximum duration of a custodial sentence for children between 10 and 17 years is two years, whereas there is no maximum duration for offenders aged 17 until 21. The ‘long detention’ system of the Flemish Community consists of three layers: a duration of a maximum of two years for minors aged 12 and 13, a maximum of five years for minors aged 14 and 15 and a maximum of seven years for minors 16 or 17 years old.

In Northern Ireland and New Zealand, on the other hand, the amount of the payments and/or the person who needs to pay varies according to the age of the offender. In Northern Ireland, children aged 10 to 14 who committed an offence do not have to pay a fine themselves; instead, their parent or guardian should. Once children have reached the age of 14, the amount of

152. For an overview of the age limits for custodial sentences in Europe: Dünkel et al., above n. 2, at 1793.

the fine increases. Minors between the age of 16 and 18, finally, have to pay the fine themselves. Similarly, in New Zealand minors only have to pay the costs of the prosecution themselves from the age of 16. Regarding minors between the age of 10 but less than 16 the parents have to pay these costs.

3.4.2 Proposal for Clearer Terminology

The fact that youth justice systems are ‘layered’, meaning that the weight or height of certain measures depends on the age of the offender at the time of the offence, shows once again that several subcategories of age limits exist within a youth justice system, between the two extreme age limits that define its scope. Connecting the age of an offender to certain consequences (the degree or duration of sentencing) allows systems to respond to the degree of maturity and responsibility of the offender. Age limits of this type can be called the internal age limits of reactions (IALR).

Internal age limits of reactions (IALR)

The age, at the time of the offence, which determines the degree or duration of the offence-oriented reaction that can be imposed on a minor under the youth justice system

3.5 Competent Court and Detention Institutions Depending on Age

24

3.5.1 Findings

The final category of age limits concerns a more procedural part, namely the jurisdiction of the existing actors in youth justice. This category can be divided into two subcategories: the competent court (trial), on the one hand, and the competent services and institutions (execution), on the other hand.

Following the upper age limit of youth justice (18 in all the systems discussed), an offender who had not reached the age of 18 at the time of the offence is tried in youth court (and sentenced according to youth justice law), while offenders of at least 18 years of age at the time of the offence are sentenced in adult court based on the provisions of criminal law. However, only in Argentina does this rule apply unexceptionally. In the other countries, two types of exceptions exist to this general rule: (1) the trial of an offender under the age of 18 in criminal court because of a transfer and (2) the trial of an offender aged 18 in adult court according to youth justice law or the trial of an offender under the age of 18 in youth court according to criminal law.

The most common exception is the transfer system. Three of the countries examined, namely Northern Ireland, New Zealand and Belgium, have introduced a procedure in which a minor can be tried in criminal court according to criminal law. In Northern Ireland this is possible from the age of 10 in the case of homicide or co-accusation with an adult (although the sentencing of the co-accused minor occurs in youth court according to youth justice law), whereas in all Belgian

systems only minors who are at least 16 years old at the time of the offence and commit a traffic offence are automatically tried in the adult criminal court according to criminal law. In New Zealand, children between the age of 10 and 14 are automatically transferred to the adult court when they are charged with murder or homicide. Regarding young persons (14–18 years old), the trial automatically takes place in adult court in certain cases (automatic transfer), while in other cases the youth court has the power to decide whether or not to transfer (judicial transfer).

The second exception to the general rule can be found in the Netherlands and in Belgium. The provisions of criminal law exceptionally apply to offenders aged 16 and 17, but only concerning the reactions available (substantive law). It is the youth court that remains competent to try these minors (procedural law). In the Netherlands the exception also applies the other way around, meaning that young adults (18–23 years old) are tried in criminal court according to youth justice law. In that sense this category is more a nuance than an actual exception, because it only adopts the substantive reaction possibilities of the age-appropriate system and not its procedure. However, in Belgium even this nuance has to be nuanced: those 16- and 17-year-olds can be tried only by a specialised non-permanent chamber of the youth court with both criminal judges and judges with expertise of youth justice law.¹⁵³ Considering that this chamber is non-permanent and criminal judges also participate, the chamber lies somewhere in between the youth and adult court.

Lastly, the competent detention institutions vary depending on the age of the offender, which must be, contrary to the other age limits, generally determined at the time of the execution. The analysis examined the age limits of only final custodial sentences, therefore excluding remand in custody or mediation services. While one would presume that minors are detained in specialised youth institutions but transferred to adult prison once they attain the age of 18, this presumption can be rebutted. Again with the exception of Argentina, the analysis of the countries shows that several exceptions to this (alleged) general rule exist.

Apart from Belgium, where juvenile offenders remain in youth institutions for the whole duration of the imposed reaction, the competent detention institution often relates to the upper age limit for custodial sentences (which is mostly higher than the ACM and the upper RAL). The ACL system in the Netherlands, for example, allows offenders to be held in young offenders institutions until the age of 23. Likewise, offenders can be detained in an Austrian institution for youth detention until the age of 27. In Northern Ireland, juvenile offenders are detained in a juvenile justice centre or a young offenders centre, depending on the type of custodial sentence. Once he or she has reached the age of 21, the judge can decide whether or not to transfer him or her to an adult prison. The age of 24 is the ultimatum;

153. Serious offences will be dealt with in the court of assizes.

offenders are then automatically transferred to adult prison.

In New Zealand, to the contrary, the competent detention institution relates to the transfer system (causing a trial in adult court with adult sentences), as described previously. More specifically, both children as young persons are usually detained in a youth justice residence, but young persons can also be sent to prison in case a transfer to the criminal justice system has occurred.

3.5.2 Proposal for Clearer Terminology

These last age limits can be named the ‘court age limits’ (CAL) and the ‘detention institutions age limits’ (DIAL), all together called the ‘actors age limits’ (AAL). The CAL is mainly a combination of the potential ACM, the (general) ACM and the delayed ACM. The DIAL, on the other hand, is, next to the aforementioned combination, influenced by the general, lower and upper RAL and the lower and upper RALs of custodial sentences. Nevertheless, both the CAL and the DIAL are distinct age limits with their own characteristics and purpose. Defining those age limits is therefore a way to emphasise their individuality and contributes to the conceptual coherence in youth justice.

Actors age limits (AAL)

Related concept: Court age limits (CAL)

The age, at the time of the offence, which determines the competent court in which a person will be tried

Related concept: Detention institution age limits (DIAL)

The age, at the time of the execution of the reaction, which determines the competent detention institution in which a person will be detained

4 Conclusion

This article, first of all, demonstrates that the distinction between the MACR and ACM is too general, considering the finesse and layers that are to be found in youth justice systems. More specifically, it is shown that this traditional pair must be completed with three other types of age limits. In the end, youth justice systems can consist of five clusters of age limits: the (raised) minimum age of criminal/youth justice responsibility (MACR/MAYR), the (advanced and delayed) age of criminal majority (ACM), the (lower and upper) reaction age limits (RAL), the internal age limits of reactions (IALR) and the actors age limits (AAL), which consist of the court age limits (CAL) and the detention institution age limits (DIAL). Each type of age limit has its own impact on the youth justice system and its own consequences with regard to the juvenile offender, which are displayed in the table in Section 5.

Apart from raising awareness of those other influential age limits, this article clarifies the meaning of the

MACR. Owing to the long-standing ill-defined nature of this notion, different interpretations have arisen in several countries. The ensuing practical implications of this issue cannot be underestimated, as it is a key concept in children’s rights. Therefore, we created a new term, which is more suitable and avoids confusion: the minimum age of youth justice responsibility (MAYR). Nevertheless, the value of the MACR/MAYR can also not be overestimated. The other age limits discussed prove that the main focus of the academic world on, and the importance of, the MACR/MAYR is slightly exaggerated.

Another reason for confusion and haziness in the field of age limits that is detected in this article is the lack of attention concerning the moment upon which the person must have reached the age limit. It is often unclear whether the criterion is the age at the time of the offence, the age at the time of the judgment or the age at the time of the execution of the reaction. The age at the time of the offence is the most common momentum, since it is the general criterion for the MACR/MAYR, ACM, lower RAL, internal age limit of reactions and CAL. This consistency is remarkable, but probably owing to the attention of the international institutions in children’s rights on this criterion.¹⁵⁴ The lower RAL in Argentina (age at the time of the execution of the reaction) and the internal age limit of reactions concerning fines in Northern Ireland (age at the time of the judgment) show that this rule is also not free from exceptions.

Furthermore, this article wants to give an incentive to examine age limits in systems other than youth justice, as such systems can equally influence the way in which the criminal behaviour of a minor is reacted upon. On the one hand, all six systems seem to have introduced a practice of dealing with child offenders who have not yet reached the MACR/MAYR under some type of youth welfare or civil law. The underlying idea of these systems is the same: a child can be subject to such a youth care system only if it finds him- or herself in some kind of problematic situation (‘growing and parenting problems, psychological problems and disorders’, ‘in need’, ‘likely to suffer significant harm’, etc.) However, this theoretical basis on which the youth care system comes into effect may be used differently in practice. For example, in Argentina, children the age of 16 who commit an offence are not punishable but are frequently detained on the basis of youth care provisions. Despite a high MACR/MAYR, the youth care system in Argentina is thus often used to deal with impunity. In conclusion, the table in the next section illustrates the theoretical age limits but does not take into account practical deviations.

On the other hand, the analysis focuses only on ‘offence-oriented reactions’ and explicitly excludes reactions in administrative law, even though custodial reactions can be imposed under such systems as well. Examining reactions imposed under youth care, civil or

154. UN Committee on the Rights of the Child, above n. 5, at 9-10.

administrative legislation would therefore certainly be a valuable extension of our preliminary study.

Finally, this analysis is limited to six countries, which is obviously too small a number to be able to make firm conclusions. Although these countries are carefully selected on the basis of varied characteristics (European versus non-European, alleged low versus high MACR/MAYR, etc.), a study of six youth justice systems cannot be generalised without further research in other countries. We therefore strongly encourage the expansion of this experimental study and continued research regarding the different age limits in different countries in order to refine our proposed conceptual framework.

albeit in a simplified way. More information on the possible exceptions and nuances can be found in the country analyses in chapter 2 of this article.

The following abbreviations are used in the table: Flemish Community (Fl), French Community (Fr), Brussels (Br), exceptionally (exc.), juvenile justice centre order (JJCO), custody care order (CCO), time of the judgment (J), time of the execution of the judgment (E).

5 Table: An Overview of the Five Clusters of Age Limits in Six Countries

The following table is a visualisation of the several distinguished age limits and the newly proposed names,

	The Netherlands	Northern Ireland	New Zealand	Belgium	Austria	Argentina
Minimum age of criminal responsibility (MACR)/ Minimum age of youth justice responsibility (MAYR)						
<i>The age, at the time of the offence, from which a minor can be imposed an offence-oriented reaction under the youth justice system</i>						
<i>General MACR/ MAYR</i>	12	10	10	– Fl: 12 – Fr: / – Br: 12	14	16
<i>Raised MACR/ MAYR</i>	/	/	– 12: other serious offences – 14: any criminal offence	– Fl: / – Fr: / – Br: /	– till 18: delayed maturity – 16: moderate misdemeanours	/
Age of criminal majority (ACM)						
<i>The age, at the time of the offence, from which a person can be imposed an offence-oriented reaction under the criminal justice system</i>						
<i>General ACM</i>	18	18	18	– Fl: 18 – Fr: 18 – Br: 18	18	18
<i>Advanced ACM</i>	16 (only substantive provisions)	10 in two cases	10	– Fl: 16 – Fr: 16 – Br: 16	/	/
<i>Delayed ACM</i>	23 (only substantive provisions)	/	/	– Fl: / – Fr: / – Br: /	21 (only procedural provisions)	/
Lower reaction age limits (Lower RAL)						
<i>The age, at the time of the offence, from which a certain offence-oriented reaction can be imposed on a minor under the youth justice system</i>						
<i>Custodial sentence</i>	/	/	/	– Fl: 14/16 (exc. 12) – Fr: 14 (exc. 12) – Br: 14 (exc. 12)	/	/
<i>Other reactions</i>	/	– community service: 16 (J) – probation: 16	/	– Fl: / – Fr: 12 (except 3 reactions under the age of 12) – Br: work to pay damages: 15	/	general: 18 (E)

	The Netherlands	Northern Ireland	New Zealand	Belgium	Austria	Argentina
Upper reaction age limits (Upper RAL)						
<i>The age, at the time of the execution of the reaction, until which offence-oriented reactions last under the youth justice system</i>						
General	/	/	19	– Fl: 23 – Fr: • provisional measures: 20 • final measures: 18 (exc. 20) – Br: • provisional measures: 20 • final measures: 18 (exc. 23) • reprimand: /	/	/
Custodial sentence	30 in case of extended PIY-measure	/	19	– Fl: 35 – Fr: / – Br: /	18, 22, 24 or 27 depending on certain conditions	/
Internal age limits of reactions (IALR)						
<i>The age, at the time of the offence, which determines the degree or duration of the offence-oriented reaction that can be imposed on a minor under the youth justice system</i>						
Maximum duration of custodial sentence	– 12-16: 12 months – 16-17: 24 months	– 10-17: 2 years – 17-21: /	/	– Fl: • 12-13: 2 years • 14-15: 5 years • 16-17: 7 years – Fr: / – Br: /	– 14-16: 10 years – 16-17: 15 years	/
Other reactions	/	– 10-14 (J): lower fines, paid by parent or guardian – 14-18 (J): higher fines, paid by parent or guardian – 16-18 (J): higher fines, paid by minor	– 10-16: order to pay costs of prosecution paid by parents – 16-18: order to pay costs of prosecution paid by minor	– Fl: / – Fr: / – Br: /	/	/

The Netherlands	Northern Ireland	New Zealand	Belgium	Austria	Argentina
Court age limits (CAL)					
<i>The age, at the time of the offence, which determines the competent court in which a person will be tried</i>					
<ul style="list-style-type: none"> - 12-18: youth court - from 18: criminal court 	<ul style="list-style-type: none"> - 10-18: youth court, except in two cases - from 18: criminal court, except in two cases 	<ul style="list-style-type: none"> - 10-11: high court - 12-13: youth court or high court - 14-18: youth court, unless automatic or judicial transfer to criminal court - from 18 (or in the above-mentioned cases): criminal court 	<ul style="list-style-type: none"> - Fl, Br: <ul style="list-style-type: none"> • 12-16: youth court • 16-17: youth court, unless transfer to criminal court • from 18 (or in the above-mentioned case): criminal court - Fr: <ul style="list-style-type: none"> • 0-16: youth court • 16-17: youth court, unless transfer to criminal court • from 18 (or in the above-mentioned case): criminal court 	<ul style="list-style-type: none"> - 14-18 (in certain cases till 21): criminal court with specialised judges - from 18 (in certain cases from 21): criminal court 	<ul style="list-style-type: none"> - 16-18 : youth court - from 18: criminal court

The Netherlands	Northern Ireland	New Zealand	Belgium	Austria	Argentina
Detention institutions age limits (DIAL)					
<i>The age, at the time of the execution of the reaction, that determines the competent detention institution in which a person will be detained</i>					
<ul style="list-style-type: none"> - 12-18, latest till 23: young offenders institution - from 18, latest from 23: adult prison 	<ul style="list-style-type: none"> - 10-14 in case of CCO (J): child care - 10-17 (exc. at 17) in case of JJCO and 14-18 in case of CCO (J): juvenile justice centre - 16-21, latest till 24: young offenders centre, but max. 4 years - from 21, latest from 24: adult prison 	<ul style="list-style-type: none"> - 10-19: youth justice residence - Exc. From 10: adult prison 	<ul style="list-style-type: none"> - Fl: <ul style="list-style-type: none"> • 12-23, exc. till 25 or 35: community institution • Exc. from 16: adult prison - Fr: <ul style="list-style-type: none"> • 12-18, latest till 20: community institution • Exc. from 16: adult prison - Br: <ul style="list-style-type: none"> • 12-18, latest till 23: community institution • Exc. from 16: adult prison 	<ul style="list-style-type: none"> - 14-18: institution for youth detention - from 18, latest from 27: adult prison 	<ul style="list-style-type: none"> - 16-18 : specialised institutions - from 18: adult prison

Giving Children a Voice in Court?

Age Boundaries for Involvement of Children in Civil Proceedings and the Relevance of Neuropsychological Insights

Mariëlle Bruning & Jiska Peper*

Abstract

In the last decade neuropsychological insights have gained influence with regard to age boundaries in legal procedures, however, in Dutch civil law no such influence can be distinguished. Recently, voices have been raised to improve children's legal position in civil law: to reflect upon the minimum age limit of twelve years for children to be invited to be heard in court and the need for children to have a stronger procedural position.

In this article, first the current legal position of children in Dutch law and practice will be analysed. Second, development of psychological constructs relevant for family law will be discussed in relation to underlying brain developmental processes and contextual effects. These constructs encompass cognitive capacity, autonomy, stress responsiveness and (peer) pressure.

From the first part it becomes clear that in Dutch family law, there is a tortuous jungle of age limits, exceptions and limitations regarding children's procedural rights. Until recently, the Dutch government has been reluctant to improve the child's procedural position in family law. Over the last two years, however, there has been an inclination towards further reflecting on improvements to the child's procedural rights, which, from a children's rights perspective, is an important step forward. Relevant neuropsychological insights support improvements for a better realisation of the child's right to be heard, such as hearing children younger than twelve years of age in civil court proceedings.

Keywords: age boundaries, right to be heard, child's autonomy, civil proceedings, neuropsychology

1 Introduction

The last decade has witnessed the increased influence of neuropsychological insights on age boundaries in legal proceedings. In the Netherlands, recent law amendments with regard to the introduction of 'adolescent criminal law' clearly reflect the influence of neuropsychological findings with regard to adolescent brain development. For instance, based on the well-replicated

findings that – on average – the brain continues to mature up until twenty-five years of age,¹ young adults (of eighteen to twenty-three years of age) can be sentenced under criminal law as children based on the personality of the suspect or the circumstances of the criminal offence.² Nevertheless, in Dutch civil law, no such influence can be distinguished.³ In Dutch civil law, different age limits with regard to the participation of children in procedures are used, and many different exceptions with various age limits can be discerned. Children lack legal capacity – *locus standi* – and are no independent party to the proceedings. Parents or guardians are responsible to represent them in civil court proceedings, and when a conflict of interests between the child and the legal representative(s) can be established, the court can appoint a guardian *ad litem* ('*bijzondere curator*') to represent the child.

Children who experience civil law proceedings are mostly involved in family law or child protection proceedings. In such proceedings, tensions often exist between the interests of parents and child. Recently, voices have been raised to improve children's legal position in civil law: to reflect upon the age limit of twelve years for children to be invited to be heard in court and the need for children to have a stronger procedural position.⁴ This article focuses on children, their current procedural possibilities in civil law and possible findings to improve their current position as legally incompetent parties in civil proceedings concerning children (family law or child protection proceedings). We aim to answer the question: to what extent are current age limits for children in Dutch family law in conformity with neuro-

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* Mariëlle Bruning is Professor of Child Law at Leiden Law Faculty, Leiden University. Jiska Peper is Assistant professor in the Developmental and Educational Psychology unit of the Institute of Psychology at Leiden University.

1. K.L. Mills, A.L. Goddings, M.M. Herting, R. Meuwese, S.J. Blakemore, E.A. Crone, R.E. Dahl, B. Güroğlu, A. Raznahan, E.R. Sowell & C.K. Tamnes, 'Structural Brain Development Between Childhood and Adulthood: Convergence Across Four Longitudinal Samples', 141 *Neuroimage* 273 (2016).
2. Art. 77c Dutch Criminal Code.
3. Empirical studies into the neuropsychological development of the adolescent brain can also be useful for reflecting upon the transition from youth to adulthood at the age of eighteen and legal problems when transferring from a child protection system for children to a system that can hardly respond to young adults who are not willing to accept professional support but who are incapable of living independently without having serious problems, such as behavioural or psychiatric problems or substance abuse. Still, in this article we will focus on the position of children and not on young adults who have experienced mandatory care and support during their childhood.
4. Government Committee on Reassessment of Parenthood, *Child and Parents in the 21st Century* (2016).

psychological insights? First, the current legal position of children in Dutch law and practice will be analysed (section 2). After a brief introduction of the child's right to be heard, the child's right to be heard in family law proceedings, recommendations for improvement of the child's legal position and political unwillingness to act upon recommendations for Dutch civil law will be discussed. Furthermore, current age limits for children in Dutch civil law will be compared with the legal position of children in other Dutch law contexts. Second, development of psychological constructs relevant for family law will be discussed in relation to underlying brain developmental processes and contextual effects in children (section 3). These constructs encompass cognitive capacity, autonomy, stress responsiveness and (peer) pressure. What is known from recent literature on the development of these neuropsychological processes in children and – based on these insights – is there a need for change of their legal position in family law? In the final part (section 4) of this article, we will address the question what lessons can be learnt from neuropsychological insights for Dutch family law.

2 The Current Legal Position of Children in Dutch Law and Practice

2.1 The Child's Right to Be Heard

Children have the right to be heard according to Article 12 of the Convention on the Rights of the Child (hereinafter CRC), and this includes the right for all children who are capable of forming their own views to express those views freely in any judicial proceedings, such as civil proceedings, 'either directly, or through a representative or an appropriate body' (Art. 12 section 2 CRC).⁵ The right to be heard, as enshrined in Article 12 CRC, includes three components: (1) the right to infor-

mation about being heard, (2) the right to be heard and (3) the right to be taken seriously by way of their views being given due weight in accordance with the age and maturity of the child. In addition to the fact that the right to be heard is an obligation that arises from the CRC, a large number of studies show that participation for children has a number of positive effects.⁶ The Committee on the Rights of the Child dedicated their *General Comment Number 12* to the child's right to be heard and emphasised that

Article 12 imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice which would restrict the child's right to be heard.⁷

The Committee on the Rights of the Child acknowledges that some jurisdictions prefer to state an age at which the child is regarded as capable of expressing his or her own views – age limits are often used in domestic procedural law. Yet, the Committee assures that, according to the CRC, children's capability to express their own views should be determined on a case-by-case basis and this requires an individual assessment of each individual child.⁸

However, many countries have included age limits that impede the child's right to be heard in legal proceedings. The Fundamental Rights Agency of the European Union looked at statutory provisions in ten member states of the European Union regarding the child's right to be heard in civil cases and found, in 2015, that age limitations are often incorporated in domestic law with regard to the child's right to be heard.⁹ Furthermore, differences can be found in the scope of the right to be heard. In some countries, the right to be heard is limited to a single interview by a judge, but in other countries, children have the possibility to present evidence, to intervene in a case or to receive court rulings.¹⁰ Age limits can hinder the child's right to be heard in legal proceedings in two ways: absolute age limits that are reflected in law can restrict children's participation in legal proceedings, but also age limits in law can lead to an interpretation of law that obstructs the child from being

5. For some critical voices about the still rather vague contents of Art. 12 CRC and Committee on the Rights of the Child, *General Comment No. 12. The Right of the Child to be Heard*, UN Doc CRC/C/GC/12 (2009), see e.g. A. Daly, *Children, Autonomy and the Courts. Beyond the Right to be Heard* (2018), A. Daly, 'No Weight for "Due Weight"? A Children's Autonomy Principle in Best Interest Proceedings', 1 *International Journal of Children's Rights* 61 (2018); A. Parkes, *Children and International Human Rights Law. The Right of the Child to be Heard* (2013), at 120; C.R. Mol, 'Children's Representation in Family Law Proceedings. A Comparative Evaluation in Light of Article 12 of the United Nations Convention on the Rights of the Child', 1 *International Journal of Children's Rights* 66 (2019). From a European perspective, Art. 6 ECHR includes the right of access to court. The right of access to court is not absolute but may be subject to limitations, for example, for children, but these must not restrict or reduce the access in such a way or to such an extent that the very essence of the right is impaired (ECtHR 21 February 1075, ECLI:CE:ECHR:1975:0221JUD000445170, *Golder v. UK*). The Court has ruled that procedures should be adapted to the developmental stage of the youth suspect; see A. Daly and S. Rap, 'Children's Participation in Youth Justice and Civil Court Proceedings', in U. Kilkelly and T. Liefwaard (eds.), *International Human Rights of Children* (2018) 299-319. However, the ECtHR has not addressed age limits with regard to child participation.

6. S. Rap, D. Verkroost, & M.R. Bruning, 'Children's Participation in Dutch Youth Care Practice: An Exploratory Study into the Opportunities for Child Participation in Youth Care from Professionals' Perspective', 25 *Child Care in Practice* 37 (2019).

7. Committee on the Rights of the Child, above n. 5, at para. 21.

8. *Ibid.*, at paras. 52 and 102; with regard to health care, the Committee welcomes the introduction of a fixed age at which the right to consent transfers to the child, but strongly recommends that where a younger child can demonstrate capacity to express an informed view on his or her treatment, this view is given due weight.

9. M.R. Bruning and K.A.M. van der Zon, 'Can You Hear Me? Children's Right to be Heard in Child Protection Proceedings in the Netherlands', paper presented at World Congress on Family Law and Children's Rights, June 2017, Dublin.

10. European Union Agency for Fundamental Rights, *Child-Friendly Justice – Perspectives and Experiences of Professionals on Children's Participation in Civil and Criminal Proceedings in 10 EU Member States* (2015), at 309; Bruning and Van der Zon, above n. 9.

heard in legal proceedings in practice. In Dutch civil law and practice, age limits are common. In the next paragraph, the use of age limits in Dutch civil law and their implementation in practice will be further discussed.

2.2 Dutch Family Law and Children's Legal Position

Under Dutch family law, a child is a person under the age of eighteen.¹¹ Children lack legal capacity, although in the past few decades many exceptions to this rule have been added to the Dutch Civil Code.¹² Only their parents or other legal guardians can initiate civil proceedings and act as an independent party.¹³ Parents who bear parental responsibility are responsible for the child's legal representation in civil matters.¹⁴ In case of a conflict of interests between the child and his or her legal representative (parent or legal guardian), the court can appoint a guardian *ad litem*¹⁵ ('*bijzondere curator*') who can represent the child in civil proceedings and instigate such proceedings. Guardians *ad litem* in the Netherlands are usually trained as (family or children's) lawyers or as educationalists (behavioural experts). Furthermore, in some family law matters, Dutch law provides children with the possibility to approach the court informally and ask for a specific decision. This informal access to the court is available in matters related to custody after divorce and contact between a child and a parent.¹⁶

Despite their legal incapacity, children are interested parties in all family proceedings,¹⁷ including proceedings concerning child protection measures such as a family supervision order. Moreover, they have the right to be heard in court proceedings if they are twelve years or older and are not regarded legally incompetent to express their will.¹⁸ Children younger than twelve years of age can be heard on their request if the court decides that the child is competent. In this part of our review we will further elaborate on children's procedural position in family law proceedings and the use of related age limits.

2.3 Age Limits in Dutch Civil Law

Although the child's legal position in family proceedings was repeatedly debated in society and in parliament in

the past few decades, the Dutch legislature has time and again made it clear that there is no reason to change the concept of legal incapacity of children in family proceedings. Nevertheless, in Dutch civil law, many exceptions to this principle can be distilled.

In Dutch family law, children from the age of sixteen and older are given some opportunities to initiate proceedings independently from their legal representatives in some particular situations. For example, an underage mother of sixteen years or older who wants to care for and raise her child under the right to exercise authority over it, may request the Juvenile Court to be emancipated.¹⁹ She also has legal capacity to act in court and to appeal against a court decision. A child who has reached the age of sixteen may request the District Court to be emancipated, in the sense that certain legal powers of an adult are granted to him by court order.²⁰ In the court order decreeing the emancipation, the District Court explicitly specifies which legal powers of an adult are awarded to the child. The child may independently act as plaintiff or defendant in legal proceedings with regard to matters concerning the emancipation itself and with regard to juridical acts for which he has obtained full legal capacity pursuant to his emancipation. This is mostly used for family business matters in which children are participating and, therefore, need to have legal powers. In matters of adoption, a parent who has not yet reached the age of legal majority has full legal capacity to act in legal proceedings.²¹ Children from sixteen years of age and older can also initiate proceedings with regard to changing the registration of sex in their birth certificate.²² This law amendment of 2014 was inspired by Article 450 of Book 7 of the Dutch Civil Code, stating that, for medical treatment, children from the age of sixteen or older are legally competent to initiate proceedings. Medical treatment for children between twelve and sixteen years of age is only possible with 'double' informed consent of both parents (as legal representatives) and the child, but some exceptions exist to start medical treatment for this age group without parents' consent.²³

For children who experience family supervision orders, exceptions to the legal incapacity of children are also incorporated in the Dutch Civil Law. Children who are twelve years of age or older can file requests to the court with regard to their complaints about the implementation of the family supervision order, such as a formal order from the child protection services that are responsible to supervise the child and the family.²⁴ Children from the age of twelve or older can also request the court to terminate a family supervision order or an out-

11. Art. 1:233 Dutch Civil Code ('*Burgerlijk Wetboek*').
12. See M.M. Limbeek and M.R. Bruning, 'The Netherlands. Two Decades of the CRC in Dutch Case Law', in T. Liefwaard and J.E. Doek (eds.), *Litigating the Rights of the Child. The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2015) 89, at 92-93.
13. Children under the age of twelve do not have the right to access all files; see Dutch Supreme Court 5 December 2014, ECLI:NL:HR:2014:3535 and for a critical reflection: T. Liefwaard and M.R. Bruning, 'Commentary on the Judgement of the Hoge Raad on the 5th of December 2014', in H. Stalford, K. Hollingsworth and S. Gilmore (eds.), *Rewriting Children's Rights Judgments. From Academic Vision to New Practice* (2017) 173.
14. Art. 1:245(4) Dutch Civil Code.
15. Art. 1:250 Dutch Civil Code.
16. Arts. 1:251a(4) and 1:377g Dutch Civil Code.
17. Art. 798(2) Dutch Code of Civil Procedure.
18. Art. 809 Dutch Code of Civil Procedure; see also The Netherlands Supreme Court, 1 November 2013, ECLI:NL:HR:2013:1084 (annotated by S.F.M. Wortmann).

19. Art. 1:253ha Dutch Civil Code.
20. Art. 1:235 Dutch Civil Code.
21. Art. 1:227 sub 6 Dutch Civil Code.
22. This option was introduced for transgender people: Art. 1:28 lid 4 Dutch Civil Code (introduced by law amendment in 2014).
23. Art. 7:450 section 2 Dutch Civil Code. The exception conditions are 'serious risk for the child' and 'without parental consent, the child still has a strong wish for medical treatment and can oversee the consequences of this decision'.
24. Arts. 1:264 and 265 Dutch Civil Code.

of-home placement of the child (in alternative care) that can be ordered in light of a family supervision order.²⁵ Still, these children cannot appeal a family supervision order without their legal representative since they have no *locus standi*.

Another exception to the rule that children are legally incapacitated in civil proceedings was introduced in 2008, for children who experience secure treatment (out-of-home) placement. Because a secure treatment placement involves a serious human rights interference – a deprivation of the child’s liberty – extra safeguards were introduced in legislation, and the child who risks or faces secure treatment placement is deemed legally competent to independently start legal proceedings or appeal a decision.²⁶ In secure treatment placement proceedings, children are an independent party to the proceedings, have *locus standi* and are represented by a lawyer.²⁷

Besides direct autonomous access to court proceedings, the Dutch Civil Code offers children who are twelve years or older the possibility to informally contact the court in the context of divorce proceedings and request that joint parental authority be converted to sole parental authority or to bring a case with respect to access rights or care plans subsequent to divorce.²⁸ Children from the age of twelve and older can informally contact the court (e.g. by writing a letter or sending an email) without (legal) representation. Children younger than the age of twelve who are considered as competent can also use this opportunity.²⁹ The court has discretionary power to decide about the child’s request. No mandatory duty to hear the child in court or to give a formal legal decision exists. The child is not competent to autonomously appeal any decision in this context but can only appeal through his or her legal representative(s) or guardian *ad litem*.³⁰ In practice, children’s use of this ‘informal access’ to court remains trivial.³¹

Children can also request the court to appoint a guardian *ad litem* when there is a conflict of interests between the child and his or her parents or guardian as legal representatives in any matter about the upbringing and education of the child.³² The court can appoint a guard-

ian *ad litem* ex officio. The child can also request the appointment of a guardian *ad litem*. When the judge rejects the request to appoint a guardian *ad litem*, the child can appeal with the support of a legal representative.³³ A significant increase in the number of appointed guardian *ad litem*s has been visible in the last decade. Furthermore, a development of further professionalisation occurred and judges have become more acquainted with the possibility to appoint a guardian *ad litem* for children.³⁴ Nevertheless, judges do not always appoint a guardian *ad litem* on request. When, for example, the child’s interests are represented by his or her parents, child protection services or a social worker who is responsible for a child protection order, judges are reluctant to appoint a guardian *ad litem*.³⁵ In legal parentage proceedings with children involved, judges will always have to appoint a guardian *ad litem* (ex officio) to represent the child.³⁶ The court has no discretionary power in such proceedings.

As was mentioned, children from the age of twelve years or older must be given the opportunity to be heard in civil court proceedings and are invited for a court hearing.³⁷ Only in child alimony proceedings, the age limit to invite children to be heard in court is sixteen years of age.³⁸ The court has discretionary power to hear children younger than twelve years of age on their request when they are deemed competent. This group of children do not have the *right* to be heard since their being heard is left to the discretionary power of the court. Thus, children under the age of twelve are not automatically invited to participate in the court procedure and need to take action if they want to be heard in court. In practice, children under the age of twelve are rarely heard in family law proceedings.³⁹

25. Art. 1: 265d Dutch Civil Code.

26. Art. 6.1.1(2) Dutch Youth Act ('Jeugdwet'); children from twelve years and older are independent parties to the proceedings with legal capacity, and children younger than twelve years have the same legal position when they are deemed competent.

27. Art. 6.1.1 section 2 Dutch Youth Act.

28. Arts. 1:251a section 4, 1:377g & 1:253a section 4 Dutch Civil Code.

29. This expansion for children younger than twelve years of age was introduced in 1995 by law amendment (see Wet van 6 April 1995 tot nadere regeling van het gezag over en van de omgang met minderjarige kinderen (1995)).

30. Dutch Supreme Court 29 May 2015, ECLI:NL:HR:2015:1409.

31. M.H.L. Van den Hoogen and P.J. Montanus, 'Hoe staat het anno 2017 met de informele rechtsingang?', 11 *FJR* 286 (2017).

32. See e.g. I.J. Pieters, 'De bijzondere curator: Quo vadis?', 9 *FJR* 180 (2008); I.J. Pieters, 'Waar staat de bijzondere curator in het huidige rechtsbestel inmiddels?', 4 *FJR* 97 (2012); I.J. Pieters, 'De groeistuipe van de bijzondere curator', 6 *FJR* 177 (2017); G.W. Brands-Bottema, 'De bijzondere curator: nieuwe ontwikkelingen', 10 *EB Tijdschrift voor*

Scheidingsrecht 183 (2018); C.A.R.M. van Leuven and I.J. Pieters, 'Stichting bijzondere curator Nederland', 3 *Relatierecht en Praktijk* 39 (2018).

33. Dutch Supreme Court 3 February 2017, ECLI:NL:HR:2017:158.

34. A Guardian *ad litem* Foundation has been established, see van Leuven and Pieters, above n. 32. Moreover, professional standards have been developed (see Landelijk Overleg Vakinhoud Familie – en Jeugdrecht (LOVF), *Werkproces benoeming bijzondere curator op grond van art. 1:250 BW*, www.rechtspraak.nl; *Leidraad werkwijze en verslag bijzondere curatoren ex art. 1:250 BW and Richtlijn Benoeming Bijzondere Curator o.g.v. art. 1:212 BW*).

35. M.R. Bruning, et al., *Kind in proces: van communicatie naar effectieve participatie* (WODC-onderzoek) Nijmegen: Wolf Legal Publishers (2020), at 47-50; M.M.C. Limbeek, 'De bijzondere curator: een volwaardig sluitstuk van rechtsbescherming?', in J.H. de Graaf, C. Mak, P.J. Montanus & F.K. van Wijk (eds.), *Rechten van het Kind en Waardigheid* (2013) 199; M.R. Bruning, 'Versterking van de procedurele positie van de minderjarige in het jeugdbeschermingsrecht – een brug te ver?', in W.H. van Boom et al. (eds.), *Een kwart eeuw Privaatrechtelijke opstellen, aangeboden aan prof. mr. H.J. Sniijders ter gelegenheid van zijn emeritaat* (2016) 75.

36. Art. 1:212 Dutch Civil Code. See also the relevant court guidelines (*Richtlijn benoeming bijzondere curator o.g.v. artikel 1:212 BW*, www.rechtspraak.nl).

37. Art. 1:809 section 1 Dutch Code of Civil Procedure.

38. Art. 1:809 lid 1 Dutch Code of Civil Procedure.

39. Bruning et al., above n. 35, at 226; K.A.M. van der Zon and M.P. De Jong-de Kruijff, 'Hoger beroep tegen een uithuisplaatsingsbeslissing en de rol van de minderjarige', *TREMA Tijdschrift voor de rechterlijke macht* (2015), at 307; H.C.M. Aalders, 'De rechtspraktijk inzake

For children twelve years or older, in the Dutch Code of Civil Procedure judges are given the opportunity to not hear these children only when it concerns a case of minimal relevance to the child. The Dutch legislator has underlined that when it is plausible that the child does not want to be heard, the judge is not obliged to hear the child.⁴⁰ The same applies for children who are unable to be heard due to a physical or mental health problem.⁴¹ A last exception to the rule to hear every child of twelve years of age and older concerns the situation in which the judge fears that hearing the child will negatively influence the child's health and development.⁴² Courts and judges are not given any conditions or blueprint in legislation on how to hear the child in court. The Dutch Code of Civil Procedure remains silent about the way children should be heard in civil law proceedings. In 2015, the Courts of Appeal developed a professional standard of how the child should be heard.⁴³

2.4 Age Limits in Other Dutch Legal Contexts

In other Dutch legal contexts, children's procedural rights are different. In criminal law, child suspects from the age of sixteen or older are given the same rights as adult suspects; in other words, they are seen as an independent party to the criminal proceedings. They can, for example, question witnesses.⁴⁴ Children are represented by a lawyer in criminal proceedings, and the lawyer can also independently execute the child's rights when the child is younger than sixteen years of age,⁴⁵ such as to initiate appeal proceedings.

In administrative law, no age limits are used with regard to the position of children. Children can independently start proceedings when they are considered competent to oversee the consequences of their decisions.⁴⁶ The court will assess the child's competency in light of the individual circumstances of the case. The Youth Act 2015, a specific administrative legal act for all forms of support and care for children and families, encompasses a similar approach, and all children who are considered competent can initiate court proceedings, for example, to contest a decision of an administrative body in response to a request for youth care and support. These children can also independently appeal court decisions. The only exception to this individualised approach to children's procedural rights in administrative law, as mentioned, involves decisions in light of secure treat-

ment placements of children that are covered by the Youth Act 2015. Since this particular situation of secure treatment placement is closely connected to other out-of-home placements of children in alternative care as part of child protection, regulated in the Dutch Civil Code,⁴⁷ the age limit of twelve years of age that is adopted in civil law is used.

It has, thus, become clear that in different law regimes the procedural position of children varies and both age limits and an individualised competency test are used. It seems like different Dutch legal contexts envisage diverse child images with differing consideration of the child's evolving capacities and competency.⁴⁸

2.5 Political (Un)willingness to Improve the Child's Legal Position

It can be concluded that the legal position of children in Dutch civil law is rather complex and fragmented and also differs from the child's position in other Dutch legal contexts. Over the past few decades several exceptions to the child legal incapability have been introduced in legislation, with various aims and motivations,⁴⁹ but this has only led to a more complicated system with regard to the legal position of children, a system that includes so many exceptions to the rule of legal incapacity. In the Dutch civil law system, children are no independent parties and cannot instigate proceedings and appeal against decisions.

In recent history, several voices have been raised to encourage the Dutch legislature to improve children's position in civil proceedings, often based on research findings.⁵⁰ According to the Dutch legislature, the child's best interests will be sufficiently represented by his parents or other legal guardians in most situations. When the child's interests conflict with the interests of his legal representative (parent or legal guardian) and this causes a serious conflict of interests, for example, with regard to the education and upbringing of the child, access to court is guaranteed via the appointment of a guardian *ad litem*; this legal possibility is considered sufficient by the legislator.⁵¹ In 1991, with regard to legal reform of family procedures, the legislator confirmed that children do not and should not have the legal capacity to initiate family proceedings. Children are not legal parties to proceedings and need to be represented by their parents or other legal guardians or by a guardian *ad litem*.⁵² In order to strengthen the legal

gezagsbeëindiging vanuit kinderrechtelijk perspectief', 11 *FJR* (2018/63), at 66.

40. *Dutch Parliamentary Documents II 1992-93*, 22487, 6, at 16; see also Dutch Supreme Court, 1 November 2013, ECLI:NL:HR:2013:1084.

41. *Dutch Parliamentary Documents II 1991-92*, 22487, 3, at 10.

42. Dutch Supreme Court, 1 November 2013, ECLI:NL:HR:2013:1084 (annotated by S.F.M. Wortmann).

43. See *Professionele standaard kindgesprekken 9 December 2016*, www.rechtspraak.nl. In practice, a child hearing in chambers lasts between 7, 5 and 19 minutes in Court of Appeal proceedings about out-of-home placement of children; Van der Zon and De Jong-de Kruijff, above n. 39.

44. Art. 292 section 3 Dutch Code of Criminal Procedure.

45. Art. 503 section 1 Dutch Code of Criminal Procedure.

46. Art. 8:21 section 2 Dutch General Administrative Law Act.

47. Art. 1:262b Dutch Civil Code.

48. Bruning et al., above n. 35, at 68.

49. *Ibid.*, at 30-38.

50. See e.g. *Dutch Parliamentary Documents II 1989-90*, 21309, 2 (*Notitie rechtspositie minderjarigen*); Raad voor het Jeugdbeleid en Nederlandse Gezinsraad (1995); *Dutch Parliamentary Documents II 1991-92*, 21487, 3 at 7 (MvT); *Dutch Parliamentary Documents II 2003-04*, 29200 VI, 116, at 3; M.J. Steketeer, A.M. Overgaag & D. Lünnevan, *Minderjarigen als procespartij? Een onderzoek naar de bijzondere curator en formele rechtsingang voor minderjarigen* (2003).

51. M.R. Bruning and T. Liefwaard, 'The Netherlands Supreme Court (Hoge Raad)', in H. Stalford, K. Hollingsworth and S. Gilmore (eds.), *Rewriting Children's Rights Judgements. From Academic Vision to New Practice* (2017) 182, at 184.

52. *Ibid.*

position of children in civil proceedings, the legislator clarified to have chosen to improve the child's possibilities to be represented by a guardian *ad litem* in cases where the child's best interests cannot be represented by a parent or other legal guardian, for example, in the situation of a conflict of interests.⁵³ The legislator emphasised that the lack of an independent procedural position does not constitute a violation of Article 6 of the European Convention of Human Rights (guaranteeing access to an impartial tribunal) since the European Court on Human Rights has accepted the vulnerable position of children as a legitimised interference of this fundamental right.⁵⁴

In 2003, in response to recommendations of a research project, commissioned by the Dutch Ministry of Justice, focused on the legal position of children in civil proceedings,⁵⁵ the legislator again took the same position in response to a research report focused on improvements of the legal position of children and the guardian *ad litem*. The legislator stated that the current possibilities of representation by a guardian *ad litem* when there is a conflict of interests between the child and his parents or other legal guardians were sufficient and it was unnecessary to introduce an independent legal position in civil proceedings for children.⁵⁶ According to the legislator, the current system in which parents or other legal guardians represent their child, unless there is a conflict of interest, sufficed. That is, the child's legal position did not need to be strengthened and was sufficiently protected.⁵⁷ The Ministry of Justice voiced a similar response to a research report of the Dutch Children's Ombudsman about the child's guardian *ad litem* in 2012. It was stated that the legal possibility to appoint a guardian *ad litem* is sufficient to guarantee the child's best interests, since the court has wide discretionary scope to appoint such a representative. A 'serious conflict of interests' needed for the court appointment of a guardian *ad litem* should, according to the legislator, not need to be interpreted strictly, like case law had shown, but could be widely interpreted.⁵⁸ Not only when parents and their child obviously have direct conflicting interests, but also when parents are incapable of overseeing the issues concerning the child or of sufficiently representing these issues, one could speak of a 'serious conflict of interests' that requires the appointment of a guardian *ad litem*.⁵⁹ This means that the threshold for a court appointment of a guardian *ad litem* should be considered low. For instance, according to the legislator divorce or separation conflicts between two ex-partners could yet lead to the assumption of such a 'serious con-

flict of interests' and, thus, lead to the appointment of a guardian *ad litem* for the child.⁶⁰

The Dutch Government Committee on Reassessment of Parenthood reflected in its report of 2016 on the current statutory framework for hearing children and concluded that there are few objective arguments that can be proffered for a specific age limit of twelve years.⁶¹ The Government Committee was of the opinion that, on the one hand,

the hearing of children should preferably not be linked to a pre-determined age-limit, but instead should be determined on a case-by-case basis ... On the other hand, the Government Committee understands the need from a practical point of view to have clear age limits, from which a child should be heard.⁶²

According to the Government Committee, children from the age of eight should have the right to be heard in procedures related to parentage and custody. Although the age limit of eight years is obviously equally arbitrary, the Committee believes that, in general, a child from this age can be presumed to be able to understand what decisions in the field of parentage and custody will mean, provided that they are explained to him or her. The Committee, therefore, recommended in 2016 that children from the age of eight should be granted the opportunity to be heard in procedures regarding parentage and custody and advised that the right of children to be heard should be placed in the context of a broader reflection of the position of children in Dutch procedural law. Furthermore, the Committee advised that the possibility of creating a formal procedure for children to bring a case to court should be examined.⁶³ The Dutch government endorsed these recommendations in its coalition agreement of 2017,⁶⁴ and in 2018, the Minister of Legal Protection announced that further research will be initiated.⁶⁵

53. *Dutch Parliamentary Documents II* 1991/92, 22487, 3, at 7.

54. *Dutch Parliamentary Documents II* 1989/90, 21309, 2, at 21 (*Notitie rechtspositie minderjarigen*).

55. Steketee et al., above n. 50.

56. Bruning and Liefwaard, above n. 51, at 184.

57. *Parliamentary Documents II* 2003/04, 29200 VI, nr. 116, at 3.

58. *Parliamentary Documents II* 2012/13, 31 753, nr. 56.

59. Bruning and Liefwaard, above n. 51, at 185.

60. *Ibid.*

61. The Wiarda Commission argued in 1971 that the age limit of twelve corresponds to the moment that occurs in the life of every Dutch child when they move from primary to secondary school, and referenced to the criminal age of responsibility that is linked to twelve; see *Commissie voor de herziening van het Kinderbeschermingsrecht, Jeugdbeschermingsrecht* (1971), at 63.

62. Government Committee on Reassessment of Parenthood, above n. 4, at 27 and 28.

63. *Ibid.*, at 28. According to the Committee, a formal procedure for children to bring a case would have the important advantage of providing the child with a formal position within the proceedings. The child would no longer be dependent upon the willingness of the court to honour an informal request of the child. At the same time, the Committee acknowledges that a formal procedure for children to bring a case to court also widens the scope for parents to bring cases to court through their child instead of in their own name, an undesirable situation.

64. Coalition Agreement 2017-2021, *Vertrouwen in de toekomst* (2017), at 6.

65. Letter of Dutch Minister of Legal Protection of 22 March 2018 ('*Nadere invulling onderzoeken op het terrein van het familierecht*'). This article is based on some of the findings of this research released in 2020, Bruning et al., above n. 35.

In this part of our review it has been made clear that in Dutch family law a tortuous jungle of age limits, exceptions and limitations regarding children's procedural rights has developed in the past few decades. In other Dutch legal contexts, different choices have been made and children's procedural position differs. Until recently, the Dutch government has been reluctant to improve the child's procedural position in family law, although in the last two years, the endorsement of the aforementioned recommendations of the Government Committee to further reflect on improvements to the child's procedural rights shows an opening and willingness that is an important step forward from a children's rights perspective.

In the next part, relevant neuropsychological insights will be presented. Moreover, it will be discussed what lessons can be learnt from these insights when reflecting upon age limits and the child's right to be heard and to initiate proceedings.

3 Neuropsychological Insights

3.1 Neuropsychological Insights and the Child's Right to Be Heard

In the first part of this review, it is mentioned that, according to Article 12 CRC, children have the right to be heard, and this includes the right for all children who are capable of forming their own views to express those views freely in any judicial proceedings, such as civil proceedings. The right to be heard as enshrined in Article 12 CRC includes three components: the right to information about being heard (1), the right to be heard (2) and the right to be taken seriously by way of their views being given due weight in accordance with the age and maturity of the child.

In order to effectively implement these components of Article 12 CRC, neuropsychological insights with regard to the child's development are crucial. In particular, developmental insights regarding the child's capability and maturity and resistance to possible influence or manipulation of the child's opinion. Furthermore, it is vital to have insight into the relevance for the child to be taken seriously by way of giving due weight to his or her views.

If we want to understand what children are capable of at a certain age, it is important to gain more insight into milestones and biological transition phases that affect cognitive and emotional processes. Such an important transition phase is adolescence – roughly spanning from age ten to age twenty-three – which entails the process of growing up from a child into becoming an adult member of society. Adolescence starts with the onset of puberty, a hormonal process that is related to brain development and emotional processing⁶⁶ and already

starts – on average – at age *eight in girls and nine in boys*⁶⁷. As hormonal changes during puberty affect brain regions involved in affective processing (including emotion regulation, stress responsiveness and decision making under risk and uncertainty), it is important to recognise that these developmental effects are initiated way before the age of twelve.

Scientific studies into large-scale normative brain development are accumulating, using state-of-the-art neuroimaging techniques.⁶⁸ Especially, longitudinal studies are informative when it comes to disentangling developmental effects from individual variation in brain and behavioural change.⁶⁹

Developmental neuropsychology offers starting points for determining and reconsidering the legal position of children. For example, a recent publication by Grootens-Wiegers, Hein and colleagues examined neuroscientific mechanisms that may be relevant to the capacities of children in making medical decisions.⁷⁰ Neuroscientific insights also have been applied in adolescent criminal law: the age limit in adolescent criminal law can be extended to twenty-three years, taking into account individual characteristics, based on the now widely replicated finding that brain development has not yet been completed with eighteen years, but extends on average to around twenty-three years.⁷¹ Although there have been reflections on the age limits on the right to be heard and the legal capacity to initiate family proceedings,⁷² current insights from developmental neuropsychology have not yet been included in determining the procedural position of children within family law. As opposed to adolescent criminal law, this article is intended to reflect on the *lower age* limit of the right to be heard and legal capacities to initiate family proceedings. Developmental brain imaging studies are usually carried out from eight years onward (up to twenty-five

66. J.S. Peper and R.E. Dahl, 'Surging Hormones: Brain-Behavior Interactions During Puberty', 22 *Current Directions in Psychological Science* 134 (2013).

67. M.E.A. Barendse, J.G. Simmons, M.L. Byrne, M.L. Steal, G. Patton, L. Mundy, S.J. Wood, C.A. Olsson & S. Whittle, 'Brain Structural Connectivity During Adrenarche: Associations Between Hormone Levels and White Matter Microstructure', 88 *Psychoneuroendocrinology* 70 (2018).

68. E.A. Crone and R.E. Dahl, 'Understanding Adolescence as a Period of Social-Affective Engagement and Goal Flexibility', 13 *Nature Reviews Neuroscience* 636 (2012); B.J. Casey, A. Galvan & L.H. Somerville, 'Beyond Simple Models of Adolescence to an Integrated Circuit-Based Account: A Commentary', 17 *Developmental Cognitive Neuroscience* 128 (2016); A.R. Smith, J. Chein & L. Steinberg, 'Impact of Socio-Emotional Context, Brain Development, and Pubertal Maturation on Adolescent Risk-Taking', 64 *Hormones and Behavior* 323 (2013); C.K. Tamnes, M.M. Hertig, A.L. Goddings, R. Meuwese, S.J. Blakemore, R.E. Dahl, B. Güroğlu, A. Raznahan, E.R. Sowell, E.A. Crone & K.L. Mills, 'Development of the Cerebral Cortex Across Adolescence: A Multisample Study of Inter-Related Longitudinal Changes in Cortical Volume, Surface Area, and Thickness', 37 *Journal of Neuroscience* 3402 (2017).

69. Mills et al., above n. 1.

70. P. Grootens-Wiegers, I.M. Hein, J.M. van den Broek & M.C. de Vries, 'Medical Decision-Making in Children and Adolescents: Developmental and Neuroscientific Aspects', 17 *BMC Pediatrics* 120 (2017).

71. Tamnes et al., above n. 68; Mills et al., above n. 1; C. Lebel, L. Walker, A. Leemans, L. Phillips & C. Beaulieu, 'Microstructural Maturation of the Human Brain from Childhood to Adulthood', 40 *Neuroimage* 1044 (2008).

72. C.C.M. van Leeuwen, 'Het hoorrecht in het civiele jeugdrecht gaat over grenzen', 10 *FJR* 260 (2017); Rap et al., above n. 6.

years of age), spanning late childhood and adolescence. Therefore, in this part, an overview is first provided on the general patterns of brain development across late childhood and (early) adolescence, to obtain a broad sense of anatomical and functional brain changes occurring in this phase of development. This knowledge is relevant in guiding the interpretation of behaviour, cognitions and emotions based on the (neuro)psychological development. In other words, What can be expected from children within a certain developmental period? This is followed by a section on the development of language, perspective taking and executive functions. These are neurocognitive capacities that are relevant for (family) law, such as the capability to form and express an own view (which is not purely dependent on cognitive systems, though, but is also influenced by emotions and theory of mind skills). Finally, development of the psychological constructs autonomy, stress responsiveness and (peer) pressure are discussed in relation to the civil law context.

3.2 Brain Development from Late Childhood into (Early) Adolescence

With the development of sophisticated neuroimaging techniques over the last twenty years, it has become possible to study changes in the living brain. We will first briefly summarise current research on structural and functional brain changes taking place during the transition from childhood into adolescence.

This summary relies on the most recent evidence available and is not intended to be an exhaustive review of the literature; moreover, studies tend to use ‘typically’ developing adolescents, which limits our ability to comment on whether or how these processes may change for young people with developmental delays or across a broader spectrum of neurodiversity.

With structural magnetic resonance imaging (MRI), it has been found that changes occur in the brain’s grey and white matter across childhood and adolescence. Grey matter includes the cerebral and subcortical brain structures and is, among others, composed of neuronal bodies, synapses (i.e. the site of transmission of electric nerve impulses between two nerve cells), glial cells (i.e. the cells that surround neurons and provide support for and insulation between them), dendrites and blood vessels. White matter largely comprises big, organised myelinated axons that connect grey matter brain regions.⁷³

It has been shown that at six years of age, total brain volume already reaches 95% of its adult size.⁷⁴ Then, total brain volume peaks around ten years of age, followed by a gradual decrease.⁷⁵ This developmental pattern of total brain volume is strikingly similar between

boys and girls⁷⁶ and invalidates claims that brain development in boys is delayed as opposed to that in girls.

Researchers found that grey matter volume was highest in childhood, decreased across early and middle adolescence and began to stabilise in the early twenties; this pattern held even after accounting for intracranial and whole brain volume. Additional studies of cortical volume have also documented the highest levels occurring in childhood, with decreases from late childhood throughout adolescence – the decrease appearing to be due to the thinning of the cortex.⁷⁷ For white matter volume, on the other hand, researchers found that, across samples, increases in white matter volume occurred from childhood through mid-adolescence and showed some stabilising in late adolescence. Some neural circuitry, consisting of networks of synaptic connections, is extremely malleable during adolescence, as connections form and reform in response to a variety of novel experiences and stressors.⁷⁸

Next to these ‘global’ changes in gross morphology, regional developmental changes in brain areas and their interconnections have been reported as well.⁷⁹ Theoretical models have emerged to explain how regional neurobiological changes map onto cognitive and emotional development from childhood into adolescence. Two of the often used models are the ‘dual systems’ model and the ‘imbalance’ model. The dual systems model⁸⁰ describes the product of a developmental asynchrony between a quickly aroused reward system (the ventral striatum), which inclines adolescents toward sensation seeking, and still maturing self-regulatory regions (i.e. the prefrontal cortex (PFC)), which limit the young person’s ability to resist these inclinations.⁸¹

The ‘reward system’ references subcortical structures, while the ‘self-regulatory regions’ refer to areas like the PFC.

The imbalance model shifts the focus away from an orthogonal, dual systems account and instead emphasises patterns of change in neural circuitry across adoles-

73. P.R. Huttenlocher, ‘Morphometric Study of Human Cerebral Cortex Development’, 28 *Neuropsychologia* 6 (1990).

74. J.N. Giedd, A. Raznahan, A. Alexander-Bloch, E. Schmitt, N. Gogtay & J.L. Rapoport, ‘Child Psychiatry Branch of the National Institute of Mental Health Longitudinal Structural Magnetic Resonance Imaging Study of Human Brain Development’, 40 *Neuropsychopharmacology* 1 (2015).

75. Mills et al., above n. 1.

76. L.M. Wierenga, M. Langen, B. Oranje & S. Durston, ‘Unique Developmental Trajectories of Cortical Thickness and Surface Area’, 15 *Neuroimage* 87 (2014).

77. Tamnes et al., above n. 68.

78. F.Y. Ismail, A. Fatemi & M.V. Johnston, ‘Cerebral Plasticity: Windows of Opportunity in the Developing Brain’, 21 *European Journal of Paediatric Neurology* 1 (2017); L.D. Selemon, ‘A Role for Synaptic Plasticity in the Adolescent Development of Executive Function’, 5 *Translational Psychiatry* 3 (2013).

79. Tamnes et al., above n. 68; A.C.K. van Duijvenvoorde, B. Westhoff, F. de Vos, L.M. Wierenga & E.A. Crone, ‘A Three-Wave Longitudinal Study of Subcortical-Cortical Resting-State Connectivity in Adolescence: Testing Age- and Puberty-Related Changes’, 40 *Human Brain Mapping* 13 (2019).

80. E.P. Shulman, A.R. Smith, K. Silva, G. Icenogle, N. Duell, J. Chein & L. Steinberg, ‘The Dual Systems Model: Review, Reappraisal, and Reaffirmation’, 17 *Developmental Cognitive Neuroscience* (2016); L. Steinberg, ‘A Social Neuroscience Perspective on Adolescent Risk-Taking’, 28 *Developmental Reviews* 1 (2008).

81. L. Sherman, L. Steinberg & J. Chein, ‘Connecting Brain Responsivity and Real-World Risk Taking: Strengths and Limitations of Current Methodological Approaches’, 33; 27-41 *Developmental Cognitive Neuroscience* (2018).

cence. This fine-tuning of circuits is hypothesised to occur in a cascading fashion, beginning within subcortical regions (such as those within the limbic system), then strengthening across regions and, finally, occurring within outer areas of the brain like the PFC.⁸² This model corresponds with observed behavioural and emotional regulation – over time, most adolescents become more goal oriented and purposeful, and less impulsive.⁸³ Irrespective of the differences between the two models of brain development and the relation to behaviour, they both converge on the point that fundamental areas of the brain undergo asynchronous development from childhood into adolescence. That is, adolescent behaviour, especially concerning increased risk taking and still-developing self-control, has been particularly attributed to asynchronous development within and between the subcortical and cortical regions of the brain. The former drives emotion, and the latter acts as the control centre for long-term planning, consideration of outcomes and regulation of behaviour.⁸⁴ Thus, if connections within the limbic system develop faster than those within and between the PFC region, the imbalance may favour a tendency towards heightened sensitivity to peer influence, impulsivity, risk-taking behaviours and emotional instability.⁸⁵

3.3 Neurocognitive Capacities

To obtain realistic predictions about the cognitive capacities needed to weigh different arguments, form an opinion, make a decision and oversee the consequences of that decision, it is important to get insights into the general developmental patterns of the underlying neurocognitive systems. All of these steps are directly relevant when reflecting on age boundaries within civil (family) law. Here, the development of cognitive capacities needed to form and express an (own) view will be highlighted, as well as the cognitive capacities needed to initiate proceedings.

On the level of language development (i.e. understanding of sentences and subsequent speech production), it has been demonstrated that the development of understanding and producing complex (i.e. multi-clause) sentences usually begins some time before the child's second birthday and is largely complete by age four. In general, comprehension precedes production.⁸⁶ Verbalising an opinion, however, including labelling emotions or feelings, is much more difficult and continues to

develop until age ten to twelve.⁸⁷ These ages are averages and, again, large individual differences exist as some children are able to verbalise an opinion at the age of four, whereas others still might have difficulties at the age of twelve. In addition to verbalising an opinion, this opinion first needs to be formed. This is a complex process of understanding information, integrating different perspectives and arguments and organising thoughts and feelings. Although children at the age of four can express their view based on arguments, they conform under the influence of peer pressure.⁸⁸

Forming an opinion is also based on taking different perspectives, that is, reasoning about others and understanding what they think, feel or believe.⁸⁹ Studies have shown that these 'theory of mind' skills develop in infancy by the age of five years.⁹⁰ In an extensive meta-analysis of more than 170 independent studies it became clear that the basic understanding of other peoples' intentions and emotions is significantly developed at age six.⁹¹ However, these skills continue to fine-tune into the teenage years,⁹² paralleled by the maturation of the 'social brain network' (i.e. temporo-parietal junction, superior temporal gyrus and intraparietal lobe).⁹³

Competence is one of the skills that is important when determining the legal position of children in civil law, certainly, when it concerns their own legal entry. Competence includes four domains – understanding, reasoning, valuing and making a choice – all part of executive functioning or higher order *cognitive* capacities. In clinical practice, extensive research has been carried out into will competence by Irma Hein. For her dissertation, she developed, among other things, a measuring instrument – the MacCat-T – to objectively measure the competence of children within medical scientific research. Hein's research showed that, with regard to participation in medical examinations, children under age 9.6 were generally not competent, whereas children above 11.2 were, with a transition area in between.⁹⁴

Brain research also shows that executive functions, which are strongly related to the ability to make independent decisions and to oversee the consequences of actions, show a spectacular increase between ten and fif-

82. Casey et al., above n. 68.

83. *Ibid.*

84. A. Galván, T.A. Hare, C.E. Parra, J. Penn, H. Voss, G. Glover & B.J. Casey, 'Earlier Development of the Accumbens Relative to Orbitofrontal Cortex Might Underlie Risk-Taking Behavior in Adolescents', 26 *Journal of Neuroscience* 25 (2006); E.A. Crone and N. Steinbeis, 'Neural Perspectives on Cognitive Control Development during Childhood and Adolescence', 21 *Trends in Cognitive Science* 205 (2017).

85. B.J. Casey and K. Caudle, 'The Teenage Brain: Self Control', 22 *Current Directions in Psychological Science* 2 (2013); Giedd et al., above n. 74; Mills et al., above n. 1.

86. G. Farkas and K. Beron, 'The Detailed Age Trajectory of Roral Vocabulary Knowledge: Differences by Class and Race', 33; 464-497 *Social Science Research* (2004).

87. A. Diamond, 'Biological and Social Influences on Cognitive Control Processes Dependent on Prefrontal Cortex', 189; *Progression in Brain Research* 319 (2011).

88. D.B. Haun and M. Tomasello, 'Conformity to Peer Pressure in Preschool Children', 82 *Child Development* 6 (2011).

89. V. Gallese and A. Goldmann, 'Mirror Neurons and the Simulation Theory of Mind-Reading', 2 *Trends in Cognitive Science* 12 (1998).

90. J. Barresi and C. Moore, 'Intentional Relations and Social Understanding', 19; 1667, *Behavioral and Brain Sciences* (1996).

91. H.M. Wellman, D. Cross & J. Watson, 'Meta-Analysis of Theory-of-Mind Development: The Truth About False Belief', 72 *Child Development* 3 (2001).

92. S. Choudhury, S.J. Blakemore & T. Charman, 'Social Cognitive Development During Adolescence', 1 *Social Cognitive Affective Neuroscience* 3 (2006).

93. E.A. Crone and A.J. Fuligni, 'Self and Others in Adolescence', *Annual Reviews of Psychology* (2019); Epub ahead of print.

94. I. Hein, 'Children's Competence to Consent to Medical Treatment or Research' (PhD Thesis at VU, Amsterdam, 2015).

teen years⁹⁵ These findings are in line with those on the cognitive development of children, which showed a major leap again around the age of twelve, especially, in the field of abstract reasoning.⁹⁶ This means, among other things, that children are increasingly able to think and reason about hypothetical situations, which is necessary when starting legal proceedings independently. For younger children, not only is abstract reasoning insufficiently developed, so that a child is unlikely to be able to see the hypothetical consequences of a legal procedure, the capacity to control impulses is also not yet optimally developed. However, these are relevant skills for initiating a (family) procedure.

Again, competence is usually determined based on cognitive skills. However, next to cognitive abilities, competence also entails emotional development, such as empathy (i.e. understanding others' emotions), or theory of mind. Interestingly, in the previous part, it was shown that most children at the age of six already have theory of mind skills.

Taken together, on the one hand, speaking capacity needed for verbalising an opinion, is – on average – developed at age four. On the other hand, higher order cognitive functions needed for complex decision making and overseeing future consequences of these decisions (such as abstract reasoning, impulse control, executive functioning) are developing into the teenage years. These findings do not imply, however, that children should be without *locus standi* in civil law proceedings and be legally incompetent or too young to be heard in court under the age of twelve. First, there are substantial individual differences in cognitive abilities, and second, there is no such thing as 'pure' cognition – an opinion or decision is, regardless of age, affected by the level of emotional arousal, motivation and social context.⁹⁷ Indeed, as the earlier mentioned imbalance model of brain development suggests, emotional and cognitive systems in the brain are highly connected and become more connected with age.⁹⁸

Therefore, in the next section, it will be described how social-emotional functions develop and how these functions and the (social) context can influence cognition and decision making across late childhood and adolescent development. Aspects such as reward sensitivity, social rejection and stress will be discussed, as these are – similar to cognitive aspects – relevant for reflections on age limits for children's participation in family proceedings.

3.4 Social-Emotional Functions and (Social) Context

Social and emotional functions can be described as

the developing capacity of the child to form close and secure adult and peer relationships; experience, regulate, and express emotions in socially and culturally appropriate ways; and explore the environment and learn – all in the context of family, community, and culture.⁹⁹

It has been reported that children from *four* years onwards start to identify and articulate their own and other people's feelings.¹⁰⁰ Importantly, when children's needs and feelings are consistently met by adults, they are better able to develop secure relationships, regulate their emotions and pay more attention to their surroundings.¹⁰¹

When it comes to meeting children's needs, this inherently means taking children seriously by – for example – hearing them in family proceedings. According to Article 12 CRC, children's views should be given due weight in accordance with the age and maturity of the child. From earlier studies it became clear that children feel frustrated and powerless if they are not involved in important decisions about their lives.¹⁰² In addition, undermining the child's autonomy – by not being allowed to participate in family law proceedings or not being heard – leads to a decrease in self-esteem.¹⁰³ Additionally, it is extremely important for children to be taken seriously: they indicate that they feel more respected when their opinion is noticed.¹⁰⁴ In her dissertation 'Children, Autonomy and Courts', Daly argues:

Urging a movement towards respect for autonomy is likely to improve the situation of children. Autonomy is a useful and important concept because it is always about what one wants. It is also about insisting that we respect others – their lived experiences, their values, their beliefs; none of which a separate individual can ever truly understand. Autonomy should be much more about the obligations of adults to respect

95. L.M. Wierenga et al., 'Sex Effects on Development of Brain Structure and Executive Functions: Greater Variance than Mean Effects', 31 *Journal of Cognitive Neuroscience* 730-753 (2019) afl. 5.

96. Diamond, above n. 87, at 319-339.

97. J. LeDoux, 'The Emotional Brain: From Soul to Synapses', 55 *Biological Psychiatry* S1 (2004).

98. Van Duijvenvoorde et al., above n. 79.

99. T. Yates, M.M. Ostrosky, G.A. Cheatham, A. Fetting, L. Shaffer & R.M. Santos, *Research Synthesis on Screening and Assessing Social-Emotional Competence*. Retrieved from Center on the Social Emotional Foundations for Early Learning (2008), http://csefel.vanderbilt.edu/documents/rs_screening_assessment.pdf.

100. T.G. Halle and K.E. Darling-Churchill, 'Review of Measures of Social and Emotional Development', 45 *Journal of Applied Developmental Psychology* 8-18 (2016).

101. N. Eisenberg, T.L. Spinrad & N.D. Eggum, 'Emotion-Related Self-Regulation and Its Relation to Children's Maladjustment', 6 *Annual Review of Clinical Psychology* 495-525 (2010).

102. V. Barnes, 'Social Work and Advocacy with Young People: Rights and Care in Practice', 42 *British Journal of Social Work* 7 (2012); C. Leeson, 'My Life in Care: Experiences of Non-participation in Decision-Making Processes', 12 *Child & Family Social Work* 3 (2007); K. Winter, 'The Perspectives of Young Children in Care about Their Circumstances and Implications for Social Work Practice', 15 *Child & Family Social Work* 2 (2010).

103. S.A. Vis, A. Strandbu, A. Holtan & N. Thomas, 'Participation and Health – A Research Review of Child Participation in Planning and Decision-making', 16 *Child & Family Social Work* 3 (2011).

104. G. Van Bijleveld, C.W.M. Dedding and J.F.G. Bunders-Aelen, 'Children's and Young People's Participation Within Child Welfare and Child Protection Services: A State-of-the-Art Review', 20 *Child and Family Social Work* 2 (2015).

children and individuals, and to treat their choices as important, as it is about children's rights claims.¹⁰⁵

From a neuroscience perspective, it can further be supported that experiences related to gaining respect can be very rewarding in young teenagers.¹⁰⁶ For instance, primary rewards (such as money) in the teenage brain lead to a strong pattern of activity in the striatum – a brain region that processes rewarding stimuli.¹⁰⁷ In addition to money, there are various other forms of rewards that affect the teenage brain, such as getting a compliment,¹⁰⁸ but possibly also experiencing autonomy.¹⁰⁹ Research in the United States has shown that certain interventions in high schools (aimed at a healthier lifestyle or aimed at reducing bullying) work particularly well with teenagers when their opinion is being heard and when their sense of autonomy is increased.¹¹⁰ For example, when teenagers are asked to come up with solutions for various problems at school (such as aggression, unhealthy eating, bullying behaviour). On the other hand, it has been found that if adults (repeatedly) violate the sense of respect and autonomy of young adolescents by not taking them seriously or not hearing them, this can lead to decreased self-confidence and self-image and behavioural problems.¹¹¹ In girls, these behavioural problems are more common in the form of internalising behaviour, such as depression or anxiety. In boys, behavioural problems are more often expressed in the form of externalising behaviour, such as aggression and problems with impulse control.¹¹² In addition, children and adolescents who have been repeatedly rejected, for example by peers, experience

mental health problems that persist into adulthood.¹¹³ A possible mechanism that underlies the mental problems and rejection by peers is an increased emotional and neural reactivity in response to negative treatment, such as being ignored or being rejected.¹¹⁴ For example, it was reported that feelings of social rejection and exclusion lead to a pattern of brain activity in areas that are also involved in physical pain.¹¹⁵ Such effects can already be measured in children under the age of ten.¹¹⁶ Thus, scientific literature suggests that taking children seriously (e.g. by being heard or being allowed to give an opinion, and also receiving feedback about the judge's decision) is highly rewarding and essential for their well-being. In addition, brains of children react strongly to feelings of exclusion, like being left out of (or not being heard in) civil proceedings that directly affect the child. The negative effects of exclusion on mental well-being can already be demonstrated in children from ten years onwards and might continue into adulthood. The aforementioned findings are directly relevant to legal practice, in which currently (young) teenagers are often not heard or are unable to independently initiate legal proceedings. Although children often indicate that they want to be heard or give their opinion, this is not always granted because of the assumption that, for example, the child conversation is stressful and young children are insufficiently resilient. Individual differences in stress sensitivity and the development of the stress system in children will now be addressed, as well as the circumstances that may play a reinforcing or protective role. Initiating legal proceedings or participating in a child conversation with a judge can be experienced as upsetting or can even be stressful or burdensome.¹¹⁷ This is partly due to unfamiliarity with the youth assistance system or legal practice, but also with the impact of the decision.¹¹⁸

Adrenaline and cortisol are the two hormones that control the physical response to stress. Adrenaline is released from the adrenal gland within seconds, while cortisol acts more slowly and regulates the initial stress

105. A. Daly, *Children, Autonomy and the Courts. Series: Stockholm Studies in Child Law and Children's Rights* (2017), at 435.
106. L.E. Sherman, A.A. Payton, L.M. Hernandez, P.M. Greenfield & M. Dapretto, 'The Power of the Like in Adolescence: Effects of Peer Influence on Neural and Behavioral Responses to Social Media', *27 Psychological Science* 1027 (2016).
107. E. Schreuders, B.R. Braams, N.E. Blankenstein, J.S. Peper, B. Guroglu & E.A. Crone, 'Contributions of Reward Sensitivity to Ventral Striatum Activity Across Adolescence and Early Adulthood', *89 Child Development* 797 (2018); B.R. Braams, A.C.K. van Duijvenvoorde, J.S. Peper & E.A. Crone, 'Longitudinal Changes in Adolescent Risk-Taking: A Comprehensive Study of Neural Responses to Rewards, Pubertal Development, and Risk-Taking Behavior', *35 Journal of Neuroscience* 7226 (2015).
108. M. Achterberg, A.C.K. Duijvenvoorde, M. van der Meulen, S. Euser, M.J. Bakermans-Kranenburg & E.A. Crone, 'The Neural and Behavioral Correlates of Social Evaluation in Childhood', *24 Developmental Cognitive Neuroscience* 107 (2017).
109. J. Reeve and W. Lee, 'A Neuroscientific Perspective on Basic Psychological Needs', *87 Journal of Personality* 102 (2019).
110. D.S. Yeager, R.E. Dahl & C.S. Dweck, 'Why Interventions to Influence Adolescent Behavior Often Fail but Could Succeed', *13 Perspectives on Psychological Science* 101 (2018).
111. J.P. Allen, S.T. Hauser, K.L. Bell & T.G. O'Connor, 'Longitudinal Assessment of Autonomy and Relatedness in Adolescent-Family Interactions as Predictors of Adolescent Ego Development and Self-esteem', *65 Child Development* 179 (1994).
112. R.D. Laird, K.Y. Jordan, K.A. Dodge, G.S. Pettit & J.E. Bates, 'Peer Rejection in Childhood, Involvement with Antisocial Peers in Early Adolescence, and the Development of Externalizing Behavior Problems', *13 Developmental Psychopathology* 337 (2001).

113. G.W. Ladd, 'Peer Rejection, Aggressive or Withdrawn Behavior, and Psychological Maladjustment from Ages 5 to 12: An Examination of Four Predictive Models', *77 Child Development* 822 (2016); M.J. Prinstein and J.W. Aikins, 'Cognitive Moderators of the Longitudinal Association Between Peer Rejection and Adolescent Depressive Symptoms', *32 Journal of Abnormal Child Psychology* 147 (2004).
114. G.J. Will, E.A. Crone, P.A. van Lier & B. Guroglu, 'Neural Correlates of Retaliatory and Prosocial Reactions to Social Exclusion: Associations with Chronic Peer Rejection', *19 Developmental Cognitive Neuroscience* 288 (2016).
115. Will et al., above n. 114; G.J. Will, P.A. van Lier, E.A. Crone & B. Guroglu, 'Chronic Childhood Peer Rejection is Associated with Heightened Neural Responses to Social Exclusion During Adolescence', *44 Journal of Abnormal Child Psychology* 43 (2016).
116. E. Peters, J.M. Riksen-Walraven, A.H. Cillessen & C. de Weerth, 'Peer Rejection and HPA Activity in Middle Childhood: Friendship Makes a Difference', *82 Child Development* 1906 (2011).
117. J. Cashmore and P. Parkinson, 'Children's Participation in Family Law Disputes: The Views of Children, Parents, Lawyers and Counsellors', *82 Family Matters* 15 (2009).
118. R. Nathanson and K.J. Saywitz, 'Preparing Children for Court: Effects of a Model Court Education Program on Children's Anticipatory Anxiety', *33 Behavioral Science Law* 459 (2015).

response.¹¹⁹ In contrast to short-term exposure to stress, long-term exposure to stress actually leads to a weakened cortisol response,¹²⁰ which may indicate reduced resilience. Although partly determined by genetic effects (i.e. individual differences in stress sensitivity or resilience related to genetic differences between people¹²¹), the environment also influences stress sensitivity. Exposure to early life adversity (such as mental and physical abuse) causes a weakened cortisol response that persists into adulthood.¹²² With regard to brain development, research has shown that (chronic) exposure to stress in early childhood has adverse effects on the development of various brain areas, including the amygdala and hippocampus.¹²³ These areas remained poorer connected and were associated with poorer memory and more internalising behaviour.¹²⁴

As mentioned earlier, children are sensitive to acceptance and rejection. For example, research has shown that peer evaluation and exclusion have a negative effect on the cortisol response.¹²⁵ These effects have already been demonstrated in children under ten years of age.¹²⁶ There are certain child characteristics and ‘buffering/protective’ circumstances under which this pathological stress response can be partially restored or overcome. For example, children who have a higher level of self-control and better cognitive reappraisal skills (i.e. being able to reinterpret and keep thoughts and behaviour under control) have a more resilient cortisol response.¹²⁷ In light of legal proceedings, it can be suggested that if a child is allowed to participate in a family-related procedure, this increases the sense of self-control, which may possibly reduce the stress response.

Moreover, high-quality friendships during adolescence also provide higher resilience and better mental health later in life.¹²⁸ In addition, it has recently been shown

that thinking back to positive life experiences has a protective effect against the development of depression in teenagers with a history of early life stress.¹²⁹ Research into the physical long-term effects of a divorce or an out-of-home placement in alternative care (i.e. foster care) has been carried out to a very limited extent. A warmer bond between mother and child after a divorce predicted a less strong cortisol response fifteen years after the divorce.¹³⁰ Only the degree of warmth as reported by the child itself, and not as reported by the mother, was related to the long-term stress response. This finding is directly relevant for legal proceedings, because it argues for hearing the child itself (instead of one of the parents only) – as the child gave the most accurate description of the relationship with the mother. All in all, children are vulnerable when it comes to exposure to stressors (such as possibly having a child conversation or having their own legal entry). However, certain environmental factors and child traits can help children to better cope with stress, such as the feeling of being in control, maintaining close friendships with peers and being able to reinterpret and control thoughts and behaviour. In addition, children have mixed rather than exclusively positive or negative feelings about participation in a court case,¹³¹ whereby the negative aspects (i.e. stress and/or loyalty conflict) do not outweigh the importance of participating (i.e. being in control, being taken seriously and the wish to matter).^{132,133}

4 Children’s Participation in Court: Room for Improvement?

Article 12 CRC reflects the child’s right to be provided the opportunity to be heard in any proceedings affecting the child.¹³⁴ States parties to the CRC, such as the

‘Adolescent Friendships Predict Later Resilient Functioning Across Psychosocial Domains in a Healthy Community Cohort’, 47 *Psychological Medicine* 2017 (2017).

119. J.C. Pruessner, K. Dedovic, M. Pruessner, C. Lord, C. Buss, L. Collins, A. Dagher & S.J. Lupien, ‘Stress Regulation in the Central Nervous System: Evidence from Structural and Functional Neuroimaging Studies in Human Populations – 2008 Curt Richter Award Winner’, 35 *Psychoneuroendocrinology* 179 (2010).

120. Y.I. Kuras, N. Assaf, M.V. Thoma, D. Gianfarante, L. Hanlin, X. Chen, A. Fiksdal & N. Rohleder, ‘Blunted Diurnal Cortisol Activity in Healthy Adults with Childhood Adversity’, 11 *Frontiers in Human Neuroscience* 574 (2017).

121. Pruessner et al., above n. 119.

122. Kuras et al., above n. 120.

123. P. Pervanidou and G.P. Chrousos, ‘Early-Life Stress: From Neuroendocrine Mechanisms to Stress-Related Disorders’, 89 *Hormone Research in Paediatrics* 372 (2018).

124. J.L. Hanson, A.R. Knodt, B.D. Brigidi & A.R. Hariri, ‘Lower Structural Integrity of the Uncinate Fasciculus is Associated with a History of Child Maltreatment and Future Psychological Vulnerability to Stress’, 27 *Development and Psychopathology* 4 Pt 2 (2015).

125. E. van den Bos, M. Tops & P.M. Westenberg, ‘Social Anxiety and the Cortisol Response to Social Evaluation in Children and Adolescents’, 78 *Psychoneuroendocrinology* 159 (2017).

126. M.R. Gunnar, A.M. Sebanc, K. Tout, B. Donzella & M.M. van Dulmen, ‘Peer Rejection, Temperament, and Cortisol Activity in Preschoolers’, 43 *Developmental Psychobiology* 346 (2003); Peters et al., above n. 116.

127. A.E. Johnson, N.B. Perry, C.E. Hostinar & M.R. Gunnar, ‘Cognitive-Affective Strategies and Cortisol Stress Reactivity in Children and Adolescents: Normative Development and Effects of Early Life Stress’, 69 *Developmental Psychobiology* 999 (2019).

128. A.L. van Harmelen, R.A. Kievit, K. Ioannidis, S. Neufeld, P.B. Jones, E. Bullmore, R. Dolan, NSPN Consortium, P. Fonagy & I. Goodver,

129. A.D. Askelund, S. Schweizer, I.M. Goodver & A.L. van Harmelen, ‘Positive Memory Specificity is Associated with Reduced Vulnerability to Depression’, 3 *Nature Human Behaviour* 265 (2019).

130. L.J. Luecken, M.J. Hagan, S.A. Wolchik, I.N. Sandler & J.Y. Tein, ‘A Longitudinal Study of the Effects of Child-Reported Maternal Warmth on Cortisol Stress Response 15 Years After Parental Divorce’, 78 *Psychosomatic Medicine* 163 (2016).

131. M. Bell, ‘Promoting Children’s Rights Through the Use of Relationship’, 7 *Child & Family Social Work* 1 (2002); J. Cashmore, ‘Promoting the Participation of Children and Young People in Care’, 26 *Child Abuse & Neglect* 8 (2002).

132. Cashmore and Parkinson, above n. 117; Van Bijleveld et al., above n. 104.

133. *Ibid.* J.S. Peper and D.J.H. Smeets, ‘Inzichten vanuit de pedagogische wetenschappen en de neuropsychologie’, in M.R. Bruning et al., *Kind in proces: van communicatie naar effectieve participatie*, Meijers-reeks nr. 335 (2020).

134. In this article, we have not discussed how the child should preferably be heard – directly or through a representative or an appropriate body. Nevertheless, our research findings clearly indicate that directly hearing the child in court proceedings is preferable from the point of view of

Netherlands, are given much leeway in how to implement this children's right and whether or not to use age limits as a means to define which children should be deemed capable of forming their own views. Still, the CRC Committee discourages states parties from introducing age limits in either law or practice that would restrict the child's right to be heard. The CRC Committee emphasises that children's capability to express their own views should be determined on a case-by-case basis and this requires an individual assessment of each individual child. When age limits are used, this should not be an absolute impediment and should not hinder younger children who are capable of forming their views from being heard. The CRC and the CRC Committee have not taken a stand on whether children should have *locus standi* in legal proceedings and be able to, independently of their legal guardians, initiate legal proceedings or file an appeal.

In the Netherlands, age limits in civil law proceedings are common ground, both regarding the right to be invited to be heard in court and the right to initiate proceedings. As mentioned earlier, children are deemed to be legally incompetent in civil law proceedings, but many exceptions to this rule were introduced in Dutch legislation in the past few decades – without a common approach to children's procedural rights in civil law – and this has led to a complicated, fragmented civil law system. Nevertheless, in Dutch criminal law and administrative law, other perspectives are found regarding the child's procedural rights. In administrative law, the child's capability to express his or her own views is assessed on an individual basis, and in criminal law, child suspects have a stronger procedural position. It, therefore, seems that these legal contexts envisage diverse child images with differing considerations of the child's evolving capacities and competency. Several research reports about the child's procedural position in family law of the past few decades have instigated parliamentary discussions about improving the child's position, but, time and again, from the perspective of the Dutch legislator it was stressed that children should be represented by their parents or other legal guardians and when this is impossible due to a serious conflict of interests, the court can appoint a guardian *ad litem* for the child. In civil law, no law amendments were deemed necessary to give children *locus standi* or lower age limits, for example, the age limit of twelve years of age for being invited to be heard in court in family proceedings. In this article, we have presented relevant neuropsychological insights that can enrich reflections upon current age limits and possible improvements, not only for Dutch civil (family) law, but also for any country using age limits in legislation for children's procedural position. We have stated that adolescence starts with the onset of puberty, a hormonal process that is related to brain development and emotional processing, and already starts – on average – at age eight in girls and

nine in boys. It is important to recognise that these developmental effects are initiated way before the age of twelve. To obtain realistic predictions about the cognitive (and social-emotional) capacities needed to weigh different arguments, form an opinion, make a decision and oversee the consequences of that decision, it is important to be aware of the general developmental patterns of the underlying neuronal systems of children. The development of understanding and producing complex sentences usually begins some time before the child's second birthday and is largely complete by age four. Studies have shown that 'theory of mind' skills develop in infancy by the age of five to six years but continue to fine-tune into the teenage years. These findings imply that the age limit of twelve years to invite children to be heard in court in family law proceedings is no longer tenable. However, it is important to note that there are substantial individual differences in cognitive abilities and that there is no such thing as 'pure' cognition: an opinion or decision is – regardless of age – affected by the level of emotional arousal, motivation and social context.

Emotional processes and social context can influence cognitive functioning and decision making across adolescent development. From a neuropsychological perspective, the concepts of autonomy and well-being, resistance to pressure and stress are relevant for a further reflection on age limits. As mentioned earlier, research findings show that rewards are a strong motivational incentive for (young) teenagers; having a free choice or the feeling of being able to exert control over decisions makes the brain more resilient in negative settings and possibly also increases performance. On the other hand, if adults violate the sense of respect and autonomy of young adolescents by not taking them seriously, this can lead to decreased self-esteem and self-image and behavioural problems. This implies that taking children seriously by being heard in court is highly rewarding and essential for their well-being. In addition, brains of children react strongly to feelings of exclusion, like not being heard in civil proceedings that directly affect the child. Most children indicate that they want to be heard by a judge,¹³⁵ but nevertheless children under the age of twelve years are hardly ever heard in Dutch family law proceedings. This often seems to be based on the assumption that child hearings in court are stressful and that young children are insufficiently resilient.

Scientific research shows that children are indeed vulnerable when it comes to exposure to stressors, such as a child hearing in court. However, certain environmental factors and child traits can help children to better cope with stress, such as the feeling of being in control, maintaining close friendships with peers and being able to reinterpret and control thoughts and behaviour. In addition, children have mixed rather than exclusively positive or negative feelings about participation in court proceedings, whereby the negative aspects do not outweigh the importance of participating. It is, therefore,

both Dutch youngsters and Dutch family and children's judges; see Bruning et al., above n. 35, at 205-208.

135. Bruning et al., above n. 35, at 175.

evident that even though participation in family law proceedings will lead to stress for children, this is no excuse to not let them participate in court, and protective factors are important for children to better cope with stress.

Overall, it should be noted that models of brain development do not – and cannot – specify at which age a child is fully capable of independent decision making or forming an authentic opinion. First, these complex cognitive processes are hard to measure using a task suitable for MRI. Second, there are many individual differences between children, and studies on brain development merely provide insights into average patterns of development across large samples. Third, besides biological factors like the brain, environmental factors, or social context, influence (cognitive) functioning. For instance, under emotionally arousing situations, adolescents may be more prone to be influenced by affective states, whereas under emotionally calm situations, they are more prone to make cognitively driven choices.¹³⁶

In conclusion, what can we learn from these neuropsychological insights in light of age limits for children in civil law? There are no easy answers to this question. Neuropsychological insights reveal that an age limit of twelve years for children to be heard in court is not only arbitrary, but also unnecessarily restrains children's right to be heard in proceedings to an extent that is not legitimate. Children younger than twelve years of age are also competent and with a child-friendly system, including support factors, can be considered capable of forming their own views. Besides their capacities or competency to form and express their own views, taking children seriously in the courtroom is highly rewarding and essential for the child's well-being and can help avoid feelings of exclusion that lead to damage for the child.

With regard to the child's procedural position to initiate proceedings and file and appeal as an autonomous party to the proceedings, one could wonder if the neuropsychological insights that were presented in part 3 also lead to the conclusion that children should have *locus standi* and be given the right to autonomous party status. We are more reluctant to conclude likewise, since expressing one's voice when being heard in court and independently initiating family proceedings seem to differ with regard to the impact of decision for the child. We recommend further research from a multidisciplinary perspective.

When considering the right to be heard, we are confident that the current age limit in Dutch civil law should be lowered. From a neuropsychological perspective, the best option would be to individually assess each individual child and determine his or her competency on a case-by-case basis. Nevertheless, using age limits has the advantage of a clear system in which the judiciary does not have the burden to organise a system for indi-

vidual assessments, but can focus on inviting all children from a certain age to be heard in court. As long as an age limit gives room to include children under the age limit who are competent and wish to be heard, age limits are permitted. We, therefore, recommend from a legal perspective that the Dutch age limit for hearing children in court in family proceedings should be lowered to at least eight years. With regard to other age limits in Dutch civil law that were mentioned earlier, a thorough review is necessary in order to decide about the child's possibilities to independently start proceedings or file a complaint in cases of separation, divorce and custody and in cases of child protection and out-of-home placement. This includes a thorough reflection on possible forms of support or (legal) representation in court for children, who now hardly ever have any possibilities to be legally represented in family law proceedings.

We hope to have clarified that scientific collaboration between the disciplines of law and neuropsychology is fruitful and crucial when children who experience legal proceedings are concerned. The legislature can no longer deny scientific neuropsychological insights and will have to embrace collaboration with social sciences. Nevertheless, neuropsychological findings will not offer any clear blueprint for new legislation regarding children in legal proceedings nor give a clear answer to legal questions about how to define certain groups of children, since every child is different and needs to be approached as an individual with specific characteristics. It is not always possible to bridge the gap between various disciplines. Still, it is worthwhile getting to know each other and trying to build the contours of a bridge. There is still much to learn and much to be gained when reflecting upon children in court proceedings. Striving to effectively implement Article 12 CRC in order to better hear children themselves in court proceedings should involve further multidisciplinary scientific collaboration and integration of scientific findings across multiple domains.

136. L.H. Somerville and B.J. Casey, 'Developmental Neurobiology of Cognitive Control and Motivational Systems', 20 *Current Opinion in Neurobiology* 2 (2010).

Characteristics of Young Adults Sentenced with Juvenile Sanctions in the Netherlands

Lise Prop, André van der Laan, Charlotte Barendregt & Chijs van Nieuwenhuizen*

Abstract

Since 1 April 2014, young adults aged 18 up to and including 22 years can be sentenced with juvenile sanctions in the Netherlands. This legislation is referred to as 'adolescent criminal law' (ACL). An important reason for the special treatment of young adults is their over-representation in crime. The underlying idea of ACL is that some young adult offenders are less mature than others. These young adults may benefit more from pedagogically oriented juvenile sanctions than from the deterrent focus of adult sanctions. Little is known, however, about the characteristics of the young adults sentenced with juvenile sanctions since the implementation of ACL. The aim of this study is to gain insight into the demographic, criminogenic and criminal case characteristics of young adult offenders sentenced with juvenile sanctions in the first year after the implementation of ACL. A cross-sectional study was conducted using a juvenile sanction group and an adult sanction group. Data on 583 criminal cases of young adults, sanctioned from 1 April 2014 up to March 2015, were included. Data were obtained from the Public Prosecution Service, the Dutch Probation Service and Statistics Netherlands. The results showed that characteristics indicating problems across different domains were more prevalent among young adults sentenced with juvenile sanctions. Furthermore, these young adults committed a greater number of serious offences compared with young adults who were sentenced with adult sanctions. The findings of this study provide support for the special treatment of young adult offenders in criminal law as intended by ACL.

Keywords: young adult offenders, juvenile sanctions for young adults, juvenile criminal law, psychosocial immaturity

1 Introduction

On 1 April 2014, adolescent criminal law (ACL, in Dutch referred to as *Adolescentenstrafrecht*) was implemented in the Netherlands. ACL is not a separate type of criminal law, but refers to several legislative

changes made in the Dutch Criminal Code (DCC). In general, in the Netherlands, 12–17-year-old offenders are sentenced with juvenile sanctions, while offenders aged 18 and over are sentenced according to adult criminal law. One of the legislative changes made in the context of ACL concerns the increase in the age limit for application of Article 77c of the DCC. Depending on two legal conditions, *offender's personal characteristics* and *the circumstances under which an offence was committed*, it is now possible to sentence young adult offenders, aged 18 up to and including 22 years at the time of committing an offence, with juvenile sanctions. The aim of ACL is to create more flexibility in the sanctioning of offenders around the age of 18. The main focus of ACL is the special treatment of young adult offenders, in order to increase resocialisation and reduce recidivism. ACL seeks to achieve this using a tailor-made approach in sanctioning.

The attention to the need for special treatment of young adult offenders in the criminal justice system is not new. Since the 1950s, it has been discussed that young adult offenders could be dealt with more effectively in the criminal justice system, and several attempts have been made to achieve special treatment for this group of offenders.¹ Since 1965, young adults – aged 18 up to and including 20 – can be sentenced according to juvenile criminal law. In practice, it turned out that this option was hardly used.² At the beginning of the 21st century, academics and professionals expressed interest in raising the age limit for the sentencing of young adults according to juvenile criminal law.³ This renewed interest was driven by scientific insights into brain

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* Lise Prop is researcher at the Research and Documentation Centre (WODC), Den Haag, the Netherlands. André van der Laan is senior researcher at the Research and Documentation Centre (WODC), Den Haag, the Netherlands. Charlotte Barendregt is senior advisor at the Health and Youth Care Inspectorate, Utrecht, the Netherlands. Chijs van Nieuwenhuizen is professor at Tilburg University, and treatment manager at the Centre for Child and Adolescent Psychiatry in Eindhoven, the Netherlands.

1. Commissie-Overwater, 'Rapport van de commissie ingesteld met het doel van advise te dienen over de vraag in welke richting het rijkstuchten opvoedingswezen en in verband daarmee het kinderstrafrecht zich zullen moeten ontwikkelen' (1951); Commissie-De-Jong, 'Rapport betreffende de strafrechtelijke behandeling van jeugdige personen' (1953); A.M. Van der Laan, M.G.C.J. Beerthuizen and C.S. Barendregt, 'Juvenile Sanctions for Young Adults in the Netherlands: A Developmental Perspective', *European Journal of Criminology* 1 (2019) Epub ahead of print 13 June. DOI: 10.1177/1477370819854163; E.P. Schmidt, S.E. Rap and T. Liefwaard, 'Young Adults in the Justice System: The Interplay between Scientific Insights, Legal Reform and Implementation in Practice in The Netherlands', *Youth Justice* 1 (2020) Epub ahead of print 6 January. DOI: 10.1177/1473225419897316; P.H. Van der Laan *et al.*, 'Offending and Justice Response at the Juvenile-Adult Interface', in R. Loeber, M. Hoeve, N.W. Slot and P.H. Van der Laan (eds.), *Persisters and Desisters in Crime from Adolescence into Adulthood. Explanation, Prevention and Punishment* (2012) 201.
2. A.M. Van der Laan and H. Goudriaan, 'Monitor Jeugdcriminaliteit. Ontwikkelingen in de jeugdcriminaliteit 2000 tot 2017' (2018).
3. Van der Laan *et al.* (2019), above n. 1.

development and begged the question of whether young adults can be treated as adults in the criminal justice system.⁴ In 2011, the Secretary of State for Security and Justice introduced a proposal for legislative changes to increase the maximum age for sentencing young adults according to juvenile criminal law. In 2013, this proposal was approved, and this legislative change became known as ACL.

An important reason for focusing on offenders around the age of 18 is their over-representation in crime.⁵ As the age-crime curve demonstrates, there is an increase in criminal behaviour during adolescence, with a peak around the late teens (16–20 years), followed by a gradual decrease starting in the early twenties.⁶ In general, adolescence is seen as a period of normal development between childhood and adulthood that is characterised by biological, psychological, emotional, social and cognitive changes.⁷ Adolescence is also a period of increased experimentation, heightened sensitivity to peer influences and involvement in risky behaviour.⁸ In the past decades, attention has increasingly been paid to the role of the immature social, cognitive, psychological and emotional development of adolescents and young adults as a possible explanation for their over-representation in crime statistics.⁹

Several studies show that the immature psychosocial development of adolescents and young adults can be related to risk-taking and delinquent behaviour.¹⁰ For example, the ability to control impulses, consider the implications of one's actions, resist peer influences and delay gratification in order to achieve longer term goals are functions that may not be entirely under an individual's control owing to his or her psychosocial immaturity.¹¹ Research also indicates that one of the reasons for

desisting from crime is that young adults mature out of antisocial behaviour.¹²

Maturity, however, is an elusive construct, which makes it susceptible to different interpretations.¹³ Maturity can, for instance, be defined as the level of development of different brain structures, the nature and degree of young adults' planning and foresight, behavioural intentions, their understanding of norms and morals, or decision-making patterns.¹⁴ Maturity is also characterised by self-reflective thoughts, future-orientation, self-regulation and the ability to oversee the (long-term) consequences of behaviour.¹⁵ Others see maturity more from a social developmental perspective, focusing on the autonomous development of young adults with regard to social relations, education, employability or finance.¹⁶ In order to understand the relationship between maturity and delinquency during adolescence, Steinberg and Cauffman proposed a model¹⁷ that suggests that during adolescence and early adulthood three aspects of psychosocial maturity develop.¹⁸ These three factors of psychosocial maturity are (1) responsibility, (2) perspective and (3) temperance. All three affect an individual's decision-making abilities and behaviour.¹⁹ Responsibility is defined as the ability to act autonomously and independently, being self-reliant and forming one's identity. Perspective is defined as the ability to understand and consider the point of view of others and to analyse decisions within a broader context. Temperance is defined

4. Van der Laan *et al.* (2019), above n. 1; Schmidt *et al.*, above n. 1.
5. Van der Laan *et al.* (2012), above n. 1; D.P. Farrington, 'Age & Crime', in M. Tonry and N. Morris (eds.), *Crime and Justice. An Annual Review of Research* (1986) 189.
6. Farrington, above n. 5.
7. R.J. Bonnie and E.S. Scott, 'The Teenage Brain: Adolescent Brain Research and the Law', 22(2) *Current Directions in Psychological Science* 158 (2013).
8. C. Bryan-Hancock and S. Casey, 'Psychological Maturity of At-Risk Juveniles, Young Adults and Adults: Implications for the Justice System', 17(1) *Psychiatry, Psychology and Law* 57 (2010); A. Galván, 'The Teenage Brain Sensitivity to Rewards', 22(2) *Current Directions in Psychological Science* 88 (2013); E.S. Scott and L. Steinberg, 'Adolescent Development and the Regulation of Youth Crime', 18(2) *The Future of Children* 15 (2008).
9. Bonnie and Scott, above n. 7; L. Steinberg, 'The Influence of Neuroscience on US Supreme Court Decisions about Adolescents' Criminal Culpability', 14 *Nature Reviews Neuroscience* 513 (2013); K.C. Monahan, L. Steinberg, E. Cauffman and E.P. Mulvey, 'Trajectories of Antisocial Behavior and Psychosocial Maturity from Adolescence to Young Adulthood', 45(6) *Developmental Psychology* 1654 (2009).
10. E. Cauffman, C. Cavanagh, S. Donley and A.G. Thomas, 'A Developmental Perspective on Adolescent Risk-Taking and Criminal Behavior', in A.R. Piquero (ed.), *The Handbook of Criminological Theory* (2015) 100; K.C. Monahan, L. Steinberg and A.R. Piquero, 'Juvenile Justice Policy and Practice: A Developmental Perspective', 44 *Crime and Justice* 577 (2015).
11. Monahan *et al.* (2009), above n. 9; H.L. Chung, M. Little and L. Steinberg, 'The Transition to Adulthood for Adolescents in the Juvenile Justice System: A Developmental Perspective', in D.W. Osgood, E.M. Foster, C. Flanagan and G.R. Ruth (eds.), *The John D. and Catherine T.*

MacArthur Foundation Research Network on Transition to Adulthood. On Your Own Without a Net: The Transition to Adulthood for Vulnerable Populations (2005) 68.

12. Monahan *et al.* (2009), above n. 9; Monahan *et al.* (2015), above n. 10; Bonnie and Scott, above n. 7; S.J. Blakemore and S. Choudhury, 'Development of the Adolescent Brain: Implications for Executive Function and Social Cognition', 47 *Journal of Child Psychology and Psychiatry* 296 (2006).
13. L. Steinberg and E. Cauffman, 'Maturity of Judgement in Adolescence Psychosocial Factors in Adolescent Decision Making', 20(3) *Law and Human Behavior* 249 (1996); D. Prior *et al.*, 'Maturity, Young Adults and Criminal Justice: A Literature Review', University of Birmingham (2011).
14. E.A. Crone and R. Dahl, 'Understanding Adolescence as Period of Social-affective Engagement and Goal Flexibility', 13 *Nature Reviews. Neuroscience* 636 (2012); Bonnie and Scott, above n. 7; A.-M.R. Iselin, J. DeCoster and R.T. Salekin, 'Maturity in Adolescent and Young Adult Offenders: The Role of Cognitive Control', 6 *Law and Human Behavior* 455 (2009).
15. Bonnie and Scott, above n. 7; K.C. Monahan, L. Steinberg, E. Cauffman and E.P. Mulvey, 'Psychosocial (Im)maturity from Adolescence to Early Adulthood: Distinguishing Between Adolescence-Limited and Persisting Antisocial Behavior', 25 *Development and Psychology* 1093 (2013); S.B. Johnson, R.W. Blum and J.N. Giedd, 'Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy', 45(30) *Journal of Adolescent Health* 216 (2009); Iselin *et al.*, above n. 14.
16. J.M. Hill, A.A.J. van der Geest, V.R. Branje, S.J.T. Hale and W.H.J. Meeus, 'Growing Up: How Personality Maturation and Adult Role Transitions Relate to Desistance from Delinquency', in J.M. Hill (ed.), *On the Road to Adulthood. Delinquency and Desistance in Dutch Emerging Adults* (2017) 100.
17. Steinberg and Cauffman, above n. 13.
18. Monahan *et al.* (2015), above n. 10.
19. Steinberg and Cauffman, above n. 13; E. Cauffman and L. Steinberg, '(Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable than Adults', 18(6) *Behavioral Sciences & the Law* 741 (2000).

as the ability to limit impulsiveness, to evaluate consequences before acting and to control aggressive responses and risk-taking behaviour.²⁰ In an attempt to provide a description for legal practice, Steinberg argued that immaturity can be described as functions that may not be entirely under an individual's control.²¹ Some young adults do not seem to have full control over important functions such as the inhibition of socially unacceptable behaviour and impulse control.²² During adolescence and young adulthood, individual variability exists in the level and rate of these psychosocial functions. However, despite individual variability in the level of maturity, in general, young adults are not fully mature until their mid-twenties.²³

Central to ACL is the question of the maturity of young adult offenders. Young adult offenders with an immature emotional, social, moral and/or intellectual development are eligible for sentencing with juvenile sanctions. According to the policy theory of ACL, juvenile sanctions are, owing to their pedagogical perspective, more adequate than adult sanctions in increasing resocialisation and reducing recidivism among immature young adult offenders.²⁴ In the pre-trial phase of ACL, advisory reports are produced by forensic experts, considering offenders' personal characteristics (e.g. their level of immaturity). With the help of these advisory reports, judges are able to apply tailor-made juvenile sanctions.²⁵

With the introduction of ACL, the pedagogical approach of the juvenile justice system has become available to a wider range of young adults. To achieve this, extensive assessment of the offender's personal characteristics during the pre-trial phase by forensic experts is necessary. According to the Explanatory Memorandum of ACL, young adult offenders who demonstrate immature development, offenders of serious offences, high-frequency offenders and vulnerable young adults are all eligible for juvenile sanctions.²⁶ However, the characteristics of young adults who are sentenced with juvenile sanctions remain unknown. The aim of this study is to gain insight into the characteristics of young adults who were sentenced in the first year after the introduction of ACL. The main research question is, what are the differences in demographic, criminogenic and criminal case characteristics between 18 to 22-year-olds who were sentenced with juvenile sanctions and between 18 to 22-year-olds who were sentenced with adult sanctions in the first year after the introduction of ACL?

2 Method

A cross-sectional study was conducted to examine the demographic, criminogenic and criminal case characteristics of young adults sentenced with juvenile sanctions. Data concerning demographic characteristics were obtained from Statistics Netherlands and the Dutch Public Prosecution Service (hereafter referred to as Public Prosecution). Criminogenic and criminal case characteristics were registered in the context of the criminal trial; these data were retrospectively collected from the Public Prosecution and the Dutch Probation Service (hereafter referred to as Probation Service).

2.1 Study Sample

With the introduction of ACL, the selection of young adult offenders during the pre-trial phase is emphasised, and the Public Prosecutor (hereafter referred to as prosecutor) can select cases that qualify for juvenile sanctions in an early phase. According to Article 63 of the Code of Criminal Procedure (CCP), the prosecutor is provided with the possibility to state his intention to request the application of juvenile criminal law at the beginning of the criminal justice process. The decision as to whether the prosecutor is intended to request the application of juvenile criminal law is based on an early screening by the prosecutor and, in the case of pre-trial detention, on an early forensic report by the Probation Service.²⁷ To assist prosecutors in their decision, they are provided with four indications regarding the eligibility of young adult offenders for juvenile sanctions. These four indications are as follows: (1) does the offender attend school, (2) does the offender live with his parents, (3) does the offender receive some form of support in cases of (mild) mental retardation and (4) is the offender susceptible to treatment.²⁸ When the prosecutor is intended to request the application of Article 77c of the DCC, young adults, as with juveniles, will be placed in a young offenders' institution during their pre-trial detention, and the investigative judge has to decide whether suspension of pre-trial detention is possible.²⁹ Then, during the pre-trial phase, probation officers are asked to prepare a forensic report, intended to advise the prosecutor and the judge.³⁰ In their forensic reports, probation officers focus on the risk of recidivism and which treatment could be suitable for the young adult offender. In the case of serious offences, or when there are indications of psychopathology, forensic experts of The Netherlands Institute of Forensic Psychiatry and Psychology (NIFP) can be requested to give

20. Steinberg and Cauffman, above n. 13; Bryan-Hancock and Casey, above n. 8; Prior *et al.*, above n. 13.

21. Steinberg, above n. 9.

22. Monahan *et al.* (2015), above n. 10; Steinberg, above n. 9.

23. Monahan *et al.* (2015), above n. 10.

24. Van der Laan *et al.* (2019), above n. 1.

25. *Ibid.*

26. *Parliamentary Documents II*, 2012/13, 33498, no. 3, at 2, 6, 22.

27. Van der Laan *et al.* (2019), above n. 1.

28. Staatscourant, Richtlijn en kader strafvoeding jeugd en adolescenten, inclusief strafmaten Halt, (2014). [Government Gazette no. 8284, Directives regarding criminal processing of juveniles and adolescents] Although the list of indications is intended to be used in the preselection of young adult offenders, in practice it turned out that prosecutors are relying primarily on their experience and the seriousness of the offence (see also Van der Laan *et al.*, 2019).

29. Art. 493 CCP.

30. Art. 63 (6) CCP.

(additional) advice about the young adult offender. At this point, a further selection of young adults qualifying for juvenile sanctions is made. When a forensic report gives cause, it is possible to adjust the intention of the prosecutor to request the application of juvenile criminal law or adult criminal law. Although the judge takes the final decision as to whether or not a young adult will be sentenced according to juvenile criminal law, the prosecutor has an important role in the selection of cases during the pre-trial phase.

In order to investigate the characteristics of young adults sentenced with juvenile sanctions, two groups of young adults were selected: (1) 18–22-year-old offenders with a case registered between 1 April 2014 and 1 April 2015, resulting in a juvenile sanction (i.e. the JS group) and (2) 18–22-year-old offenders with a case registered in 2015, resulting in an adult sanction (i.e. the AS group). Both groups were selected from the official registration system of the Public Prosecution, Rhapsody Central (RAC-min), which contains data on all criminal cases handled by district courts in the Netherlands. The following inclusion criteria were used. First, offenders had to be aged between 18 and 22 years old at the time of committing the offence. Second, in cases of multiple registered offences, at least one offence had to be committed after the offender had turned 18 years old. Third, at least one of the offences had to be committed between 1 April 2014 and 31 December 2015. Only criminal cases that were settled by district courts were selected. Appeal cases and those cases settled by the Public Prosecution were excluded.

A total of $n = 403$ criminal cases of young adults who were sentenced with juvenile sanctions were selected for the JS group. The AS group consisted of a random selection of all cases in which young adults were sentenced according to adult criminal law ($n = 10,872$). A random sample stratified by age at the time of committing the offence of $n = 150$ criminal cases was selected. The number of 21- and 22-year-olds was relatively small in absolute numbers; the 21- and 22-year-olds were therefore oversampled by a factor of 3 ($n = 45$ instead of $n = 15$). This resulted in a total of $n = 180$ criminal cases of young adults who were sentenced according to adult criminal law selected for the AS group. A comparison of the JS group and AS group shows a significant difference in mean age. The JS group is characterised by a significantly lower mean age at the time of the offence compared with the AS group ($M = 18.8$; $SD = 1.1$; $M = 19.3$; $SD = 1.4$; $t(581) = -4.1$, $p < 0.05$). The JS group consisted of significantly more 18-year-olds and fewer 21- and 22-year-olds (χ^2 ($df = 4$) = 24.9, $p < 0.05$). In the JS group the majority of young adults (52.4%) was 18 years old at the time of committing the offence, followed by 19 years old (24.8%), whereas the AS group, because of the oversampling, consisted of relatively more 21 (16.7%) and 22-year-olds (8.3%). The differences between the JS group and the AS group are described without differentiating in age categories. Two arguments underlie this choice. First, because of the small numbers it was not

possible to analyse differences between both groups for all separate age categories. Second, in the introduction it is stated that despite individual variability in the level of maturity, in general, young adults are not fully mature until their mid-twenties.

In order to examine whether the AS group was representative for the population of young adults sentenced according to adult criminal law, the available criminal case characteristics of the population and the sample were compared. The AS group and population showed differences in respect of two criminal case characteristics, namely age and type of offence, as would be expected given the stratification by age and oversampling of 21- and 22-year-olds in the AS group. While the population consisted of 16.0% 18-year-olds and 21.4% of both 21- and 22-year-olds, in the AS group 42.2% were 18 years old, 16.7% were 21 years old and 8.3% were 22 years old. Thus, the number of 21- and 22-year-olds was relatively low compared with the population. Regarding the type of offence, within the population almost twice as many traffic offences were committed compared with within the sample (10.7% in the population and 5.6% in the sample). A possible explanation for the relatively low percentage of traffic offences in the AS group is the over-representation of 18 year olds; these young adults are less likely to have a driver's licence compared with older young adults. No differences were found between the groups on the type of sanction imposed.

2.2 Measures

The characteristics of young adults sentenced with juvenile sanctions measured in this study were divided into three categories: (1) demographic characteristics, (2) criminogenic characteristics and (3) criminal case characteristics (see Table 1). Three data sources were used to identify these characteristics (see Table 2).

2.2.1 Demographic Characteristics

Data regarding demographic characteristics (ethnicity, education, socio-economic status and accommodation) were requested from the Social Statistics Files (SSB)³¹ of Statistics Netherlands and from RAC-min (age). Data on $n = 385$ individuals from the JS group and $n = 147$ individuals from the AS group were available.

2.2.2 Criminogenic Characteristics: OASys

The Dutch version of the Offender Assessment System (OASys, in Dutch: *RISC*) was used to gain insight into criminogenic characteristics (see Table 1)³² The OASys is a structured assessment tool used to assess offending related risks and needs associated with criminal activities and reconviction. It consists of both static (e.g.

31. F.M. Bakker, J. Van Rooijen and L. Van Toor, 'The System of Social Statistical Datasets of Statistics Netherlands: An Integral Approach to the Production of Register-based Social Statistics', 30 *Statistical Journal of the IAOS* 411 (2014).

32. A. Vinke et al., '*RISC: Recidive Inschattingsschalen. Handleiding*' (Adviesbureau Van Montfoort, Woerden, 2013); P. Howard, 'The Offender Assessment System: An Evaluation of the Second Pilot' (Home Office, United Kingdom, 2006).

criminal history) and dynamic factors (e.g. drug misuse).³³ The OASys consists of 12 items; (1-2) criminal history and (current) offence analysis (e.g. whether the person committed an offence before the age of 18, the type of offence and the seriousness of the offence), (3) housing and living arrangements (e.g. is the person homeless, are his/her living arrangements unstable, does he live in a high-crime neighbourhood), (4) education, training and employability (e.g. is the person unemployed or does he/she have suitable work), (5) financial management and income (e.g. does the person have a poor financial situation, does he/she have debts), (6) relationships with partner, family and relatives (e.g. is there a lack of secure attachment or a lack of a prosocial role model, are the person's family relationships of poor quality), (7) lifestyle and associates (e.g. does the person have criminal friends, does he/she take advantage of others), (8-9) drug and alcohol misuse (e.g. is the person addicted to drugs and/or alcohol), (10) emotional well-being (e.g. does the person repeatedly lie and cheat, show aggressive behaviour, does the person have reduced or no sense of guilt and shame), (11) thinking, behaviour and skills (e.g. does the person show cognitive deficits, show a lack of social skills and/or problems with his/her impulse control, does the person show a lack of empathy) and (12) attitudes (e.g. does the person have a pro-criminal attitude). The OASys scores were obtained from the Integral Probation Information System (IRIS), the database of the Probation Service. OASys scores for $n = 233$ (57.8%) of the offenders in the JS group and $n = 34$ (18.8%) of the offenders in the AS group were available.

2.2.3 ACL Screening Tool

With the introduction of ACL, probation officers are explicitly asked whether sentencing with juvenile sanctions is advised. To assist probation officers, an 'ACL screening tool' (in Dutch: *Wegingskader Adolescentenstrafrecht*) was developed.³⁴ The ACL screening tool is not a decision-making tool but is intended as a guideline to gain insight into indications and contraindications for sanctioning young adults according to juvenile criminal law. It helps probation officers to structure their thoughts in order to come up with their advice regarding the type of criminal law. The ACL screening tool offers two indications and four contraindications for sanctioning young adult offenders with juvenile sanctions (see Table 1). These indications and contraindications consist of different items for which the probation officer can indicate whether these items apply to the

young adult offender. There is no ranking in items within the indications and contraindications. Based on the different items, a general conclusion is made up for each indication and contraindication. Indications for a juvenile sanction are: (1) capacity to instigate behaviour change (i.e. having a mild mental retardation, is not able to oversee long-term consequences of his behaviour, can hardly organise his own behaviour, is acting impulsively, demonstrates childish behaviour and is sensitive to peer influences) and (2) pedagogical possibilities (i.e. pedagogical approach is possible, pedagogical approach is necessary, continuing school attendance is necessary, actively participates in family, family-oriented assistance is necessary, dependency relationship with parent(s)/caregiver(s), is susceptible to social, emotional or practical support by adults, current threat of neglect or abuse, needs a group-oriented living environment). Contraindications for juvenile sanctions are: (3) criminal history (i.e. the person has a persistent criminal career, previously imposed juvenile sanctions failed, has previously had a juvenile treatment order, and adult criminal law sanction is needed for long-term security of society), (4) criminal lifestyle (i.e. chosen criminal lifestyle, is proud of criminal activities, lives in a criminal environment and does not respect the judicial authorities), (5) psychopathy traits (i.e. demonstrates psychopathy traits, exhibits antisocial behaviour and uses others for own purposes) and (6) pedagogical impossibilities (i.e. no positive parental influence, the person has a negative influence on other juvenile delinquents). ACL screening tool scores were available for $n = 167$ (41.4%) offenders in the JS group and $n = 31$ (17.2%) in the AS group.

2.2.4 Criminal Case Characteristics

Furthermore, data regarding criminal cases (e.g. type of offence and type of sanction) were obtained from RAC-min and were available for both the total JS group ($n = 403$) and AS group ($n = 180$).

2.3 Data Analyses

Differences between the JS group and AS group were tested using Chi-square tests. To minimise the problem of multiple comparisons due to multiple univariate analyses a modified Hochberg procedure was used.³⁵ Where significant differences were found, a post-hoc test was conducted.

When assumptions for conducting a Chi-square test were violated Fisher's Exact Test, which is suitable for 2×2 cross tables, was conducted. The level of significance was set at $p < 0.05$, tested one-sided. Data analyses were performed using SPSS 21 (Statistical Package for the Social Sciences).

33. J. Bonta and D.A. Andrews, *Risk-Need-Responsivity Model of Offender Assessment and Rehabilitation* (2007).

34. W. Buysse and S. Scherders, *Bruikbaarheid van het wegingskader ASR* (2015).

35. D.M. Rom, 'An Improved Hochberg Procedure for Multiple Tests of Significance', 66 *British Journal of Mathematical and Statistical Psychology* 189 (2013).

Table 1 Measured characteristics and description for each domain

Domain	Characteristic	Explanation	Categories	
Demographic	Age	Age at time of committing the offence	18/19/20/21/22	
	Ethnicity	What is the ethnicity of the offender (according to the definition of Statistics Netherlands)	Dutch/Moroccan/Turkish/Surinam/Dutch Antilles/other	
	Accommodation	Living situation at time of committing the offence	Independent/with parents/with one parent/institutionalised/other	
	Education	Was the young adult attending education at the time of committing the offence?		Yes/no
			Highest level of education completed at time of committing the offence	Community college and higher/secondary/primary/unknown
			Highest level of education attended at time of committing the offence	Community college and higher/secondary/primary/unknown
	Socio-economic status	What is the socio-economic status of the offender at time of committing the offence?		Employed/unemployment benefits/student/unemployed/unknown

Table 1 Measured characteristics and description for each domain

Domain	Characteristic	Explanation	Categories
Criminogenic	OASys items 1-12	1-2. Criminal history and (current) offence analysis; 3. Housing and living; 4. Education, training and employability; 5. Financial management and income; 6. Relationships with partner, family and relatives; 7. Lifestyle and associates; 8. Drug misuse; 9. Alcohol misuse; 10. Emotional well-being; 11. Thinking, behaviour and skills; 12. Attitudes	No risk factor/risk factor
	Conclusion according to OASys	Likelihood of recidivism	Low-moderate/high-very high/no total risk assessment
Adolescent criminal law screening tool	Indications	1. Capacity to instigate behaviour change; 2. Pedagogical possibilities	Indications for sentencing with juvenile sanction/no indications for sentencing with juvenile sanction
	Contraindications	3. Criminal history; 4. Criminal lifestyle; 5. Psychopathy traits; 6. Pedagogical impossibilities	Contraindication for sentencing with juvenile sanction/no contraindication for sentencing with juvenile sanction
	Conclusion Adolescent criminal law screening tool	Are there indications for sentencing the offender with a juvenile sanction?	Indications for sentencing with juvenile sanction/no indications for sentencing with juvenile sanction/no conclusive advice

Table 1 Measured characteristics and description for each domain

Domain	Characteristic	Explanation	Categories
Criminal case	Type of offence	Type of offence as registered by the Dutch Public Prosecution Service	Non-violent property offence/violent property offence/violent offence/drug offence/sexual offence/traffic offence/vandalism and public disturbance/other*
	Type of sanction	Imposed sanction as registered by the Dutch Public Prosecution Service	Fine/community service/suspended imprisonment/imprisonment/no sanction

* Other types of offences: weapons and ammunition, miscellaneous offences and type of offence unknown.

Table 2 Available data and data source

Domain	Source	Organisation	Counting unit	JS group n = 403 (n %)	AS group n = 180 (n %)
Demographic	SSB	Statistics Netherlands	Individuals	385 (95.5)	147 (81.7)
Criminogenic	IRIS				
	(OASys)	Dutch Probation Services	Criminal cases	233 (57.8)	34 (18.8)
	(ACL-tool)	Dutch Probation Services	Criminal cases	167 (41.4)	31 (17.2)
Criminal case	RAC-min	Dutch Public Prosecution service	Criminal cases	403 (100)	180 (100)

3 Results

3.1 Demographic Characteristics

Table 3 represents the demographic characteristics of the JS group and the AS group.

No significant differences were found in ethnicity between the groups. The largest ethnic group for young adults in the JS group was Dutch (44.4%), followed by young adults of Moroccan or Turkish (26.5%) origin. In the AS group, the percentage of young adults of Dutch origin (35.4%) and those of Moroccan or Turkish origin (36.1%) was very similar.

In both groups, about one in five young adults was in education at the time of committing the offence (21.0% in JS group, 19.0% in AS group). The JS group is characterised by a significantly lower proportion of young adults who have successfully completed the highest level of education (χ^2 (df = 3) = 29.5, $p < 0.05$). Primary school was the most common level of education completed in the JS group (48.1%), while it was secondary school for the AS group (42.2%). Regarding the level of education attended, young adults in the JS group had a significant lower level of education attended compared with young adults in the AS group (χ^2 (df = 2) = 36.1, $p < 0.05$). In the JS group, the majority of young adults

(56.4%) have attended some secondary school, while the majority of young adults in the AS group have attended community college or higher (59.9%). Furthermore, significant differences between both groups were found regarding socio-economic status (χ^2 (df = 3) = 16.0, $p < 0.05$). The socio-economic status with the highest percentage of young adults in the JS group is receiving unemployment benefits (37.7%), followed by the socio-economic status of student (28.8%). At the time of committing the offence, the socio-economic status with the highest percentage of young adults in the AS group was students (41.5%), followed by young adults receiving unemployment benefits (20.4%). There was also a significant difference in type of housing between the two groups (χ^2 (df = 3) = 16.8, $p < 0.05$). In both groups, at the time of committing the offence, the housing category with the highest percentage of young adults was that of living with parents (37.4% in the JS group and 56.5% in the AS group). However, the percentage of young adults in the category *other* (e.g. institutionalised or other types of household) was relatively higher in the JS group than in the AS group (20.0% in JS group and 10.9% in AS group).

Table 3 Demographic characteristics of JS group and AS group

	JS group n = 385 (n %)	AS group n = 147 (n %)
<i>Ethnicity</i>		
Dutch	171 (44.4)	52 (35.4)
Moroccan/Turkish	102 (26.5)	53 (36.1)
Surinam/Dutch Antilles	37 (9.6)	11 (7.5)
Other	75 (19.5)	31 (21.1)
<i>Education</i>		
<i>In education</i>		
Yes	81 (21.0)	28 (19.0)
No	304 (79.0)	119 (81.0)
<i>Highest level of education completed*</i>		
Community college and higher	77 (20.0)	35 (23.8)
Secondary	107 (27.8)	62 (42.2)
Primary	185 (48.1)	35 (23.8)
Unknown	16 (4.2)	15 (10.2)
<i>Highest level of education attended*</i>		
Community college and higher	152 (39.5)	88 (59.9)
Secondary	217 (56.4)	42 (28.6)
Primary/unknown	16 (4.2)	17 (11.6)
<i>Socio-economic status*</i>		
Employed	60 (15.6)	29 (19.7)
Unemployment benefits	145 (37.7)	30 (20.4)
Student	111 (28.8)	61 (41.5)
Unemployed/unknown	69 (17.9)	27 (18.4)
<i>Accommodation*</i>		
With parents	144 (37.4)	83 (56.5)
With one parent	105 (27.3)	30 (20.4)
Independent	59 (15.3)	18 (12.2)
Other**	77 (20.0)	16 (10.9)

* p < 0.05.

** Institutionalised, other types of households or unknown.

3.2 Criminogenic Characteristics

Table 4 shows the criminogenic characteristics relating to the individual items of the OASys. The JS group is characterised by significantly fewer problems regarding criminal history and (current) offence analysis ($\chi^2(df = 1) = 4.9, p < 0.05$) and financial management and income ($\chi^2(df = 1) = 7.9, p < 0.05$). The percentage of young adults with a risk factor regarding criminal history and/or current offence was 47.2% in the JS group compared with 67.7% in the AS group. The percentage of young adults with problems regarding financial management and income was 24.0% in the JS group and 47.0% in the AS group. On the other hand, the JS group is characterised by significantly more problems regarding lifestyle and associates ($\chi^2(df = 1) = 4.0, p < 0.05$) and thinking, behaviour and skills compared with the AS group ($\chi^2(df = 1) = 8.1, p < 0.05$). 'Lifestyle and associates' was a risk factor for 47.4% of the JS group and for 29.4% of the AS group. In the JS group, 86.7% of the young adults showed problems regarding thinking, behaviour and skills compared with 67.6% in the AS group. The JS group also shows high levels of problems regarding education, training and employability (72.1%), relationships (44.2%) and emotional well-being (76.4%). In the AS group, the Probation Service reported problems regarding education, training and employability (64.7%), emotional well-being (73.5%) and thinking, behaviour and skills (67.4%). In both groups, the majority of offenders scored low to moderate on the total risk score (51.9% in the JS group and 53% in the AS group).

Table 5 provides details of the indications and contraindications for imposing juvenile sanctions based on the ACL screening tool scores. Regarding the indications for juvenile sanctions, there were significant differences between the groups. For 70.7% of the JS group there was an indication that they have the capacity to instigate behaviour change and would benefit from a juvenile sanction compared with just 35.5% of the AS group ($\chi^2(df = 1) = 25.7, p < 0.05$). Regarding pedagogical possibilities, for 62.3% of the young adults in the JS group there was an indication that they would benefit from a juvenile sanction, compared with 13.0% in the AS group ($\chi^2(df = 1) = 14.2, p < 0.05$).

For the majority of young adults in both groups there were no contraindications regarding a juvenile sanction. The JS group and AS group did show significant differences on the criterion psychopathy traits (Fisher's exact test, 1-sided, $p = 0.028$) and pedagogical impossibilities (Fisher's exact test, 1-sided, $p = 0.001$). However, psychopathy traits were no contraindication for 98.8% of the JS group and 90.3% of the AS group. Pedagogical impossibilities were a contraindication for just 10.2% of the JS group and for 35.5% of the AS group. Furthermore, criminal history was a contraindication for just 25.1% of the JS group and 32.3% in the AS group. A criminal lifestyle was reported for 9.0% of the JS group and 19.4% in the AS group. For 78.4% of the JS group a juvenile sanction was indicated, while a juvenile sanction was indicated for less than 5.0% of young adults in the AS group. In the JS group, for 17.4% of the young adults there was no conclusive advice regarding the type of sanctioning, and in the AS group this was true of 54.8% of young adults.

Table 4 Criminogenic characteristics of JS group and AS group according to OASys

OASys item	JS group n = 233 (n %)	AS group n = 34 (n %)
1-2 Criminal history and (current) offence analysis*		
No risk factor	123(52.8)	11 (32.4)
Risk factor	110 (47.2)	23 (67.7)
3 Housing and living		
No risk factor	194 (83.2)	29 (85.3)
Risk factor	39 (16.8)	5 (14.7)
4 Education, training and employability		
No risk factor	65 (27.9)	12 (35.3)
Risk factor	168 (72.1)	22 (64.7)
5 Financial management and income*		
No risk factor	177 (76.0)	18 (52.9)
Risk factor	56 (24.0)	16 (47.0)
6 Relationships with partner, family and relatives		
No risk factor	130 (55.8)	20 (58.8)
Risk factor	103 (44.2)	14 (41.2)
7 Lifestyle and associates*		
No risk factor	122 (52.4)	24 (70.6)
Risk factor	111 (47.4)	10 (29.4)
8 Drug misuse		
No risk factor	146 (62.7)	27 (79.4)
Risk factor	87 (37.3)	7 (20.6)
9 Alcohol misuse		
No risk factor	195 (83.7)	30 (88.2)
Risk factor	38 (16.3)	<5 (-)
10 Emotional well-being		
No risk factor	55 (23.6)	9 (26.5)
Risk factor	178 (76.4)	25 (73.5)
11 Thinking, behaviour and skills*		
No risk factor	31 (13.3)	11 (32.4)
Risk factor	202 (86.7)	23 (67.6)
12 Attitudes		
No risk factor	142 (60.9)	21 (61.8)
Risk factor	91 (39.1)	13 (26.5)

Table 4 Criminogenic characteristics of JS group and AS group according to OASys

OASys item	JS group n = 233 (n %)	AS group n = 34 (n %)
Total risk assessment		
Low-moderate	121 (51.9)	18 (53.0)
High-very high	72 (30.9)	8 (23.5)
No total risk assessment	40 (17.2)	8 (23.5)

* p < 0.05.

Table 5 Criminogenic characteristics according to adolescent criminal law screening tool

Indications and contraindication for sentencing with juvenile sanctions	JS group n = 167 (n %)	AS group n = 31 (n %)
1 Capacity to instigate behaviour change*		
Indication	118 (70.6)	11 (36.5)
No indication	49 (29.3)	20 (64.5)
2 Pedagogical possibilities*		
Indication	104 (62.3)	<5 (-)
No indication	63 (37.7)	27 (87.0)
3 Criminal history		
Contraindication	42 (25.1)	10 (32.3)
No contraindication	125 (74.9)	21 (67.7)
4 Criminal lifestyle		
Contraindication	15 (9.0)	6 (19.4)
No contraindication	152 (91.0)	25 (80.6)
5 Psychopathy traits*		
Contraindication	<5 (-)	<5 (-)
No contraindication	165 (98.8)	28 (90.3)
6 Pedagogical impossibilities*		
Contraindication	17 (10.2)	11 (35.5)
No contraindication	150 (89.8)	20 (64.5)
Conclusion		
Indication	131 (78.4)	<5 (-)
Contraindication	7 (4.2)	8 (25.8)
No conclusive advice	29 (17.4)	17 (54.8)

* p < 0.05.

Table 6 Criminal case characteristics based on Dutch prosecution service registration data

	JS group n = 403 (n %)	AS group n = 180 (n %)
Mean age (SD)	18.8 (1.1)	19.3 (1.4)
Age*		
18	211 (52.4)	76 (42.2)
19	100 (24.8)	40 (22.2)
20	54 (13.4)	19 (10.6)
21	25 (6.2)	30 (16.7)
22	13 (3.2)	15 (8.3)
Type of offence		
Non-violent property offence	152 (37.7)	75 (41.7)
Violent property offence*	88 (21.8)	<5 (-)
Violent offence	109 (27.0)	36 (20.0)
Drug offence	15 (3.7)	12 (6.7)
Sexual offence	8 (2.0)	<5 (-)
Traffic offence*	<5 (-)	10 (5.6)
Vandalism and public disturbance	52 (12.9)	22 (12.2)
Other ^A	17 (4.2)	20 (11.1)
Type of sanction		
Fine*	<5 (-)	27 (15.0)
Community service*	81 (20.1)	52 (28.9)
Suspended detention	71 (17.6)	32 (17.8)
Mandatory detention*	209 (51.9)	55 (30.6)
Other	38 (9.4)	14 (7.8)

* $p < 0.05$.

^A Other: weapons and ammunition, miscellaneous offences and type of offence is unknown.

3.3 Criminal Case Characteristics

Table 6 presents criminal case characteristics for the JS group and the AS group. Regarding type of offence and type of sanction, significant differences were found between both groups. The JS group committed significantly more violent property offences (χ^2 (df = 1) = 36.0, $p < 0.05$), fewer traffic offences (χ^2 (df = 1) = 15.8, $p < 0.05$) and fewer other type of offences (χ^2 (df = 1) = 9.9, $p < 0.05$) compared with the AS group. The most frequently committed offence in both groups was a non-violent property offence (37.7% in JS group and 41.7% in AS group), followed by a violent offence (27.0% in the JS group and 20.0% in the AS group). In the JS group more than one in five (21.8%) of the committed offences was a violent property offence, while less than five percent of the AS group committed a violent property offence. In the JS group, less than five of the crim-

inal cases (<1.2%) concerned a traffic offence, while in the AS group 6.7% of the criminal cases concerned a traffic offence.

Regarding type of sanction, the JS group received significantly fewer fines (χ^2 (df = 1) = 48.5, $p < 0.05$) and more mandatory detentions (χ^2 (df = 1) = 22.8, $p < 0.05$) compared with the AS group. Mandatory detention (51.9%) was the most frequently applied sanction in the JS group, followed by community service (20.1%) and suspended detention (17.6%). A fine was the least frequently imposed sanction (<1.2%). In the AS group, the most frequently applied sanction was also mandatory detention (30.6%), followed by community service (28.9%) and a fine (15.0%).

4 Discussion

The aim of this study was to gain insight into the demographic, criminogenic and criminal case characteristics of 18–22-year-olds sentenced with juvenile sanctions in the first year after the introduction of ACL. Two important results were found. First, young adults who were sentenced with juvenile sanctions in this period are characterised by problems across different domains. Second, indications for juvenile sanctions were a deciding factor during the selection process of young adults who are eligible for sanctioning according to juvenile criminal law.

4.1 JS group: Young Adults with Problems Across Different Domains

On the basis of the description of young adults eligible for juvenile sanctions, according to the Explanatory Memorandum, we expected this group of young adults to be a heterogeneous group with problems across different domains. Although no differences were found between the JS group and the AS group in the percentage of young adults who were in education at the time of committing the offence, there were differences between both groups in the level of education. Young adults in the JS group had relatively more often a lower level of completed education and a lower level of education attended compared with young adults in the AS group. In addition, young adults in the JS group were significantly more often in receipt of unemployment benefits, while young adults in the AS group were more often students. Furthermore, young adults in the JS group were more likely to be living in an institution or other type of undefined housing. On the contrary, young adults in the AS group were more likely to be living with their parents.

A possible explanation for these findings may be found in the fact that young adults in the JS group were more likely to demonstrate problems regarding thinking, behaviour and skills (e.g. cognitive deficits, a lack of social skills, impulse control problems and/or a lack of empathy), as well as problems regarding their emotional well-being. This assumption is supported by the fact that young adults in the JS group committed more violent property offences. This may indicate a lack of impulse control and problems with aggression regulation.³⁶ This may further explain the relatively high percentage of mandatory detentions in the JS group, as these young adults commit more serious offences compared with young adults in the AS group. This is in line with the Explanatory Memorandum, in which it is stated that juvenile sanctions are intended for young adult offenders of offences that are more serious and therefore more likely to lead to pre-trial detention.³⁷

It is plausible that the characteristics of young adults sentenced with juvenile sanctions may hamper these

young adults from attending and completing a higher level of education, from having a job and from living with their parents. These findings correspond to studies into background characteristics of young adults in judicial youth institutions in the Netherlands.³⁸ Young adults in these previous studies demonstrated behavioural problems (e.g. impulsivity, hyperactivity), psychological problems, alcohol and/or drug abuse. Furthermore, the majority of young adults in these studies had a problematic family background (e.g. domestic violence and abuse), and they experienced problems regarding financial management (e.g. debts).³⁹

The risk-need-responsivity model (RNR) for assessment and treatment of offenders states that individuals can desist from crime if they receive an appropriate level of treatment that is proportional to their risk of reoffending.⁴⁰ In the RNR a distinction is made between static (immutable risk factors) and dynamic risk factors (criminogenic needs) that are related to criminal behaviour, such as antisocial personality patterns (e.g. impulsivity and aggressive behaviour), substance abuse, school or work (poor school/work performance) and family relationships (e.g. inappropriate parental monitoring and disciplining).⁴¹ Although both groups scored low to moderate on the total risk score of the OASys, the JS group showed more often dynamic risk factors (e.g. problems regarding thinking, behaviour and skills and emotional well-being), and the AS group showed more often static risk factors (e.g. criminal history). These results seem to indicate that, because of the dynamic risk factors, it is thought that young adults in the JS group may benefit more from the developmental approach of juvenile sanctions.

4.2 Indications for Juvenile Sanctions Are Decisive

Pre-trial forensic advice concerning the offender's personal characteristics was emphasised with the introduction of ACL. Probation officers can use an ACL screening tool to determine which young adults are eligible for sentencing with juvenile sanctions. According to the probation officers, the majority of young adults in the JS group showed *indications* (e.g. capacity to instigate behaviour change and pedagogical possibilities) that made them eligible for a juvenile sanction. On the contrary, the majority of both groups showed *no contraindications* (e.g. criminal history, criminal lifestyle, psychopathy traits and pedagogical impossibilities) for juvenile sanctions. These results suggest that, regardless of multiple problems, from the probation officers' point of

38. L. Boendermaker *et al.*, *Zorgaanbod voor 18- tot 23-jarigen in justitiële jeugdinstellingen* (University of Groningen, 2014).

39. B.O. Vogelvang *et al.*, *Prevalentie van criminogene factoren bij mannelijke gedetineerden in Nederland* (Adviesbureau Van Montfoort/WODC, 2003); S. Noordhuizen and G. Weijters, *Derde meting van de nazorg ex-gedetineerden* (WODC, 2012).

40. D.A. Andrews, J. Bonta and J.S. Wormith, 'The Risk-Need-Responsivity (RNR) Model. Does Adding the Good Lives Model Contribute to Effective Crime Prevention?', 38 *Criminal Justice and Behavior* 735 (2011); Bonta and Andrews, above n. 33.

41. Bonta and Andrews, above n. 33.

36. Prior *et al.*, above n. 13; Monahan *et al.* (2009), above n. 9; Bonnie and Scott, above n. 7.

37. Parliamentary Documents II, 2012/13, 33498, no. 3, at 6, 22.

view, young adults who were sentenced with juvenile sanctions are likely to benefit more from the pedagogically oriented juvenile criminal law. Furthermore, demographic characteristics show that more young adults from the AS group are living with their parent(s), while living with parents is considered an indication for sentencing with juvenile sanctions. A possible explanation for this finding may be found in the fact that ACL is intended for a diverse target group and results show that the JS group is characterised by problems across different domains. It is likely that these characteristics contribute to the fact that young adults of the JS group do live less often with their parents, but are instead institutionalised or in another type of household. In addition, results indicate that vulnerable young adults were sentenced with juvenile sanctions. This result may indicate that professionals see vulnerability rather than pedagogical possibilities as an indication for juvenile sanctions. It is therefore important, in line with the RNR, to consider the dynamic criminogenic needs of an individual when selecting an intervention.⁴² This is also in line with the Explanatory Memorandum, in which it is stated that juvenile criminal law, with its pedagogical character and focus on resocialisation, offers a more tailored approach to sentencing compared with adult criminal law.⁴³

4.3 Limitations

This is the first study since the introduction of ACL in which the characteristics of young adults who were sentenced with juvenile sanctions in the Netherlands were examined. However, this study has three limitations that should be considered when interpreting the results. First, the AS group consists of a sample stratified by age and an oversampling of 21- and 22-year-old offenders. This resulted in an over-representation of 18-year-olds and a lower percentage of 21- and 22-year-olds in the AS group compared with the population of young adults sentenced according to adult criminal law. In addition, the JS group and AS group differ significantly in age. Second, the study sample was selected on the basis of criminal cases that were settled by district courts. During the pre-trial phase, there are several dropout moments in the selection of young adults eligible for juvenile sanctions. Therefore, the results of this study are limited to young adult offenders that were dealt with by the judge. And third, data used in this study were registered in the context of the criminal trial, and information was not available for many of the criminal cases. Despite the fact that pre-trial forensic advice is emphasised in ACL, one in five criminal cases in the JS group and even fewer cases in the AS group lacked this information.

4.4 Concluding Remarks

In conclusion, as expected, young adults sentenced with juvenile sanctions showed relatively more characteristics indicative of problems across different domains. Furthermore, they committed more offences of a serious nature compared with young adults sentenced with adult sanctions. At the same time, it seems that these young adults are more likely to have the capacity to instigate behaviour change compared with other young adult offenders. The main focus of ACL is on the special treatment of young adult offenders in order to increase resocialisation and reduce recidivism. To benefit from this special treatment, it is important to select young adults for whom juvenile sanctions may offer opportunities to change their criminal behaviour. In ACL, special attention is given to young adult offenders with immature emotional, social, moral and/or intellectual development. Owing to their immaturity, these young adults are more likely to benefit from the developmental approach of juvenile sanctions. However, the concept of maturity remains elusive and is therefore difficult to assess. Although young adults sentenced with juvenile sanctions seem to indicate some level of immaturity (e.g. impulsivity, inability to oversee long-term consequences, sensitivity to peer influences) and although emotional or practical support by adults and continuing school attendance is desirable, it remains unknown whether and to what extent these young adults are immature. While the findings of this study provide support for the special treatment of young adult offenders in criminal law, as intended by ACL, further research is needed to show whether the special treatment of young adults is effective in increasing resocialisation and reducing recidivism.

42. Andrews *et al.*, above n. 40; *ibid.*

43. Parliamentary Documents II, 2012/13, 33498, no. 3.

Too Immature to Vote?

A Philosophical and Psychological Argument to Lower the Voting Age

Tommy Peto*

Abstract

This article argues in favour of lowering the voting age to 16. First, it outlines a respect-based account of democracy where the right to vote is grounded in a respect for citizens' autonomous capacities. It then outlines a normative account of autonomy, modelled on Rawls's two moral powers, saying what criteria must be met for an individual to possess a (pro tanto) moral right to vote. Second, it engages with empirical psychology to show that by the age of 16 (if not earlier) individuals have developed all of the cognitive components of autonomy. Therefore, since 16- and 17-year-olds (and quite probably those a little younger) possess the natural features required for autonomy, then, to the extent that respect for autonomy requires granting political rights including the right to vote – and barring some special circumstances that apply only to them – 16- and 17-year-olds should be granted the right to vote.

60 **Keywords:** voting age, children's rights, youth enfranchisement, democracy, votes at 16

1 Introduction

Over the last decade, more and more countries have allowed 16- and 17-year-olds to vote. Nicaragua and Brazil were early adopters, allowing 16-year-olds to vote in all elections from the 1980s. In the mid-2000s, 16-year-olds were given the vote in the Isle of Man (2006), Austria (2007), Guernsey (2007), Jersey (2008) and Ecuador (2008). More recently, 16-year-olds have been granted the vote in Argentina (2012) and Malta (2013), and in Scotland (2014), where they can vote in local and Scottish parliamentary elections, and voted in the 2014 independence referendum, although they cannot vote in UK-wide elections. Other countries allow 16-year-olds to vote in some elections but not others: 16-year-olds can vote in state or municipal elections in some German Länder and Swiss cantons; Estonia has allowed 16-year-olds to vote in local elections since 2015; and 16-year-olds could vote in the official Catalan self-determination referendum of 2014. Most countries, however, are still

reticent: Luxembourg rejected a reduction in the voting age in a referendum in 2015, and the UK parliament debated but rejected allowing 16-year-olds to vote in the EU referendum.

So far, research into the voting age has seen the right to vote as grounded in political knowledge and political interest/apathy, with empirical research investigating whether 16- and 17-year-olds have enough political knowledge, or enough political interest, to vote.¹ However, in this article, I will examine an alternative liberal view: that the right to vote is grounded not in knowledge but in moral autonomy and that all those who possess the capacities for autonomy have a pro tanto right to vote.² This article therefore sets out an account of autonomy, and the criteria individuals need to meet to count as possessing autonomy, and then uses empirical psychology to see whether adolescents meet those criteria. In fact, developmental psychologists are clear that adolescents (from 14/15) are almost indistinguishable from adults in their general cognitive abilities.³ There-

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1. Tak Wing Chan and Matthew Clayton, "Should the Voting Age Be Lowered to Sixteen? Normative and Empirical Considerations," *Political Studies* 54, no. 3 (2006), pp. 533-58; Tommy Peto, "Why the Voting Age Should Be Lowered to 16," *Politics, Philosophy & Economics* 17, no. 3 (2018), pp. 277-97; Eva Zeglovits and Julian Aichholzer, "Are People More Inclined to Vote at 16 Than at 18? Evidence for the First-Time Voting Boost among 16- to 25-Year-Olds in Austria," *Journal of Elections, Public Opinion and Parties* 24, no. 3 (2014), pp. 351-61; Eva Zeglovits and Martina Zandonella, "Political Interest of Adolescents Before and After Lowering the Voting Age: The Case of Austria," *Journal of Youth Studies* 16, no. 6 (2013), pp. 1-21; Eva Zeglovits, "Voting at 16? Youth Suffrage Is Up for Debate," *European View* 12, no. 2 (2013), pp. 249-54; Johannes Bergh, "Does Voting Rights Affect the Political Maturity of 16- and 17-Year-Olds? Findings from the 2011 Norwegian Voting-Age Trial," *Electoral Studies* 32, no. 1 (2013), pp. 90-100; Markus Wagner, David Johann, and Sylvia Kritzingner, "Voting at 16: Turnout and the Quality of Vote Choice," *Electoral Studies* 31, no. 2 (2012), pp. 372-83; Daniel Hart and Robert Atkins, "American Sixteen- and Seventeen-Year-Olds Are Ready to Vote," *The ANNALS of the American Academy of Political and Social Science* 633 no. 1 (2011).
2. 'pro tanto' because this right is perhaps sometimes legitimately suspended or infringed, e.g. in times of national emergency. I do not address the question of when, if ever, such circumstances arise.
3. Joe Coleman, "Answering Susan: Liberalism, Civic Education, and the Status of Younger Persons," in *The Moral and Political Status of Children*, ed. David Archard and Colin M. Macleod, 1 online resource (Oxford: Oxford University Press, 2002), pp. viii, 296 pages, 168. Also David Moshman, *Adolescent Psychological Development: Rationality, Morality, and Identity* (Mahwah, NJ: Lawrence Erlbaum Associates, 1999), p. 40; Michael D. A. Freeman, *The Moral Status of Children: Essays on the Rights of the Child* (Boston: Martinus Nijhoff, 1997), p. 28; M. Schmidt and N. Reppucco, "Children's Rights and Capacities," in *Children, Social Science, and the Law*, ed. Bette L. Bottoms,

fore, since 16- and 17-year-olds (and perhaps even younger adolescents) possess the same cognitive capacities as adults, they meet the criteria for the possession of autonomy. Thus, because autonomy grounds a (pro tanto) right to vote, 16- and 17-year-olds have a pro tanto right to vote.⁴

One point worth clarifying is that this investigation into the voting age is not an investigation into what Dahl calls the ‘problem of the unit’ or the ‘boundary problem’.⁵ The problem of the unit is, what persons have a rightful claim to be included in the demos? When we say a group of individuals, or ‘the people’, have a right to democratic self-rule, who is included in ‘the people’? This is distinct from what I shall call the qualification question: which members of that people/association/unit should be permitted to vote? Whether the problem of the unit is solved by the ‘all affected’ principle (everyone affected by state actions should be included), the ‘all subjected’ principle (everyone subject to the laws of the state should be included), an appeal to historic boundaries, or an appeal to national identity and self-determination, there remains the question of who within that unit is qualified to vote. Therefore, determining whether an individual has the right to vote within a particular state/association is a two-step process: (i) are they a member of the relevant group? (ii) are they the kind of individual who in general merits the right to vote? This article speaks only to the second question. My argument is that 16-year-olds should, in general, be allowed to vote. It is a separate question whether for, say, Dutch elections, it is those 16-year-olds who are affected/coerced by the policies of the Dutch government, who are resident within the Netherlands or who are Dutch nationals who should be allowed to vote.

I also want to make two methodological points. First, I take as a general assumption that all adult citizens, or the overwhelming majority of them, possess the natural features required for the right to vote. Therefore, to establish whether adolescents possess the right to vote, we can compare their psychological capacities to adults’. When defining the criteria for autonomy, there is the threshold question: what level of psychological capacity is required to meet those normative criteria? Sorites’ paradoxes abound. But if adolescents reach the same level of autonomy as average adults, then, assuming adults deserve the right to vote, so too do adolescents. In fact, the threshold will be below the level of an average adult. After all, adults with capacities significantly below average still possess the vote. Of course, by assuming that adults generally deserve the vote, this article will not convince an anti-democrat that 16- and 17-

year-olds should be allowed to vote. But for democrats, the argument cantilevers from the claim that adults should have the vote to the claim that 16- and 17-year-olds should have the vote.

Second, this article examines empirical psychology rather than neuroscience to assess teenagers’ capacities. Neuroscientific results are sometimes quoted in debates about the voting age. For example, Chan and Clayton, and Dawkins and Cornwell quote research showing that adolescents’ frontal lobes have not yet settled into an adult structure.⁶ More specifically, there is less development in the connections in the fronto-parietal-striatal brain system (localised primarily in the lateral prefrontal cortex, inferior parietal lobe and anterior cingulate cortex).⁷ Since the frontal lobes are associated with executive functions such as the cognitive and emotional control needed to make cool and rational decisions, they claim this shows that teenagers do not merit the right to vote.⁸ That said, others dispute whether these neurological differences are a significant factor in political decision-making.⁹ However, this article engages with the psychological evidence rather than the neurological evidence. The reason is that since we define autonomy in terms of powers of reason, we should investigate directly whether adolescents possess those powers of reason (and the cognitive control to exercise them). If adolescents lack key reasoning abilities, they lack the relevant autonomy to vote, even if they have ‘fully developed’ brains. And if they possess these powers of reason, then they do possess the relevant autonomy, even if they have otherwise ‘undeveloped brains’. Neurology may provide interesting insights into the bases of cognition, but it is not itself of direct normative relevance.¹⁰ For that reason, I focus on the psychology.

1.1 Outline

Section 2 lays out how autonomy is linked to the right to vote, and the criteria for possessing autonomy. It uses the Rawlsian account of the ‘two moral powers’ to provide the criteria for possessing the relevant kind of autonomy. Section 3 lays out which parts of empirical psychology are relevant to the two moral powers. Sections 4–8 provide an empirical outline of adolescent psychological capabilities through the normative lens of the two moral powers. In turn, they examine five norma-

Margaret Bull Kovera, and Bradley D. McAuliff (Cambridge, UK; New York: Cambridge University Press, 2002), p. 160.

4. For simplicity, I will usually refer to ‘the right vote’ without adding ‘pro tanto’ each time.
5. Robert A. Dahl, *Democracy and Its Critics* (New Haven: Yale University Press, 1989), pp. 193, 119 and 146-47. See also Goodin’s ‘problem of “constituting the demos”’, Robert E. Goodin, “Enfranchising All Affected Interests, and Its Alternatives,” *Philosophy & Public Affairs* 35, no. 1 (2007), pp. 40-68.

6. Chan and Clayton, “Should the Voting Age Be Lowered to Sixteen? Normative and Empirical Considerations,” p. 357; Richard Dawkins and R. Elizabeth Cornwell, “Dodgy Frontal Lobes, Y’dig? The Brain Isn’t Ready to Vote at 16,” *The Guardian*, 13th December 2003.
7. Laurence Steinberg, “Adolescent Brain Science and Juvenile Justice Policymaking,” *Psychology, Public Policy, and Law* 23, no. 4 (2017), p. 414.
8. For results on neurological development, see J. N. Giedd et al., “Brain Development During Childhood and Adolescence: A Longitudinal MRI Study,” *Nature Neuroscience* 2, no. 10 (Oct 1999), pp. 861-63; V. F. Reyna and F. Farley, “Risk and Rationality in Adolescent Decision Making: Implications for Theory, Practice, and Public Policy,” *Psychology Science in the Public Interest* 7, no. 1 (2006), pp. 1-44.
9. Hart and Atkins, “American Sixteen-and Seventeen-Year-Olds Are Ready to Vote,” p. 220.
10. See also Steinberg, “Adolescent Brain Science and Juvenile Justice Policymaking,” p. 418.

tively relevant components of cognitive thinking: logical reasoning, empirical reasoning, decision-making, argumentation, and moral reasoning. Each section (i) defines them theoretically and identifies their sub-components; (ii) discusses their normative relevance; and (iii) provides an empirical comparison of adolescents and adults. Together, these sections show that older adolescents (14-16) and adults possess the two moral powers equally. Section 9 then examines 'hierarchical control' and assesses the claim that although adolescents have the same cognitive abilities as adults, they are more impulsive or emotional and so should not be granted the vote. While Section 9 accepts the empirical claim, it denies that this should be a bar to adolescent voting, since voting does not usually occur in the type of emotionally intense setting that some adolescents struggle with. Therefore, to the extent that respect for the two moral powers implies a right to vote for adults, so too should it for adolescents. First, let us examine autonomy and how it links to voting rights.

2 Autonomy and the Right to Vote

This section outlines the view that the right to vote is grounded in a respect for individual autonomy and, in so doing, provides an account of the criteria that, on one major liberal tradition, an individual must meet to possess autonomy and therefore to deserve the right to vote. First, I outline the autonomy-respecting view of democracy. Then I outline the Rawlsian account of autonomy, which is grounded in the 'two moral powers', and I link it to the right to vote. The two moral powers then provide us with the qualification criteria for inclusion in political decision-making. This section is, of course, not a fully fleshed out liberal defence of democracy: that would require (much) more space than can be given here. But it does provide an outline of how this account of democracy works and the qualification criteria for the franchise under this account.

A certain classic view of democracy takes democracy to be implied by basic values of respect or fairness.¹¹ This account says that all competent individuals possess the right to direct their own lives autonomously. This implies that they deserve a say in those decisions that regulate their lives and/or deserve to have decisions made about them justified to them in some way. Principles of fairness then imply that one individual's voice should have the same weighting as anyone else's. Therefore, denying a competent citizen the right to vote does two wrongs: (i) it violates their equal standing as a citizen; (ii) it fails to respect that citizen as an autonomous decision maker. These two effects can be wrong

either derivatively for recognition-type reasons or intrinsically as a violation of basic principles. Either way, mature/competent citizens deserve consultation and equal standing, and it is wrong to deny them those things. This is true regardless of whether those individuals also happen to share an independent characteristic (like age) with other people who perhaps do not deserve equal standing. Thus, there is a rights violation, a pro tanto wrong, when we deny the vote to competent people, and *a fortiori* there is a pro tanto wrong when we deny the right to vote to competent 16- to 17-year-olds. So, what are the capacities required to possess autonomy? One prominent liberal account of autonomy, which shares features with many other liberal accounts, is the Rawlsian one.¹² The Rawlsian account of autonomy is based on the two moral powers:

- i. *A capacity for a sense of justice*: 'the capacity to understand, to apply, and to act from (and not merely in accordance with) the principles of political justice';
- ii. *A capacity for a conception of the good*: 'the capacity to have, to revise, and rationally to pursue a conception of the good'.¹³

Let's first examine the second moral power. All major accounts of autonomy encompass something like this: a self-imposed authentic standard of excellence (J.S. Mill), a conception of what gives value to life (R. Dworkin), projects and goals (Raz). Griffin characterises a 'human existence' as involving reflection and assessment. We 'form pictures of what a good life would be [and] ... we try to realise these pictures'.¹⁴ He concludes that, 'what ... [gives] dignity to human life is our capacity to choose and to pursue our conception of a worthwhile life'.¹⁵ The basic idea is that, to be autonomous, you must be, amongst other things, self-determining your life. And to do this, you must be determining your life according to some self-imposed standard or set of goals. Put differently, you must be part-author of your life. And to be part-author of your own life, you must have a (partial) script. The 'conception of the good' is that script (even if that script is constantly revised, edited and rewritten). We can use Rawls's conception of this idea, embodied in the 'second moral power', because it usefully splits the power into different component abilities: 'the capacity to have, to revise, and rationally to pursue a conception of the good', which we can then use to match against specific psy-

11. Francis Schrag, "Children and Democracy: Theory and Policy," *Politics, Philosophy & Economics* 3, no. 3 (2004), pp. 365-79, 366; Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Belknap Press, 2011), p. 379.

12. Strictly speaking, in the Rawlsian framework, the two moral powers are the basis of moral personhood/citizenship rather than components of 'autonomy', but it can play a similar role to autonomy in our overall argument. See Catherine Audard, "Autonomy, Moral," in *The Cambridge Rawls Lexicon*, ed. Jon Mandle and David A. Reidy (Cambridge; New York: Cambridge University Press, 2015a), pp. xxiii, 897 pages and "Autonomy, Political," in *The Cambridge Rawls Lexicon*, ed. Jon Mandle and David A. Reidy (Cambridge; New York: Cambridge University Press, 2015b), pp. xxiii, 897 pages.

13. John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA; London: Harvard University Press, 2001), pp. 18-19.

14. James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2010), p. 32.

15. *Ibid.*, p. 44.

chology capabilities later. Similarly, Rawls gives a precise definition of ‘conception of the good’, saying it is:

an ordered family of final ends and aims which specifies a person’s conception of what is of value in human life or, alternatively, of what is regarded as a fully worthwhile life.¹⁶

Therefore, the Rawlsian second moral power embodies the same idea as the other major liberal accounts of autonomy mentioned earlier while providing a precision that is helpful when we turn to empirical psychology. This is why we should use it when investigating adolescent autonomy.

It is worth clarifying a few things about the second moral power. This ‘plan of life’ or ‘conception of the good’ does not need to be good in an objective sense. Indeed, some people’s lifestyle and life goals may seem objectively objectionable. But the whole point of self-authorship is that we can decide and construct for ourselves what is good for us. Any dream will do (although we may restrict how you pursue that dream).¹⁷ This may sound rather grand, but it need not be. R. Dworkin provides the following image:

Each person follows a more or less articulate conception of what gives value to life. The scholar who values a life of contemplation has such a conception; so does the television-watching, beer-drinking citizen who is fond of saying “This is the life”, though of course he has thought less about the issue and is less able to describe or defend his conception.¹⁸

One’s life need not have a unity, or a single rigid plan (though it may do). The ideal of autonomy is about being able to fashion one’s life through one’s own goals and decisions, even as those goals shift and change.¹⁹ To the extent you have formed goals and plans, or assessed what you want to do in a given situation, you have been (to various degrees of sophistication and explicitness) reasoning about ‘the good’. Like Monsieur Jourdain in Molière’s *The Bourgeois Gentleman*, who discovers that ‘these forty years now I’ve been speaking in prose without knowing it!’, we are using fancy concepts used to describe something which, at its heart, is familiar.

How does the second moral power link to the right to vote? Respect for autonomy, and for the second moral power specifically, means letting people make decisions about themselves. It would be inconsistent with respect for autonomy to substitute your own judgment for someone else’s about their own good: claims that ‘I

respect you as a chooser but will deny you any choice’ would be disingenuous. In particular here, the second moral power involves the ability to make judgments about one’s own interests. Respect for autonomy requires a respect for how individuals identify and pursue their own interests. If your mother were devoted to your interests, but nevertheless ignored how you perceive those interests, she would be lacking in respect for you or, more specifically, for your autonomous ability to define and identify your own interests. This would be true even if your judgment turned out to be mistaken and hers correct. To respect someone as a person is to take their own view of themselves seriously. As Benn puts it, you would have:

every reason to resent the indulgent dismissal of [your] point of view, “Yes, dear, but Mummy knows best,” even in the case that Mummy does.²⁰

This means that when certain decisions are made about an individual or for an individual, that decision-making process should include their own judgment about themselves. For most self-regarding decisions, this implies the liberal position that people may make such decisions uninhibited. But when decisions must be made about people collectively through political institutions, including individuals’ own judgments about themselves means giving them a voice in that process, something usually formalised and enshrined in the right to vote.²¹ The people must be allowed to define and express their own interests, and not have their interests determined for them by technocrats or despots.

Next, let’s examine the first moral power, which covers the ability to reason about justice, apply principles of justice and, as I would add to it, reason about and apply moral principles more generally. Including the first moral power helps us make sense of the idea of moral autonomy. Self-government encompasses the ability to decide not only how you would like to live your life, but also how you ought to live your life. The capacity to reason about justice and morality captures the idea that to be truly morally self-governing we must be able to impose moral laws on ourselves. This ideal is Kantian in flavour: for a rational (and autonomous) being to qualify as such, it must be able to construct, recognise and follow moral laws.

How does the first moral power link to the right to vote? The first moral power helps make sense of ‘political autonomy’. This is the idea that humans are fundamentally politically free. The ideal of political autonomy is what makes liberals concerned about state legitimacy and state coercion. Political autonomy is the idea that

16. Rawls, *Justice as Fairness: A Restatement*, pp. 18-19; also Pete Murray, “Conception of the Good,” in *The Cambridge Rawls Lexicon*, ed. Jon Mandle and David A. Reidy (Cambridge: Cambridge University Press, 2015).

17. You may not, for example, sell your brother into slavery to pursue your dream.

18. Ronald Dworkin, “Liberalism,” in *A Matter of Principle* (Oxford: Clarendon Press, 1986), p. 191.

19. Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), pp. 370-71.

20. Stanley I. Benn, *A Theory of Freedom* (Cambridge: Cambridge University Press, 1988), p. 105.

21. Perhaps there are ways other than the vote that protects people’s moral right to self-government and includes them in political decision-making. It may not be an analytic truth that the moral right to inclusion in political decision-making entails the right to vote, but the right to vote does seem to be the best method we have come up with for instantiating that moral right. Dworkin, *Justice for Hedgehogs*, pp. 379-400.

we, as individuals, are politically self-governing. Individuals can deliberate on, construct and self-impose rules of political morality. Respecting that ability to politically self-govern means recognising individuals' political freedom. This gives rise to a problem: if individuals are fundamentally politically self-governing, then why may a coercive institution, such as the state, govern them politically? One way to (at least partially) address this problem is to include those individuals in the political decision-making mechanisms of the state.²² This is a different argument from the one earlier about letting people define their own interests and including them in decisions that affect their interests. Political rights, such as the right to vote, presuppose an ability to reason not merely about what we want individually, but about the right and the good more generally. Mirroring the above argument about the second moral power, technocrats and rulers may not impose their own version of the right and the good on people who possess the capacity to make their own judgments about the right and the good. Therefore, in political decisions, which involve imposing views of justice and morality on a society, respect for autonomy means including all members of that society who can make decisions about justice and morality. To exclude those with that capacity is to disrespect that capacity.

Therefore, autonomy, as exemplified here by the two moral powers, grounds the right to vote in two ways: first, individuals who can define and pursue their own interests must be included in decisions about their choices and their interests; and, second, individuals who can reason about justice must be included in decisions about the rules of justice that apply to them. Individuals who possess the two moral powers therefore possess these moral rights to inclusion in political decision-making. So, to assess whether 16- and 17-year-olds should possess the right to vote, we should assess empirically whether they possess the two moral powers.

2.1 Autonomy and Political Maturity

How does the autonomy approach here relate to the political maturity approach (emphasising knowledge and interest in politics) more common in the political science literature? The autonomy approach fits broadly within a Kantian or Republican tradition, in which political rights come from citizens' dignity, personhood or autonomy. Non-democratic forms of government are objectionable because they stand the state in the wrong kind of relationship to its citizens.

The political maturity approach appears to have roots in epistocracy, that is, a tradition which holds that political power should be wielded by those best able to make political decisions. The concern in this tradition is often good outcomes. Of course, many in the epistocratic tradition are not democrats: Plato, for example, argued that political power should be restricted to an elite class of the wise and just. However, there are democratic arguments grounded in the wisdom of the crowd, rather

than the wisdom of the elite. Aristotle, retaining Plato's concern for just and wise government, argued that larger groups are more likely to make correct decisions than smaller groups, even if additional members are less wise than the existing members, so long as the new voters are wise enough.²³ Condorcet's jury theorem similarly demonstrates that adding more members to a group increases the chances that a collective decision is correct, so long as each additional voter is more than 50% likely to make the correct decision. This theorem, as with the Aristotelian argument, is sometimes used to justify democracy, but it would only suggest extending the franchise when the additional voters are sufficiently competent. The most significant democratic theorist in the epistocratic tradition is J.S. Mill. Concerned about granting votes to an uneducated mob, he argued that the educated should be given extra votes and advocated knowledge requirements for the franchise (albeit with a low bar):

I regard it as wholly inadmissible that any person should participate in the suffrage without being able to read, write, and, I will add, perform the common operations of arithmetic.²⁴

The concern about whether people can make sufficiently competent political decisions seems to animate those who use knowledge and interest in politics to either exclude or include adolescents from voting. Chan and Clayton, for example, argue that, 'we have good reasons of justice to prevent the incompetent from voting',²⁵ and that if the voting age were lowered:

too many of them [16- and 17-year-olds] would vote and do so incompetently, in a way that would be detrimental to our democracy.²⁶

The political maturity approach can therefore, broadly, be seen as part of the same epistocratic tradition as J.S. Mill: concerned about good governance and restricting the vote from those who may damage the overall decision-making quality of the polis.

How do the autonomy and political maturity approaches differ? First, the political maturity approach takes interest in politics to be of fundamental importance, whereas the autonomy approach takes it to be morally irrelevant (although an interest in politics could be one of many ways that individuals exercise and develop their moral reasoning abilities). While Chan and Clayton, among others, claim political apathy disqualifies teenagers from the franchise, the autonomy approach asks instead whether they have the relevant psychological

22. *Ibid.*, p. 385.

23. David M. Estlund, "Why Not Epistocracy?", in *Desire, Identity, and Existence: Essays in Honor of T.M. Penner*, ed. Naomi Reshotko and Terry Penner (Kelowna, BC: Academic Print. & Pub., 2003), pp. 55-57.

24. John Stuart Mill, "Considerations on Representative Government," in *Essays on Politics and Society*, ed. John M. Robson, *Collected Works of John Stuart Mill* (London: Routledge & Kegan Paul, 1977), p. 470.

25. Chan and Clayton, "Should the Voting Age Be Lowered to Sixteen? Normative and Empirical Considerations," p. 539.

26. *Ibid.*, p. 537.

capacities. Rights are not generally denied to those uninterested in using them. To deny someone the vote just because they are not interested in politics is to disrespect their autonomy, because you are unilaterally substituting their judgment with yours about what is good for them and right for the community. Of course, people who are uninterested in politics may let others make those judgments for them by not voting. But choosing to do so is an instantiation of their autonomy rather than an infringement of it. The autonomy approach would grant the apathetic this choice because to do so is to respect them as choosers.

The second difference between the political maturity and autonomy approaches is in their attitude towards knowledge. Those in the epistocratic tradition see knowledge, or education, as key qualifications for the franchise because it helps voters to collectively make better decisions. The autonomy approach is concerned about the state standing in the right kind of relation to those whom it governs, and holds that, generally speaking, it may not rule over autonomous citizens who have no say in it, even those citizens who are uneducated.²⁷

However, both accounts do care about competence/development to some extent. In neither account do rocks, plants or animals qualify for the franchise. So there must be some natural features possessed by (adult) humans that qualify them for the vote. Therefore, both care about children reaching some threshold to qualify for the vote. But the approaches have different attitudes to the threshold. On the autonomy account, reaching the threshold means reaching a political status that is morally incompatible with non-democratic rule. On the epistocratic account, reaching the threshold means reaching a level of competence/ability such that the individual can usefully contribute to democratic and political decision-making.

Therefore, the political maturity approach broadly lies within an epistocratic tradition that cares about democratic decisions having good outcomes or good deliberative processes, and sees knowledge and interest as of fundamental importance. The autonomy approach, however, sees interest as lacking fundamental importance in the franchise and is generally hostile to knowledge requirements that may lead to the domination or disrespect of citizens.

Since we are adopting the autonomy approach here, let's now examine which psychological capacities correspond to the two moral powers which constitute autonomy and therefore which capacities we must measure to investigate whether 16- and 17-year-olds should possess the vote.

3 Connecting Psychology to the Two Moral Powers

In this section, I outline what psychological capacities are presupposed by the two moral powers. These boil down to five: logical/syllogistic reasoning, empirical reasoning, decision-making, argumentation and moral reasoning. In the following sections, we will see that each component is possessed equally by adolescents and adults, and therefore that adolescents (or, at least, older adolescents) fully possess the two moral powers. Let's take each moral power in turn.

The second moral power is the capacity to have, to revise and rationally to pursue a conception of the good, which specifies an ordered family of final ends and aims. The full ability to *have* a conception of the good requires moral reasoning abilities, since you must internalise and understand moral norms. Once you have internalised normative beliefs, you can be said to 'have' a theory of the good.

The capacity to *revise* a conception of the good requires a combination of logical/syllogistic reasoning, moral reasoning and argumentative ability. To revise a conception of the good, you must understand the rules of logic to make rational and reasonable inferences; you must be able to reason in moral terms to assess the contents of your conception of the good; finally, you must possess abilities of argumentation to generate and critique arguments and counterarguments so you can judge whether to revise your views about the good. Without such psychological capacities, one would be unable to possess the second moral power. Since, as discussed later, adolescents have all those abilities, they can therefore *revise* their conception of the good.

The ability *rationally to pursue* that conception of the good is provided by empirical reasoning, argumentation and decision-making rationality. Empirical reasoning is necessary to assess for yourself the best means to your ends and argumentation, which includes the ability to follow and critique arguments, is necessary to assess the advice of others, e.g. doctors, lawyers, etc., who might provide advice on how best to achieve your ends. Decision-making rationality is also necessary 'rationally to pursue' your conception of the good, since individuals need it to avoid decision-making fallacies that could otherwise frustrate their actions. By having the same abilities of empirical reasoning, argumentation and decision-making as adults, adolescents have an equal ability rationally to pursue their conception of the good.

Finally, individuals need the capacity to specify 'an ordered family of final ends and aims'.²⁸ The ability to order, weigh up and trade-off different goals and values requires the ability to make 'preference judgments' (a component of decision-making rationality), which consist in weighing up and trading-off different preferences. However, since it is not merely preferences that

27. For one such opposition to knowledge requirements, see David M. Estlund, *Democratic Authority: A Philosophical Framework* (Princeton, NJ: Princeton University Press, 2008), pp. 206-22.

28. Rawls, *Justice as Fairness: A Restatement*, p. 19.

must be weighed in a conception of the good but also normative values, weighing ends also requires moral reasoning abilities. Complex moral reasoning, which involves balancing personal goals, social norms and moral values, is important so that individuals can coordinate different normative values within their own thinking. And as will be discussed later, adolescents and adults have the same levels of moral reasoning and decision-making abilities.

The first moral power, as we are understanding it here, is the capacity to understand, apply, and act from moral principles and principles of justice. The ability to understand those principles is given by a level of development in prosocial moral reasoning at least beyond hedonistic and direct-reciprocity reasoning; and, for complex dilemmas, development in complex moral reasoning. In addition to moral reasoning, the first moral power requires the other abilities necessary for 'rational pursuit' described in the above discussion of the second moral power (empirical reasoning, argumentation, decision-making).

The above outlines how the two moral powers correspond to various aspects of cognitive psychology. Therefore, in demonstrating that adolescents possess equivalent levels of the five key psychological capacities, we will have demonstrated that adolescents possess the two moral powers and therefore (via the arguments of Section 2) that they have a *pro tanto* right to vote. Let's now investigate each of those five psychological capacities in turn: logical/syllogistic reasoning, empirical reasoning, decision-making, argumentation and moral reasoning.

4 Logical Reasoning

4.1 Definition

Logical reasoning includes three core abilities: (1) to understand the rules of logic and inference; (2) to understand the concept of 'validity' as distinct from 'truth' and to follow deductive arguments and assess their validity. And the ability not only to understand and follow given logical inferences but (3) to draw inferences oneself from given premises. This includes being able to solve both determinate and indeterminate syllogisms.²⁹ Determinate syllogisms are syllogisms in which the conclusion follows from the premises with logical necessity. Indeterminate syllogisms, by contrast, involve conclusions that are perhaps suggested by the premises, but do not follow as a matter of necessity. Logical reasoning, therefore, covers the ability to understand and apply the rules of logic.

4.2 Normative Significance

Logical reasoning abilities are at the heart of philosophical accounts of humans as rational beings. Logical rea-

soning is important for forming beliefs, making evaluative judgments, means-ends reasoning, justifying one's beliefs, and forming and following arguments and counterarguments. Indeed, logical reasoning is a prerequisite for all the accounts of autonomy mentioned earlier. The second moral power requires that people be able to have a 'rational plan of life'. But someone unable to reason logically cannot have a 'rational' plan of life properly speaking, since their plans do not flow from the exercise of reason.³⁰ Similarly, they cannot reason morally (a requirement of the first moral power), form logically consistent preferences (a requirement of the second moral power), or form practical syllogisms to make rational decisions or assess evidence (required by both moral powers). Logical/syllogistic reasoning is therefore a major component of the two moral powers and is a prerequisite for all other components of rationality.

Second, logical reasoning abilities protect individuals (morally) from certain kinds of paternalism. Respect for an individual's ability to reason means not interfering with the decisions the individual makes on the basis of that ability. Interference would be illegitimate. However, if they lack that ability, then we no longer have the same reason to respect their right to self-government and so no longer have the same reason to include them formally in decision-making processes that govern them. Yet if an individual possesses this ability for self-government (i.e. possesses the two moral powers), then respect means, generally speaking, allowing individuals to make decisions about themselves; and when society as a whole governs over the individual, they are bound to include that individual in the decision-making process. Therefore, logical reasoning helps to ground rights to inclusion in the political process.

4.3 Empirical Findings

Let's take each of the three components of logical reasoning in turn. First, in understanding validity as distinct from truth, adolescents and adults make similar errors in deductive reasoning when the premises are counterfactual.³¹ Moshman and Franks (1986) investigated whether participants in their study could recognise validity as distinct from truth. In the initial experiments, 45% of 12- to 13-year-olds and 85% of college students used validity as a basis for distinguishing different arguments. In later experiments, the experimenters explained the concept of validity to the participants. 12- to 13-year-olds could then understand and apply the concept of validity just as well as college students; indeed, their results were almost indistinguishable.³²

30. Though they may, by chance, have the appearance of rationality.

31. Henry Markovits and Robert Vachon, "Reasoning with Contrary-to-Fact Propositions," *Journal of Experimental Child Psychology* 47, no. 3 (1989), pp. 398-412; Deanna Kuhn and Robert S. Siegler, *Handbook of Child Psychology. Volume 2, Cognition, Perception, and Language*, 6th ed. (Hoboken, NJ: John Wiley, 2006), p. 962.

32. David Moshman and Bridget A. Franks, "Development of the Concept of Inferential Validity," *Child Development* 57, no. 1 (1986), pp. 153-65; Moshman, *Adolescent Psychological Development: Rationality, Morality, and Identity*, p. 15.

29. Paul A. Klaczynski, Mary J. Schuneman, and David B. Daniel, "Theories of Conditional Reasoning: A Developmental Examination of Competing Hypotheses," *Developmental Psychology* 40, no. 4 (2004), pp. 559-71.

Second, we can examine the ability to solve determinate and indeterminate syllogisms. When solving problems involving the most common determinate syllogisms (e.g. *modus ponens*, *modus tollens*), performance is very good by middle to late childhood at 75% accuracy, and is near ceiling level by adolescence.³³ For the most difficult determinate syllogisms, there is ‘no clear developmental change’ from the age of 8 onwards, with performance ‘remaining poor through adulthood’.³⁴ Therefore, there is no difference in the inferential abilities of adults and adolescents in solving determinate syllogisms.

In studies investigating the ability to solve indeterminate syllogisms, individuals are provided with premises that involve denying the antecedent or affirming the consequent. They are then asked whether they can infer a definite conclusion.³⁵ An argument that *affirms the consequent* provides the premises:

if p then q
 q

This argument ‘invites’ us (invalidly) to infer p as a conclusion. An argument that *denies the antecedent* provides the premises:

if p then q
not p

This argument ‘invites’ us to conclude (invalidly) that ‘not q ’. The correct answer is that we cannot infer a definite conclusion from either syllogism.³⁶ In general, mistakes in solving indeterminate syllogisms decrease with age. In their landmark study, Klaczynski et al. (2004) found correct indeterminate inferences were apparent only in the adolescent (12–14) and adult groups, with a small ability gap between those groups.³⁷

To summarise, young adolescents (12–14) are equivalent to adults in their understandings of validity and their ability to solve determinate syllogisms, but are slightly behind adults in their ability to solve indeterminate syllogisms. Older adolescents (15–16), however, have the same or similar logical abilities as adults.³⁸

5 Empirical Reasoning

5.1 Definition

Under ‘empirical reasoning’ I class together the technically separate cognitive abilities of inductive/causal reasoning and scientific reasoning/hypothesis testing.

Inductive/causal reasoning consists of three key components. (1) The ability to identify (potential) causes in multivariable contexts and understand the importance of isolating variables when making causal inferences. (2) The ability to coordinate prior expectations with new information. People who lack sufficient control over the interaction of theory and evidence in their thinking might ignore new evidence and base inferences on their prior theory; distort evidence; or selectively recognise only the data that fits their theory.³⁹ Finally, inductive/causal reasoning includes (3) the ability to make justified inductive inferences.

Scientific thinking is the ability to form basic experiments to test one’s hypotheses.⁴⁰ It involves the ability to solve problems across four phases: (i) the *inquiry* phase, where ‘the goals of the activity are formulated’ and ‘the questions to be asked are identified’.⁴¹ The various possible investigative strategies formed in the inquiry phase include, in increasing order of sophistication: just generate experimental outcomes; see what makes a difference in outcomes; investigate the effect of specific variables on outcomes. (ii) *Analysis*: one identifies relevant evidence and analyses it.⁴² (iii) *Inference* strategies involve applying mental operations to the evidence to derive conclusions from that evidence.⁴³ Inferential strategies range in adequacy from making unsupported claims without processing the evidence to skilled coordination of theory and evidence.⁴⁴ (iv) *Argument*, which I discuss in Section 7, involves the ability to construct arguments and deal with counterarguments. With argumentation abilities, one can explain and justify the claims produced by the earlier phases of scientific thinking. Hypothesis testing/scientific thinking, in sum, refers to the ability to form relevant, testable hypotheses; understand logically how to test those hypotheses; run valid tests to get relevant data; and draw valid inferences from that data.

33. Kuhn and Siegler, *Handbook of Child Psychology. Volume 2, Cognition, Perception, and Language*, p. 961. Also Klaczynski, Schuneman, and Daniel, “Theories of Conditional Reasoning: A Developmental Examination of Competing Hypotheses.”

34. Kuhn and Siegler, *Handbook of Child Psychology. Volume 2, Cognition, Perception, and Language*, p. 961; Klaczynski, Schuneman, and Daniel, “Theories of Conditional Reasoning: A Developmental Examination of Competing Hypotheses.”

35. Robert B. Ricco, “The Development of Reasoning,” in *Handbook of Child Psychology and Developmental Science. Volume 2, Cognitive Processes*, ed. Lynn S. Liben, et al. (Hoboken, NJ: John Wiley, 2015), pp. 525–26.

36. *Ibid.*, pp. 525–27.

37. Klaczynski, Schuneman, and Daniel, “Theories of Conditional Reasoning: A Developmental Examination of Competing Hypotheses,” pp. 566 and 533.

38. Moshman, *Adolescent Psychological Development: Rationality, Morality, and Identity*, p. 40.

39. Kuhn and Siegler, *Handbook of Child Psychology. Volume 2, Cognition, Perception, and Language*, p. 965; Deanna Kuhn, “Children and Adults as Intuitive Scientists,” *Psychological Review* 96, no. 4 (Oct 1989), pp. 674–89; Ricco, “The Development of Reasoning,” p. 556.

40. Deanna Kuhn, “What Is Scientific Thinking and How Does It Develop?,” in *The Wiley-Blackwell Handbook of Childhood Cognitive Development*, ed. Usha Goswami, 2nd ed. (Chichester: John Wiley, 2010); Bärbel Inhelder and Jean Piaget, *The Growth of Logical Thinking from Childhood to Adolescence: An Essay on the Construction of Formal Operational Structures*, trans. Anne Parsons and Stanley Milgram (London: Routledge and Kegan Paul, 1958).

41. Kuhn, “What Is Scientific Thinking and How Does It Develop?,” p. 505.

42. *Ibid.*, p. 506.

43. *Ibid.*; Kuhn and Siegler, *Handbook of Child Psychology. Volume 2, Cognition, Perception, and Language*, p. 973.

44. Kuhn, “What Is Scientific Thinking and How Does It Develop?,” p. 507.

5.2 Normative Significance

Normatively, empirical reasoning is important for rights that presuppose an ability to make judgments about the world. Most significantly, it enables individuals to apply means-ends reasoning.

Theoretically, empirical reasoning forms part of both moral powers. For the second moral power – the capacity to have, to revise, and rationally to pursue a conception of the good – it provides the ability ‘rationally to pursue’ that conception of the good. This is because ‘rational pursuit’ involves taking the best means to your ends, and means-ends reasoning requires empirical judgments. For example, if your stated goal is improved fitness, you need to work out empirically whether sitting on a sofa, eating cake or jogging will achieve that goal. Therefore, empirical reasoning is necessary for the two moral powers. Empirical reasoning has a second importance: it facilitates the formation of a conception of the good, understood as a family of ordered final ends, because it helps the individual to learn what ends are technically compatible and incompatible. For example, we might reason, empirically, whether it is possible to (a) enjoy rich foods, (b) stay slim and (c) avoid exercise. If we (alas) reason that these are incompatible, we are forced to rank and order these goals. For the first moral power, empirical reasoning is required for the means-ends reasoning needed to ‘apply’ principles of justice and, just as it facilitates trading-off personal preferences and goals, it facilitates trading-off and weighing moral values. Empirical reasoning, therefore, is a key component of each moral power.

Practically, means-ends reasoning is a prerequisite for the franchise on most accounts of voting, since most accounts require voters to understand/critique/propose practical policies. Means-ends reasoning may be unnecessary for the franchise under some theories: certain economic theories of voting, for example, only ask voters to reveal their ultimate preferences when voting;⁴⁵ other theories ask voters to reason exclusively on the moral plane, leaving means-ends judgments to technocrats.⁴⁶ Autonomy-based accounts, however, may rule out such technocratic forms of government as disrespecting voters’ capacity to reason empirically. Whatever may be required in the ideal democratic system, in the real world politics demands that voters assess practical policies and their likely effects. Since we must assess policies when voting, and since assessing policies requires reasoning empirically about their effects, empirical reasoning is necessary for voting.

5.3 Empirical Findings

Let’s first examine development in scientific reasoning and then development in inductive reasoning.

As discussed previously, scientific reasoning breaks down into four phases, each with its own modes of reasoning.

In the *inquiry* phase of investigation, preadolescent children tend to apply less sophisticated strategies than adults and adolescents. The most sophisticated investigation strategy is the ‘falsification strategy’, in which one formulates a hypothesis and attempts to disprove it. But when comparing adolescents and adults, it seems that they are both generally (in)capable of reasoning effectively in the inquire phase of reasoning: most adults and most adolescents fail to apply the falsification strategy.⁴⁷

With respect to *analysis* and *inference*, people in middle childhood (8–11) sometimes appear quite ready to interpret multiple variables as causing an outcome based on a single co-occurrence of the variable and the outcome, and empirical observations are used more to illustrate theories than test them.⁴⁸ Despite these weaknesses, there is only modest improvement between middle childhood (8–11) and early adulthood, with ‘far from ideal’ performance by adults. Among 11- to 12-year-olds, the proportion of beliefs in a test scenario based on evidence-based inferences (rather than erroneous theory-based inferences) was about 25%, compared with roughly 50% for non-college young adults. Following an evidence-focus probe (where testers ask participants questions like, ‘do these results tell you anything about whether X has an effect?’) these percentages increased to 60% and 80%, respectively.⁴⁹ And when interpreting some kinds of evidence, adults are just as likely to exhibit certain kinds of bias as 11- to 12-year-olds.⁵⁰ Kuhn et al. (1995) conclude that, for scientific reasoning, there is only ‘some improvement in the years between middle childhood and early adulthood’: individual variance is high and age-related improvements are small.⁵¹ It seems, therefore, that there is only a minimal difference between younger adolescents (12–14) and adults in the ability to reason scientifically.

Now turning to inductive/causal reasoning, we investigate the three components separately. (i) *Inductive inference*: we have already shown that adolescents and adults have roughly the same ability to make inductive inferences. (ii) Regarding the ability to *identify* and *isolate variables* in experiments, and understand why doing so is

45. E.g. Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* (Lanham, MD: Start Publishing, 2012); Kenneth Joseph Arrow, *Social Choice and Individual Values*, 3rd ed. (New Haven, CT; London: Yale University Press, 2012).

46. Max Weber, “Bureaucracy,” in *From Max Weber: Essays in Sociology*, ed. Hans Gerth and C. Wright Mills (Oxford; New York: Routledge, 2009a); “Politics as a Vocation,” in *From Max Weber: Essays in Sociology*, ed. Hans Gerth and C. Wright Mills (Oxford; New York: Routledge, 2009b).

47. Moshman, *Adolescent Psychological Development: Rationality, Morality, and Identity*, p. 17; Jonathan St B. T. Evans, *Bias in Human Reasoning: Causes and Consequences* (London: Erlbaum, 1989). Also Deanna Kuhn et al., “Strategies of Knowledge Acquisition,” *Monographs of the Society for Research in Child Development* 60, no. 4 (1995), pp. 1-127.

48. Kuhn, “What Is Scientific Thinking and How Does It Develop?,” esp. p. 508.

49. Kuhn and Siegler, *Handbook of Child Psychology. Volume 2, Cognition, Perception, and Language*, p. 966.

50. *Ibid.*

51. *Ibid.*

important, we have already shown that adolescents fully possess this ability. For the avoidance of doubt:

adolescents have the ability to form hypotheses in advance and to perform experiments that isolate variables.⁵²

(iii) *Coordinating theory and evidence*: individuals are considered incapable of adequate coordination if they are more likely to interpret evidence as valid when it is consistent with their previously held theories, and/or if they interpret identical evidence differently as a function of its consistency with their prior theory. In fact, people of all ages ignore and distort evidence that is discrepant with their prior beliefs.⁵³ And by adolescence, the rates of bias are identical to those of adults.⁵⁴ Indeed, as aggregate groups, adults have abilities equivalent, not only to adolescents, but also to people towards the end of middle childhood.⁵⁵

To summarise, there is no significant difference between adults and adolescents in their cognitive capabilities for empirical reasoning. This means we must respect adolescents' empirical beliefs and cannot deny them the vote on the grounds they reason differently from older citizens or hold different empirical beliefs than older citizens.

6 Decision-Making

6.1 Definition

Decision-making rationality has two main components: the ability to make sound preference judgments and the ability to make sound decision judgments. *Preference judgments* involve the abilities to (i) render one's preferences consistent;⁵⁶ and (ii) select appropriate choice strategies when applying preferences to concrete choices (e.g. deciding how to weight different preferences).⁵⁷ *Decision judgments* are about making decisions in accordance with sound decision-making principles and

avoiding decision fallacies, such as hindsight bias;⁵⁸ contingency bias;⁵⁹ outcome bias;⁶⁰ the gamblers' fallacy; and the sunk-cost fallacy.

6.2 Normative Significance

Theoretically, decision judgments and preference judgments are each important for the two moral powers. Preference judgments are important for possessing a 'conception of the good'. A conception of the good (required for the second moral power) specifies 'an ordered family of final ends and aims'. Since our preferences constitute some of our final ends and aims, and since preference judgments are necessary to 'order' those final ends, the ability to make preference judgments is necessary for the second moral power. However, the ability to make preference judgments is not sufficient for the individual to be able to reason about their preferences morally. Therefore, decision-making rationality does not entail a full-blown ability to hold, form and revise a conception of the good, although it is necessary for those abilities.

Second, decision judgments are important for the ability 'rationally to pursue' a conception of the good. 'Rational pursuit' of a goal involves both choosing the best means to your ends and actually applying that reasoning in a decision. After all, what is the use of means-ends reasoning if you cannot apply it to any concrete decision? Decision-making fallacies confound this application and lead us to make irrational and suboptimal decisions. Decision-making rationality enables us 'rationally to pursue' our conceptions of the good by helping us avoid those decision-making fallacies. By the same reasoning, decision-making rationality is necessary to apply moral principles in our decisions and is therefore necessary for the first moral power.

Practically, preference judgments are important for voting: someone who cannot render their preferences rational cannot have their preferences taken into account. When someone completely lacks the ability to render their preferences rational – even when their irrationality is pointed out to them – there is not even a *prima facie* reason to take their declared preferences into account. It is not clear what such a person is really expressing when declaring inconsistent/irrational 'preferences'. It is unclear whether such a person really has any preferences; and, even if they do, they seem unable to express or represent those underlying preferences. Decision-making rationality is therefore important for any right, such as voting, which presupposes that someone knows, and can express, their preferences. Therefore, decision-making ability is important for the right to vote because (i) it is a prerequisite for rights that require having and expressing at least minimally coherent

52. Fred Danner, "Cognitive Development in Adolescence," in *The Adolescent as Decision-Maker: Applications to Development and Education*, ed. Fred Danner and Judith Worell (San Diego; London: Academic Press, 1989), pp. xii, 320 pages. Also Moshman, *Adolescent Psychological Development: Rationality, Morality, and Identity*, fn 38.
53. Richard Lehrer and Leona Schauble, "The Development of Scientific Thinking," in *Handbook of Child Psychology and Developmental Science. Volume 2, Cognitive Processes*, ed. Lynn S. Liben, et al. (Hoboken, N.J.: John Wiley, 2015), p. 694.
54. Kuhn and Siegler, *Handbook of Child Psychology. Volume 2, Cognition, Perception, and Language*, p. 971. See also Ricco, "The Development of Reasoning," p. 536.
55. Kuhn and Siegler, *Handbook of Child Psychology. Volume 2, Cognition, Perception, and Language*, p. 966; Kuhn et al., "Strategies of Knowledge Acquisition"; Lehrer and Schauble, "The Development of Scientific Thinking," p. 695.
56. See John Von Neumann and Oskar Morgenstern, *Theory of Games and Economic Behavior* (Princeton, NJ: Oxford: Princeton University Press, 2004).
57. Yoella Bereby-Meyer, Avi Assor, and Idit Katz, "Children's Choice Strategies: The Effects of Age and Task Demands," *Cognitive Development* 19, no. 1 (2004), pp. 127-46.

58. Daniel Kahneman and Amos Tversky, "On the Reality of Cognitive Illusions," *Psychological Review* 103, no. 3 (1996), pp. 582-91.
59. Suzanne C. Thompson, "Illusions of Control: How We Overestimate Our Personal Influence," *Current Directions in Psychological Science* 8, no. 6 (1999), pp. 187-90.
60. Francesca Gino, Don A. Moore, and Max H. Bazerman, *No Harm, No Foul: The Outcome Bias in Ethical Judgments* (Harvard: Harvard Business School, 2009).

ent preferences; (ii) preference judgments are important for holding a conception of the good; (iii) decision judgments are required for the moral powers, so we can rationally apply our goals and principles.

6.3 Empirical Findings

Capon and Kuhn (1980) compared adults with four age groups (kindergarten, fourth grade, eighth grade and college). Subjects rated a product along different dimensions and said how important those different dimensions were. Subjects of all ages were likely to possess and express preferences along each individual dimension. The researchers then asked them to rank the products. Both adolescents and adults could integrate their preferences from two or more dimensions; younger children, however, tended to make product judgments on the basis of a single, constant dimension, ignoring other dimensions over which they had expressed preferences. Similarly, Bereby-Meyer et al. (2004) investigated the choice strategies participants employed when applying their preferences to choosing a product. 4- to 6-year-olds base their choices mainly on the perceptual features of a product. 8- to 9-year-olds could form more complex preferences, but when applying them to choices, they tended to use a lexicographic strategy, that is, only take the single most important attribute into consideration in their ranking. 9- to 13-year-olds could choose correctly between two alternatives (each with three attributes) by using the lexicographic and equal-weighting strategies flexibly. Generally, 12- to 13-year-olds could make preference judgments as well as adults.

There are a number of studies comparing adolescent and adult decision-making directly.⁶¹ When making decisions,

adolescents do not differ from adults in their competence, whether determined by their understanding of alternatives, the rationality of their reasoning, or the reasonableness of their choices.⁶²

In studies testing decision-making fallacies, 'older teens did not perform substantially worse, if at all inferior, to adults'.⁶³ And, in general, the picture is of 'modest improvement' through the teen years, with adults reaching only a 'very modest' level of decision-making rationality, with the average adult at least as likely (and often much more likely) to make incorrect judgments as cor-

rect ones in test scenarios.⁶⁴ Indeed, one survey of the material on competence of children suggested that the majority of people at 14 had similar decision-making capacities as adults.⁶⁵ Therefore, since 12- to 16-year-olds are about as likely to avoid decision-making errors as adults, we cannot treat adolescents differently on the basis of their decision-making rationality.

7 Argumentation

7.1 Definition

Broadly, argumentation skills are of two types, only one of which is a component of autonomy. The first, which we are interested in, is 'argument construction', which covers the cognitive abilities of producing justifications and counterarguments, and rebutting counterarguments. The second is 'argumentative discourse' or 'discourse strategies', which is about engaging in a dialogue in social contexts and about strategies to force concessions from opponents or challenge their key premises.⁶⁶ This second set of skills is not about constructing an argument, but about competitive debating and negotiation. While (as discussed later) mid and late adolescents possess argument construction abilities which are similar to adults', they lag behind in social discourse strategies. Specifically, in social discursive (or debate) scenarios, mid-adolescents are not as good as adults at selecting strategies to challenge opponents or defend their own position, at portraying the merits of opponents' positions, or at coordinating multiple perspectives in an argument.⁶⁷

Why are discourse strategies less normatively relevant to us here? For autonomy, as set out in Sections 2 and 3, individuals must be able to produce arguments (understood as chains of reasoning rather than performative debates) to generate and critique their conceptions of the good, conceptions of justice, and plans to pursue them. This basic ability to form autonomous plans does not require the debating skills, verbal dexterity and argumentative strategy required for 'argumentative/social discourse'. While debating may help individuals formulate their autonomous goals, it is not a core component of autonomy itself. Sure, on epistocratic or competence-based approaches to democracy, debating abilities may help improve the quality of democratic discourse. Then again, since debating skills are often linked to formal education, requiring that citizens be good

61. See Paul A. Klaczynski, "Analytic and Heuristic Processing Influences on Adolescent Reasoning and Decision-Making," *Child Development* 72, no. 3 (2001a), pp. 844-61 and "Framing Effects on Adolescent Task Representations, Analytic and Heuristic Processing, and Decision Making: Implications for the Normative/Descriptive Gap," *Journal of Applied Developmental Psychology* 22, no. 3 (2001b), pp. 289-309.

62. Gary B. Melton, "Are Adolescents People? Problems of Liberty, Entitlement, and Responsibility," in *The Adolescent as Decision-Maker: Applications to Development and Education*, ed. Fred Danner and Judith Worell (San Diego; London: Academic Press, 1989), p. 282. See also Gerald P. Koocher, Gary B. Melton, and Michael J. Saks, *Children's Competence to Consent* (New York: Plenum, 1983).

63. Kuhn and Siegler, *Handbook of Child Psychology. Volume 2, Cognition, Perception, and Language*, p. 977.

64. *Ibid.*

65. Schmidt and Reppucco, "Children's Rights and Capacities," p. 160.

66. See Mark K. Felton, "The Development of Discourse Strategies in Adolescent Argumentation," *Cognitive Development* 19, no. 1 (2004), pp. 35-37; Deanna Kuhn and Wadiya Udell, "The Development of Argument Skills," *Child Development* 74, no. 5 (2003), p. 1245.

67. I thank an anonymous reviewer for pressing this point. See Felton, "The Development of Discourse Strategies in Adolescent Argumentation," pp. 35-52; Deanna Kuhn and Wadiya Udell, "Coordinating Own and Other Perspectives in Argument," *Thinking & Reasoning* 13, no. 2 (2007), pp. 90-104; Kuhn and Udell, "The Development of Argument Skills."

debaters to have the vote may reduce the diversity of voices and hence the quality of democratic decision-making. In any case, the autonomy approach is less concerned with the quality of show debates and discussions. As such, so long as the individual can construct their own arguments to form a conception of the good, assess how to achieve it, etc. they are autonomous in the correct way. Therefore, the abilities of ‘argumentative discourse’ are less relevant for the autonomy account laid out here.

The psychological capacities that we are interested in are the skills of ‘argument construction’. These skills (which form the last phase of ‘scientific reasoning’ discussed previously) include generating and evaluating reasoned argument.⁶⁸ (i) Argument generation involves (a) offering valid supporting arguments for one’s opinions; and (b) envisioning and critiquing counterarguments to those opinions. (ii) Argument evaluation involves assessing the strength or soundness of arguments and counterarguments, and, importantly, being able to do this regardless of whether you independently disagree with the conclusion.

7.2 Normative Significance

There are two main ways argument construction is relevant for the franchise.

First, as mentioned in the previous sub-section, skills of argumentation are important for the ability to form reasoned views of the right and the good, and how to pursue them, by forming arguments for those positions, probing the weaknesses of those positions and considering alternative positions.

Second, argumentative ability is important for individuals to make decisions in scenarios where they rely on expert advice. Means–ends judgments are required for both moral powers. When we cannot make means–ends judgments ourselves, we must rely on the judgments of others. But to understand those judgments fully, and to weigh the reasons given for and against various options, we must be able to evaluate those expert judgments and opposing arguments. Such abilities facilitate the informed consent required to preserve autonomy. The argument for the normative importance of argumentative abilities in this sphere runs as follows:

- i. To be fully autonomous, we must understand (the reasons for and against) the decisions we make (i.e. our decisions must be based on informed consent).
- ii. Many decisions require specialised knowledge to understand the options, and this knowledge is (ordinarily) accessible only via expert advice.
- iii. For that advice to help us understand certain options, we must be able to understand and assess the reasons for/against those options (i.e. have argumentative capabilities).

Therefore:

68. Kuhn and Siegler, *Handbook of Child Psychology. Volume 2, Cognition, Perception, and Language*, p. 978. For discussion of different frameworks, see Lehrer and Schauble, “The Development of Scientific Thinking,” pp. 700-4.

- iv. To be fully autonomous when making specialised decisions, individuals require argumentative capabilities.

Premise (i) is true since, to make an autonomous decision, ‘one’s choice must be real; [thus] one must have at least a certain minimum education and information’.⁶⁹ If one lacks key information, then this acts as a hindrance to meaningful choice.⁷⁰ We do, for example, take (unwilful, non-negligent) ignorance as a defence for many crimes,⁷¹ and doctors are required to provide patients with information to help the patient make a decision.⁷² Premise (ii) is empirically true of many of the decisions we make in the political sphere, which depend on policy expertise or economic or scientific expertise etc. I also take (iii) to be true. When giving advice, experts usually provide us with certain options (even if one option is ‘do nothing’) and give reasons for and against each option; thus, giving advice involves providing reasons. Argumentative ability includes the ability to follow and critique those reasons. Therefore, to understand the advice of experts, we need argumentative abilities. Note that the capabilities in (iii) do not require strategic discourse, since when we read expert opinions or take expert advice, we are rarely in an adversarial scenario where we are trying to ‘win’ the argument. We merely need cognitive abilities to follow and critique those arguments. From (i) to (iii) it follows that, to be fully autonomous when making specialised decisions, individuals must be able to understand, follow and evaluate the advice (arguments) of others and hence require some level of argumentative ability.

If an individual lacks argumentative capabilities, and therefore cannot comprehend or assess the advice they are being given, then we would doubt their ability to make an informed decision. And if an individual is unable to make informed decisions, then we are not required, out of respect for autonomy, to respect their decisions, whether personal or political. Note that the concern here is not that individuals actually do possess that knowledge, but rather that they possess the ability (and opportunity) to gather that knowledge. On the flip side, if they possess this capacity and they can make autonomous and informed decisions, then we must respect their decisions out of respect for their autonomy.

7.3 Empirical Findings

As with the other stages of scientific reasoning described earlier, age is not an effective proxy at measuring development in persuasive and perspective-taking abilities; there is wide variability in individual abilities.⁷³ Argu-

69. Griffin, *On Human Rights*, p. 33.

70. Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics*, 7th ed. (New York: Oxford University Press, 2013), pp. 120-21.

71. *E.g. R v. G & R* [2003] 3 WLR House of Lords.

72. Jonathan Herring, *Medical Law and Ethics*, 5th ed. (Oxford: Oxford University Press, 2014), pp. 165-72.

73. Ruth Anne Clark and Jesse G. Delia, “The Development of Functional Persuasive Skills in Childhood and Early Adolescence,” *Child Development* 47, no. 4 (1976), p. 1013.

mentation, as explained earlier, is composed of (i) argument generation, which includes generating supporting arguments and considering counter-arguments; and (ii) argument evaluation. Let's take each in turn.

(1) Generation of supporting arguments. There is some slight difference between younger teenagers and adults here. '[O]n average about one-third of a teen sample' could offer 'a valid supporting argument for their claim[s] ... a percentage that increased only very modestly to near one half among adults'.⁷⁴ Therefore, there is some small difference between adults and young adolescents in generating supporting arguments. However, this difference in ability is eliminated by later adolescence and, anyway, chronological age between 12 and 60 is not a strong predictor of this skill.⁷⁵

(2) Consideration of counterarguments. In some studies on the topic, it was found that young adolescents concentrate their efforts on exposition of their own claims to the neglect of attending to their opponent's claims. Kuhn and Udell (2007) found that when adults and adolescents are asked to write arguments in favour of their position, about half of adults will attend to rebutting potential counterarguments, whereas a little under a third of 12- to 14-year-olds will do the same.⁷⁶ However, when their ability to consider counterarguments is tested directly, they are at near ceiling performance, meaning that an 'inability to generate arguments against an opposition position cannot be regarded as a major contributor' to their lower tendency to generate counterarguments.⁷⁷ They can 'attend to the other's argument ... when explicitly instructed to do so'.⁷⁸ Therefore, it seems that the differences between young teens and adults are explained by differences in argumentative strategy rather than in argument construction. Thus, adolescents do have the ability to consider counterarguments, even if, as a matter of strategic judgment, they often do not. Since we care about the possession of capabilities (rather than the second-order inclination to deploy them), it is possessing these first-order capabilities that matters for their autonomy. And indeed, contrary to their earlier results, Kuhn and Siegler (2006) find that young teens (12-14) and adults are equally likely to address both sides of the argument in an argumentative scenario.⁷⁹ Taking (1) and (2) together, overall:

the available research indicates only slight improvement during the adolescent years [from age 12] in the ability to produce sound arguments.⁸⁰

(3) Argument evaluation. For this, psychologists measure the bias towards those arguments whose conclusions you already agree with by measuring your tendency to miss deliberately planted mistakes in those arguments. Both adolescents and adults, 'exhibited a positive bias towards studies that portrayed their group favourably', and 'the extent of this bias did not diminish with age'. Indeed, 'on one indicator it in fact increased' with age!⁸¹ Thus, adolescents do not lag behind adults in their ability to evaluate arguments.⁸²

There is no difference in the argument construction abilities of adults and adolescents, and adolescents lag behind adults only in argumentative strategy. It also seems that many such skills can be improved through education and training.⁸³ Therefore, we cannot appeal to argumentative construction abilities as a basis for granting different rights to older adolescents (14-16) and adults.

8 Moral Reasoning

In this section, I examine development in moral reasoning. Moral reasoning is important for the two moral powers. The ability to reason in moral terms, and be motivated by that reasoning, implies and constitutes the first moral power, that is, the capacity to understand, to apply and to act from moral principles and principles of justice. Moral reasoning is also important for the second moral power, since the ability to reason morally also implies an ability to reason about the good. This can supply the last few pieces of the second moral power (the capacity for a conception of the good), namely, it supplies the ability to 'have' a conception of the good and a full ability to 'revise' it. The ability to *have* a conception of the good requires the ability to understand and internalise norms and principles about the good. An ability to *revise* a conception of the good requires the ability to reason in evaluative and normative terms, abilities that correspond to moral reasoning.

I first examine development in prosocial moral reasoning and then complex moral reasoning (which involves balancing social and personal goals with moral considerations). In each case, the results show that adolescents

74. Kuhn and Siegler, *Handbook of Child Psychology. Volume 2, Cognition, Perception, and Language*, p. 979.

75. *Ibid.*

76. Kuhn and Udell, "Coordinating Own and Other Perspectives in Argument," p. 100.

77. *Ibid.*, pp. 100-1.

78. Deanna Kuhn et al., "Arguing on the Computer: A Microgenetic Study of Developing Argument Skills in a Computer-Supported Environment," *Child Development* 79, no. 5 (2008), pp. 1310-28, 1311. Also Kuhn and Udell, "Coordinating Own and Other Perspectives in Argument."

79. Kuhn and Siegler, *Handbook of Child Psychology. Volume 2, Cognition, Perception, and Language*, p. 979. See also Deanna Kuhn, Victoria Shaw, and Mark Felton, "Effects of Dyadic Interaction on Argumentative Reasoning," *Cognition and Instruction* 15, no. 3 (1997), pp. 287-315; Mark Felton and Deanna Kuhn, "The Development of Argumentative Discourse Skill," *Discourse Processes* 32, no. 2-3 (2001), pp. 135-53.

80. Kuhn and Siegler, *Handbook of Child Psychology. Volume 2, Cognition, Perception, and Language*, p. 979.

81. *Ibid.*, p. 980.

82. See also Deanna Kuhn, "How Do People Know?," *Psychological Science* 12, no. 1 (2001), pp. 1-8, 5.

83. Kuhn, "What Is Scientific Thinking and How Does It Develop?," p. 512; Kuhn and Siegler, *Handbook of Child Psychology. Volume 2, Cognition, Perception, and Language*, pp. 981-82; Marion Goldstein, Amanda Crowell, and Deanna Kuhn, "What Constitutes Skilled Argumentation and How Does It Develop?," *Informal Logic* 29, no. 4 (2010), p. 379.

can reason morally in nuanced and sophisticated ways, and to the same level as adults.

8.1 Prosocial Reasoning

Prosocial moral reasoning is:

reasoning about moral dilemmas in which one person's needs or desires conflict with those of others in a context in which the role of prohibitions, authorities' dictates, and formal obligations is minimal.⁸⁴

Prosocial moral reasoning is not therefore looking at obedience to law or deference to authority but purely at interpersonal moral conflicts.⁸⁵ Empirically, it seems that from the age of 12 individuals reason using abstract moral principles and can reason in nuanced ways about distributive fairness, incorporating factors such as desert, talent, advantage and disadvantage.⁸⁶ These results are confirmed in a large, long-running longitudinal study into the development of prosocial moral reasoning in individuals aged 6–20 run by Eisenberg et al.⁸⁷ Interestingly, hedonistic (i.e. self-interested), direct-reciprocity (you scratch my back, I'll scratch yours) and approval-oriented (concern with social approval and acceptance) modes of moral reasoning, all of which declined through adolescence, stopped declining, and even increased slightly, in early adulthood. Overall, the results show that individuals from early adolescence can use the range of moral concepts and principles in their prosocial moral reasoning that are available to adults. And, indeed, the results suggest that adolescents are more willing to use more of those other-regarding moral concepts than individuals in early adulthood, when people become more concerned with social perceptions and social success relative to other moral concerns than at younger ages.⁸⁸

Indeed, even in tests of strong moral dilemmas that, unlike the prosocial scenarios, involve legal obligations and dictates of authority (e.g. can you steal medicine to save your sick wife?), adolescents and adults are at the same level of moral reasoning.⁸⁹ Preadolescent children often struggle in such scenarios and default to mere obedience to authority or to self-interested reasoning about the need to avoid punishment.⁹⁰ Such reasoning is especially common in young children, although adults can

also exhibit this level of reasoning.⁹¹ The crucial developmental transition away from such reasoning (and towards reasoning about relationships, virtues and societal level reasoning) generally occurs during the late elementary years and has occurred for most people, if not nearly everyone, by 13.⁹² And this level of reasoning is typical of both adults and adolescents.⁹³ The point is stated clearly by Melton, who, in his review, concludes that:

the evidence is overwhelming that in fact most adolescents do have the capability to act as citizens of the moral community.⁹⁴

8.2 Complex Reasoning

The previous sub-section described development in different modes of moral reasoning. Something else that develops across childhood is the ability to deal with more complex moral scenarios by coordinating the various morally and socially salient aspects of those scenarios. Nucci and Turiel (2009) investigated development in contextual moral decision-making and in how people coordinated different elements of moral decisions. They presented participants with three basic types of scenarios: direct harm (whether to hit another child); indirect harm (whether to return money to a child who unknowingly dropped it); and helping someone in need (whether to seek help for a child who falls and is injured). In each scenario, the researchers varied the cost of the moral action (i.e. whether it conflicted with the desires of the protagonist or was 'unconflicted') and the characteristics of the other child (whether they were simply a 'girl' or a 'boy', someone who had bullied the protagonist previously, or a vulnerable child). The study was conducted on 7- to 17-year-olds.⁹⁵

All participants agreed that hitting another child unprovoked would be wrong. In scenarios where the other child hits the protagonist first, about half of the children at each age thought that the protagonist had the right to self-defence, though the percentage of 10- to 14-year-olds claiming this right was higher than for 8- and 16-year-olds.

In the indirect harm scenario, someone unknowingly drops some money, and the protagonist must decide whether to return or keep the money. The participants

84. Nancy Eisenberg et al., "Prosocial Development in Late Adolescence: A Longitudinal Study," *Child Development* 66, no. 4 (1995), p. 1179.

85. Testing moral reasoning in hypothetical scenarios in which laws, authority and definite rules apply can mask the moral reasoning abilities of younger children. See Elliot Turiel, "The Development of Morality," in *Handbook of Child Psychology. Volume 3, Social, Emotional, and Personality Development*, ed. Nancy Eisenberg, 1 online resource (1 volume) (Hoboken, NJ: John Wiley, 2006), pp. 800, 824.

86. *Ibid.*, pp. 824-25.

87. Eisenberg et al., "Prosocial Development in Late Adolescence: A Longitudinal Study."

88. *Ibid.*

89. Daniel K. Lapsley, *Moral Psychology* (Boulder, CO: Westview Press, 1996), pp. 64-65, 78; "Moral Stage Theory," in *Handbook of Moral Development*, ed. Judith G. Smetana and Melanie Killen (Mahwah, NJ: Taylor and Francis, 2006), p. 49.

90. Lapsley, *Moral Psychology*, p. 68.

91. Anne Colby and Lawrence Kohlberg, *The Measurement of Moral Judgment / Vol.2, Standard Issue Scoring Manual* (Cambridge: Cambridge University Press, 1987).

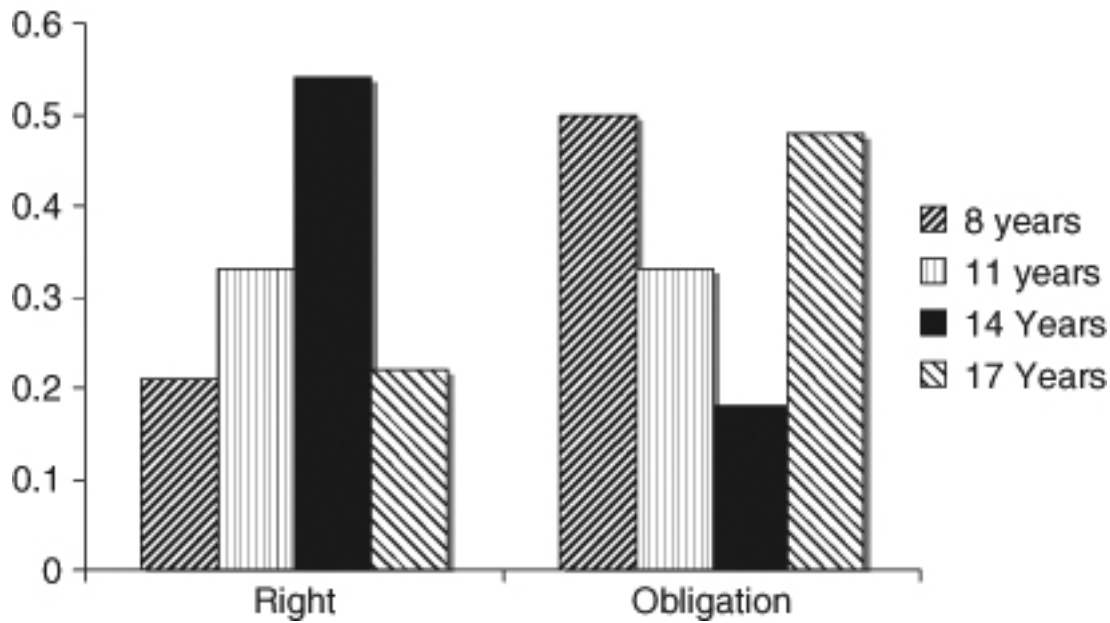
92. Lawrence Kohlberg and Carol Gilligan, "The Adolescent as a Philosopher: The Discovery of the Self in a Postconventional World," *Daedalus* 100, no. 4 (1971), pp. 1051-86.

93. There are, however, some adults who never move beyond pre-conventional reasoning. Moshman, *Adolescent Psychological Development: Rationality, Morality, and Identity*, pp. 48-49; F. Clark Power, Ann Higgins-D'Alessandro, and Lawrence Kohlberg, *Lawrence Kohlberg's Approach to Moral Education* (New York: Columbia University Press, 1989), pp. 29-30; Kohlberg and Gilligan, "The Adolescent as a Philosopher: The Discovery of the Self in a Postconventional World."

94. Melton, "Are Adolescents People? Problems of Liberty, Entitlement, and Responsibility," p. 282.

95. Larry Nucci and Elliot Turiel, "Capturing the Complexity of Moral Development and Education," *Mind, Brain, and Education* 3, no. 3 (2009), p. 153.

Figure 1 Right to keep money and obligation to help by age (Nucci and Turiel, 2009, p. 154)



were asked whether the protagonist had a ‘right’ to keep the money or had an obligation to return it. The results are shown in Figure 1. For 8-year-olds the situation poses little ambiguity: to keep the money is the same as stealing it from the passenger’s pocket. For the 14-year-old, however, the situation is more complex. Typical answers include:

74 he’s not necessarily doing something wrong [in keeping the money], but the right thing to do would be to give it back ... [it’s] not in the kid’s house or anything.

For the 14-year-old, the ambiguity of the situation suggests that keeping or returning the money is a matter of personal prerogative. This mode of reasoning is more nuanced and sensitive to the facts of the situation than the 8-year-old’s. By 16, most adolescents have resolved the ambiguity, seeing the situation as entailing a certain form of theft. They consider the indirectness of the theft to make it different from the act of intentional stealing, but they consider the protagonist’s knowledge that the money originally belonged to someone else to place moral constraints on them. When the moral salience of the situation was upped and the child dropping the money was described as vulnerable or disabled, nearly all the participants said the money should be returned.

In the helping scenario, a child falls and is injured. Nearly all participants thought it would be wrong not to help. However, in scenarios where providing help conflicts with the protagonist’s goals, or where the injured child had previously bullied the protagonist, 14-year-olds were less than half as likely as 8- and 16-year-olds to say the protagonist has an obligation to help. As with the other scenarios, the age-related pattern disappeared when the injured child was described as vulnerable. The results from the indirect harm and helping scenarios are represented in Figure 1.

This study shows that children and adolescents move from an early childhood set of judgments about unprovoked harm to notions of fairness and just reciprocity. Moreover, children become more able to incorporate multiple facets of moral situations; this then leads to periods of transition in which the expanded capacity to consider various aspects of moral situations leads to more variations in moral judgments. This is why we see the U-shaped patterns in the substantive answers to moral questions. Young children tend to focus on blunt moral aspects of the acts and are less likely to incorporate situational and non-moral features of the acts. The increased social and moral understandings of older children create more of a grey area in their minds, and hence a greater variability of answers. Older adolescents outperform their younger counterparts: early adolescents can spot and incorporate situational information; older adolescents can coordinate that information in ways that ‘afforded a moral resolution while acknowledging competing nonmoral interests’.⁹⁶ The results of this study show that, while individuals (as discussed earlier) from the age of 11 or 12 can reason using sophisticated moral principles, it is from the age of 16 that individuals can integrate and balance competing moral principles in complex or ambiguous moral dilemmas. Sections 4-8 together show that 16- to 17-year-olds have reached the threshold level of psychological development across all five of the core cognitive abilities needed for the two moral powers. As such, 16- to 17-year-olds possess the two moral powers and, with it, core autonomy.

96. *Ibid.*, p. 156.

9 Hierarchical Control and Impulsivity

In this final section, I address the claim that adolescents may be too impulsive to vote. One important element of autonomous decision-making is ‘hierarchical control’, understood here as the ability to think about and control one’s thoughts and motivations, and to regulate and control confounding internal factors, such as emotions, which can interfere with those mental processes needed for thought and action, and, in particular, the capacity to regulate and control the mental processes needed for the exercise of the two moral powers.⁹⁷ While this is not a component of core autonomy as set out in Section 2, it is a second-order power needed to enable the operation of those powers, and to ensure autonomous decision-making. If you lack this power, then, while you possess the ability to formulate rational goals and plans, emotionality and impulses may interfere with that reasoning and frustrate your ability to make properly autonomous decisions.

Although adolescents have reached adult levels of cognitive capacity latest by age 16, adolescents are not yet as developed as adults in psychosocial maturity (this is the psychological/behavioural expression of the neurological differences alluded to in p. 3).⁹⁸ ‘Psychosocial maturity’ actually refers to a wide range of abilities and propensities, such as risk-seeking, sensation/pleasure-seeking, future-discounting and compliance with peer groups.⁹⁹ A number of these are irrelevant to whether an individual has autonomy. It can be, for example, consistent with autonomous choice to be thrill-seeking (one can autonomously save money and plan for bungee-jumping or skiing trips). Similarly, one can autonomously take greater risks, prioritise current over future benefits or prioritise social inclusion over individuality. However, impulse control *is* relevant to the capacity to make one’s higher-order preferences and values effective in one’s actions. To the extent someone lacks control over their impulses, they lack that hierarchical capacity to pursue self-chosen goals and values. More precisely, *impulsivity* ‘refers to a lack of self-control or

deficiencies in response inhibition’,¹⁰⁰ and ‘the extent to which one acts without thinking [and] has difficulty controlling impulses’.¹⁰¹ Impulsivity leads to hasty, unplanned behaviour, which is not reflective of one’s autonomy.

In one of the key studies on impulsivity, Steinberg et al. (2008) find that impulsivity declines steadily and linearly from age 10 to 30.¹⁰² The development of impulse control seems to happen mainly in late adolescence and early adulthood. The 16- to 17-year-olds and the 18- to 21-year-olds in the study were significantly less impulsive than younger ages, but significantly more than the 22- to 25-year-olds or the 26- to 30-year-olds. These results are also found in other studies using different scales of impulsivity or measuring psychosocial maturity more broadly.¹⁰³ This suggests that while adolescents can make mature decisions in scenarios where cognitive capacity predominates, they may struggle in emotionally intense situations.¹⁰⁴ This could suggest that while adolescents should be treated as adults ‘for decisions typically made with deliberation’, this may not be appropriate for decisions ‘typically made in emotionally charged situations’.¹⁰⁵

Do these findings mean that teenagers should be denied the vote? Probably not. First, there is a case that although late adolescents have lower hierarchical control than older adults, they may not fall below the critical threshold needed for full autonomy. There is little difference between those 16- to 17-year-olds and 18- to 21-year-olds in Steinberg et al.’s study. And indeed, 25% of 14- to 15-year-olds have a level of psychosocial maturity above the mean for 26- to 30-year-olds.¹⁰⁶ But second, and more important, voting is not the kind of ‘hot’, or emotionally charged decision where lower hierarchical control matters, meaning that their lower hierarchical control does not disqualify them from this

97. On hierarchical accounts of autonomy, see Harry G. Frankfurt, “Freedom of the Will and the Concept of a Person,” in *The Inner Citadel: Essays on Individual Autonomy*, ed. John Philip Christman (New York; Oxford: Oxford University Press, 1989), pp. x, 267 pages, 73; Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988), p. 20.

98. G. Icenogle et al., “Adolescents’ Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a ‘Maturity Gap’ in a Multinational, Cross-Sectional Sample,” *Law and Human Behaviour* 43, no. 1 (2019), pp. 69-85; Laurence Steinberg et al., “Are Adolescents Less Mature Than Adults?: Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA ‘Flip-Flop,’” *The American Psychologist* 64, no. 7 (2009), pp. 583-94.

99. Steinberg et al., “Are Adolescents Less Mature Than Adults?: Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA ‘Flip-Flop,’” pp. 587-88.

100. Laurence Steinberg et al., “Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model,” *Developmental Psychology* 44, no. 6 (2008), p. 1765.

101. Steinberg et al., “Are Adolescents Less Mature Than Adults? Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA ‘Flip-Flop,’” p. 588.

102. Steinberg et al., “Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model,” pp. 1771, 1774. See also L. Steinberg et al., “Around the World, Adolescence Is a Time of Heightened Sensation Seeking and Immature Self-Regulation,” *Developmental Science* 21, no. 2 (2018).

103. See Adriana Galvan et al., “Risk-Taking and the Adolescent Brain: Who Is at Risk?,” *Developmental Science* 10, no. 2 (2007), pp. F8-F14 on 7- to 29-year-olds, and Rotem Leshem and Joseph Glicksohn, “The Construct of Impulsivity Revisited,” *Personality and Individual Differences* 43, no. 4 (2007), pp. 681-91 on 14- to 22-year-olds. Also Steinberg et al., “Are Adolescents Less Mature Than Adults? Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA ‘Flip-Flop’”; Laurence Steinberg and Elizabeth Cauffman, “Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making,” *Law and Human Behavior* 20, no. 3 (1996), pp. 249-72.

104. Icenogle et al., “Adolescents’ Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a ‘Maturity Gap’ in a Multinational, Cross-Sectional Sample.”

105. *Ibid.*, p. 70.

106. Steinberg et al., “Are Adolescents Less Mature Than Adults? Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA ‘Flip-Flop,’” p. 591.

right. Voting does not lend itself to the kinds of intense emotionality that some adolescents struggle with. Adolescents suffer from cognitive slippage in decision-making in scenarios such as acute hospitalisation, intoxication or under the stress of police questioning.¹⁰⁷ But voting is unlike those scenarios. In fact, voting is considered a typical case of ‘cold cognition’, where the final decision is made in the absence of high emotion.¹⁰⁸ After all, political decisions are taken after weeks, if not months, of political campaigning to give space to slow deliberation. The final decision itself is normally made in the sober atmosphere of a polling booth. Even if a decision is made ‘on the spur of the moment’, that does not mean that emotionality or impulse inhibited the exercise of reason.¹⁰⁹ Indeed, existing work on political decision-making among teenagers suggests that impulsivity does not affect their decision-making:

To date, there is no neurological evidence that indicates that 16- and 17-year-olds lack the requisite neurological maturation necessary for citizenship or for responsible voting.¹¹⁰

And in countries where 16- to 17-year-olds have been allowed to vote, the quality of their choices became similar to that of older voters, and there is

no convincing evidence that the voting decisions of voters under 18 are in any way of lesser quality ... than that of older groups of voters.¹¹¹

Quality of voter choice is here the level of ideological congruence between the voters and the party they vote for. This suggests that emotionality and impulsivity is not interfering with the connection between 16- and 17-year-olds’ political views and their decisions any more than it does for adults.

Therefore, although adolescents possess the full cognitive powers that constitute the two moral powers, impulsivity could indicate an autonomy-based reason for adolescents (especially younger adolescents) to have different rights or have their rights respected differently

from adults. But considering that (i) adolescents may not fall below the critical threshold of hierarchical control in general, (ii) voting does not usually involve the kind of emotionality that some teenagers struggle with, and (iii) the evidence suggests adolescent impulsivity is not a barrier to their political decision-making, it seems unlikely to indicate a reason that they should not vote.

10 Conclusion

This article has examined the normative grounds for the right to vote, and then seen empirically whether 16- and 17-year-olds meet the criteria to qualify for the franchise. I have advanced the view that respect for autonomy grounds the right to vote. Taking the Rawlsian two moral powers as the exemplar for autonomy, I laid out the psychological capacities that correspond to the two moral powers. Finally, I summarised findings from empirical psychology that suggest that 16- and 17-year-olds, and some younger adolescents, possess those two moral powers. From the evidence laid out above, it seems generally that there is little discernible difference in cognitive ability between (older) adolescents and adults. Examining their cognitive abilities as aggregate groups, it can be difficult to distinguish adolescents from adults.¹¹² Indeed,

cognitive differences among adolescents and adults are not related strongly to age ... [most adults] never proceed beyond the level of an average adolescent – and many adolescents function more rationally than an average adult.¹¹³

Therefore, 16- and 17-year-olds have a pro tanto right to vote. And while adolescents may have less hierarchical control than older adults, this does not disqualify from the franchise, first, because it is not clear they fall below a critical threshold and, second, because voting is not the kind of ‘hot’ decision where emotionality is a problem for the operation of core autonomy. However, the argument here has not definitely shown that the voting age should be lowered: it has not established the autonomy account, and if one rejected those accounts, then this argument to lower the franchise will not be convincing. Moreover, the argument here only provides a pro tanto moral right to vote for 16- and 17-year-olds. If there were, for example, significantly negative consequences to letting them vote, that might defeat this right (although the evidence from places they can vote do not suggest such negative consequences).¹¹⁴

So, since adolescents aged 16 and 17 (and quite probably those a little younger) possess the natural features required for autonomy, then, to the extent that respect for autonomy requires granting political rights including

107. On hospitalisation scenarios, see P. Harris and M.S. Lipian, “Understanding Emotion and Experiencing Emotion,” in *Children’s Understanding of Emotion*, ed. Paul L. Harris and Carolyn Saarni (Cambridge: Cambridge University Press, 1989), quoted in Carolyn Saarni et al., “Emotional Development: Action, Communication, and Understanding,” in *Handbook of Child Psychology. Volume 3, Social, Emotional, and Personality Development*, ed. Nancy Eisenberg (Hoboken, NJ: John Wiley, 2006), p. 277. Also Steinberg, “Adolescent Brain Science and Juvenile Justice Policymaking,” p. 411.

108. Icenogle et al., “Adolescents’ Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a ‘Maturity Gap’ in a Multinational, Cross-Sectional Sample,” p. 71.

109. It is important to distinguish impulsivity and spontaneity. A spontaneous action involves quick decisions made in light of higher-order goals. Impulsiveness, on the other hand, is characterised more by the absence of decision. The distinguishing feature of an impulse is that one has reduced control over whether to follow that impulse.

110. Hart and Atkins, “American Sixteen- and Seventeen-Year-Olds Are Ready to Vote,” p. 220.

111. Wagner, Johann, and Kritzinger, “Voting at 16: Turnout and the Quality of Vote Choice,” p. 380.

112. Moshman, *Adolescent Psychological Development: Rationality, Morality, and Identity*, p. 6.

113. *Ibid.*, p. 40

114. Peto, “Why the Voting Age Should Be Lowered to 16.”

the right to vote – and barring some special circumstances that apply only to them – 16- and 17-year-olds should be granted the right to vote.

What do the findings here imply for other rights? Generally, the findings suggest that for ‘cool’ decisions, which are not typically made in situations of intense emotionality, adolescents possess the same moral rights as adults. What that should mean for legal rights will depend on the right in question, and on a range of practical factors. For ‘hot’ decisions, the argument here still leaves open what the correct response is. Are adolescents above the critical threshold required for full adult rights? If not, do we deny them decisions in such scenarios or merely facilitate their decision-making? Such questions are left for further avenues of research.

Is the CJEU Discriminating in Age Discrimination Cases?

Beryl ter Haar*

Abstract

Claims have been made that the Court of Justice of the European Union (CJEU) is more lenient in accepting age discriminating measures affecting older people than in those affecting younger people. This claim is scrutinised in this article, first, by making a quantitative analysis of the outcomes of the CJEU's case law on age discrimination cases, followed by a qualitative analysis of the line of reasoning of the CJEU in these cases and concluding with an evaluation of the Court's reasoning against three theoretical approaches that set the context for the assessment of the justifications of age discrimination: complete life view, fair innings argument and typical anti-discrimination approach. The analysis shows that the CJEU relies more on the complete life view approach to assess measures discriminating old people and the fair innings argument approach to assess measures discriminating young people. This results in old people often having to accept disadvantageous measures and young workers often being treated more favourably.

Keywords: age discrimination, old people, young people, complete life view, fair innings argument

1 Introduction

Age is as discrimination ground included in Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation (further referred to as Framework Equality Directive or FED). Approximately twenty years on, there exists a substantive body of case law (I identified forty-eight cases for this article) from the Court of Justice of the European Union (CJEU). The vast majority of these cases concern older workers, whereas a much smaller number of cases deal with discrimination younger workers. Over the course of time the impression has grown that the CJEU is more lenient in justifying measures that are disadvantageous to older workers compared with measures nega-

tively affecting younger workers.¹ This study attempts to find out whether this impression is correct.

Towards this end I elaborate in Section 2 on age as discrimination ground and its regulation in EU law, including a discussion of theoretical approaches, *i.e.* complete life view and fair innings argument, underpinning the evaluation of age discrimination cases. Section 3 holds a quantitative analysis assessing how many cases the CJEU found to be precluded or not by the FED and whether there is a difference in numbers between the four age categories (old, young, middle-aged and other). If there is a significant difference between the age categories old and young, this could be a first indication that the Court might indeed be discriminatory. In Section 4 a qualitative analysis is made of the content of the cases identified in Section 3. The aim of the analysis is to identify the main reasons for the CJEU to conclude that a measure would be precluded by EU law or not. The analysis is done per age category. In Section 5 the outcome of the qualitative analysis is evaluated against the background of the theoretical approaches presented in Section 2 in order to determine whether the CJEU is indeed biased in its case law and has hence at least created the image of being discriminatory in age discrimination cases.

2 Age as Discrimination Ground in EU Law

When the Framework Equality Directive 2000/78/EC (FED) was adopted, it was not so evident to include age as discrimination ground as it currently seems to be. Distinctions made on the grounds of age are routinely accepted as dictated by common sense. For example, it is generally accepted that there is a minimum age for driving a car, drinking alcohol, voting, acting as a judge, etc.² Likewise, it seems commonly accepted that age limits are set to certain activities such as sports, modelling, etc. as well as certain jobs that require good physical health and strength, up to the fact that at a certain age working life ends. Furthermore, unlike discrimination on grounds such as gender, sexual orientation and race, age is a passing personal characteristic, giving rise to the argument for a more lax protection against

* Beryl ter Haar is assistant professor and academic coordinator of the Advanced LL.M. Global and European Labour Law at Leiden University and visiting professor at the University of Warsaw.

1. E.g. B.P. ter Haar and M. Rönmmar, *Intergenerational Bargaining, EU Age Discrimination and EU Policies – An Integrated Analysis*, Report for the project 'Intergenerational Bargaining Towards Integrated Bargaining for Younger and Older Workers in EU Countries (2014), at 25; and T. Gyulavári, 'Age Discrimination: Recent Case Law of the European Court of Justice', 14 *ERA Forum* 377 (2013).

2. M. Sargant, 'Young People and Age Discrimination', 2 *E-Journal of International and Comparative Labour Studies* 1 (2013).

discrimination on the grounds of age. The acceptance of age as a passing personal characteristic has consequences for how the discriminatory measures are being evaluated. This is not only reflected in the positive law of the FED, which allows for general justifications based on labour market-related issues,³ but also in theoretical approaches.

Two dominant theories in this context are: the complete life view and the fair innings argument.⁴ Both have the commonality that equality between individuals on the grounds of age should not be assessed at one particular moment in time (only) but across a whole lifetime (of work). In particular, McKerlie defined the complete life view in the following terms: '[D]ifferent people's share of resources, or welfare, should be equal when we consider the amounts of those things that they receive over the complete course of their lives.'⁵ This means that there will be no discrimination if over the course of a lifetime everyone is eligible for the same benefits and subjected to the same burdens.⁶ Therefore, it is acceptable or even necessary to accept less favourable treatment today, e.g. mandatory retirement or lower wage at the beginning of a career, which might be compensated by more favourable treatment received in the past or to be received in the future. The fair innings argument claims that sometimes we should discriminate on the grounds of age 'to avoid inequality or to achieve substantive equality between generations'.⁷ Effectively, this view favours a positive discrimination approach to ensure that the younger generation will get the same opportunities as the older generation has had. If, at a certain moment in time, both age groups (young and old) were treated the same, this may result in a permanent disadvantage to younger workers compared with the older workers who have lived and worked longer and, as such, have already acquired advantages the young could not yet.⁸

Both these approaches have been critiqued for falling short on certain aspects. One of these aspects is the fact that both approaches are based on a form of distributive inequality over the course of time; however, there are forms of age discrimination that may harm the dignity of a human being or a person's autonomy.⁹ This can particularly be the case when the age distinction is based on stereotypes.¹⁰ Therefore arguments have been made for a multidimensional approach that takes into account 'the full range of wrongs and harms potentially caused

by differences in treatment because of age'.¹¹ In her study about how the CJEU justifies age discrimination, Horton could identify neither a clear preference of the court for one of the approaches, nor a consequent full account of all the wrongs and harms caused by the discriminatory measure.¹² However, the three approaches, namely complete life view, fair innings argument and the typical anti-discrimination approach, can serve to clarify how the CJEU got its image that it is more lenient in accepting less favourable treatment of older workers and more strict in protecting young workers from age discrimination. In very general terms it could be stated that when the CJEU follows a complete life view approach both age groups have to accept disadvantageous treatments at times, whereas the fair innings argument would justify younger people being treated more favourably sometimes in order to create better opportunities for them that older workers already (could have) had. When more measures under the complete life view are accepted that negatively affect older workers than younger workers and when there are more measures under the fair innings argument that positively affect younger workers to the detriment of older workers, the overall picture is that younger workers are treated more favourably than older workers. This would confirm the image of the CJEU being discriminatory in age discrimination cases.

To find out what the CJEU is actually doing, a combination of qualitative and quantitative research methods is applied. First, an inventory is made of all the cases dealing with age discrimination. These are then ordered by age category, subject of the measure and whether the CJEU found that it would be precluded or not precluded by the FED. This will give a first impression of whether the CJEU precludes more measures that are disadvantageous to young people than to older people. Following this quantitative analysis is a qualitative analysis of the case law based on age category. The focus of the analysis will be on the main reasons for the CJEU to conclude whether a measure should be precluded by the FED or not. This means it will not be an analysis of how the CJEU dealt with cases in relation to the positive law of the FED. The analysis of the main reasons for precluding a measure from the FED or not will give an impression of what the underlying theoretical approach could have been. Understanding this will eventually lead to an evaluation of whether the CJEU is discriminating in age discrimination cases.

3 Quantitative Analysis of Age Discrimination Cases

Based on Article 18 FED, Member States had until December 2003 to implement the directive, with the option of extending this period by another three years,

3. Recital 25 preamble and Art. 6 FED.

4. Cf. R. Horton, 'Justifying Age Discrimination in the EU', in U. Belavusau and K. Henrard (eds.), *EU Anti-Discrimination Law Beyond Gender* (2018) 273, at 277-278.

5. D. McKerlie, 'Equality and Time', 99 *Ethics* 475 (1989).

6. Horton, above n. 4, at 277.

7. *Ibid.*

8. *Ibid.*

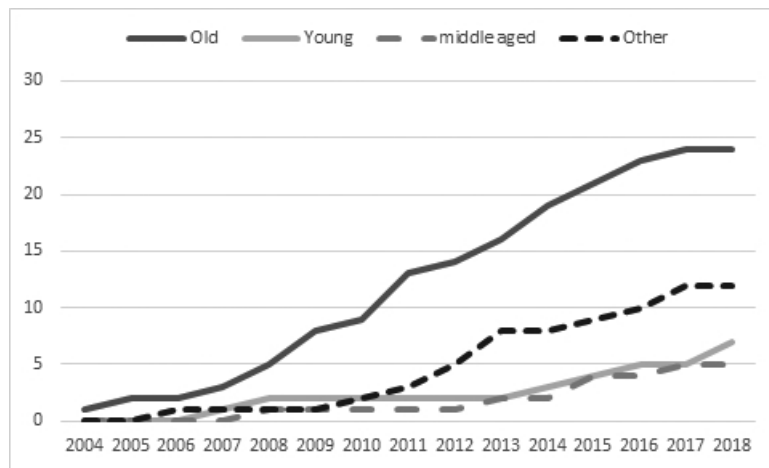
9. Horton, above n. 4, at 279. See also: S. Fredman, *Discrimination Law* (2011); and B. Hepple, 'Age Discrimination in Employment: Implementing the Framework Directive 2000/78/EC', in S. Fredman and S. Spencer (eds.), *Age as an Equality Issue: Legal and Policy Perspectives* (2003).

10. Horton, above n. 4, at 283.

11. *Ibid.*, at 280.

12. Horton, above n. 4.

Figure 1 Overview of cases on age discrimination dealt with by the CJEU



making a total of six years. Consequently, we find the first cases dealing with age discrimination only since 2004¹³ and a real increase in the number of cases after 2006, *i.e.* when the implementation period expired for all the Member States.

A search in Eurlex for cases based on the FED in general results in over seventy cases, more than half of which, forty-eight, deal with age discrimination.¹⁴ A further breakdown of the numbers by different age categories (old, young and middle-aged; and a rest category ‘other’) reveals that the majority of these cases concern older workers (twenty-four). We also see a slow increase in the number of cases concerning young people (seven) and merely five cases dealing with issues affecting middle-aged people. A rather surprisingly high number of cases (twelve) deal with issues that cannot be directly linked to a specific age category. The development of these cases over time is shown in Figure 1.

The large number of cases dealing with issues concerning older workers is clearly visible in Figure 1. By far the majority of these cases deal with issues related to retirement (see also Table 1). Cases dealing with issues concerning young people and middle-aged people seem to pick up pace from 2013. The cases in the latter group affect people who are distinguished from a younger group of workers since the divide often lies around the age of thirty or thirty-five; hence the qualification of ‘middle-aged’.

The last category of cases, ‘other’, is remarkably large, with twelve cases. Figure 1 shows a strong increase in cases of this kind after 2011. A brief glance at the content of these cases reveals that a good number of them is actually related to the CJEU’s judgment in the case

Hütter.¹⁵ This may be briefly explained as follows: in *Hütter* the CJEU ruled that a measure excluding work experience gained before the age of eighteen resulted in a difference in treatment between young people in the same age group and was therefore to be interpreted as being precluded by Articles 1, 2 and 6 of the FED.¹⁶ Following the ruling in *Hütter*, similar national measures, mainly from Austria and Germany, have been adjusted to end the discriminatory effect they had. In the cases dealing with these measures, questions have been raised as to whether the adjustments have sufficiently neutralised the (effects of the) previously existing discriminatory situation.¹⁷ Since these cases deal with transitional legislation they cannot be directly linked to a particular age category, and hence the categorisation as ‘other’.

In Table 1 the cases are listed by age category and subsequently by the subject of the measures that are challenged and the CJEU’s conclusion concerning whether the measure would be precluded or not by the FED. Before discussing the content of Table 1 a few preliminary remarks need to be made. A number of cases that are included in Figure 1 are not included in this table. *Werner Fries*,¹⁸ a case rather similar to *Prigge*, is excluded, because, even though it popped up in Eurlex by searching on the FED, it is actually based on Regulation (EC) No 216/2008, which deals with civil aviation safety in Europe. Case C¹⁹ is also not included because the CJEU concluded that the tax measure, which intended to create incentives for older workers to work longer, does not fall within the scope of the FED. Lastly, *Garda Síochána*²⁰ is not included because the CJEU was not asked to determine whether the national measure was discriminatory on grounds of age; instead it was asked

13. An exception is the case *Mangold*, which was dealt with before the implementation period had passed. Case 144/04 *Werner Mangold v. Rüdiger Helm*, [2005] ECR I- 09981.

14. Eurlex search dated 26 October 2019. There are more cases dealing with age discrimination that did not show up in this search since they are not based on the FED. For example, Case 619/18 *European Commission v. Republic of Poland* ECLI:EU:C:2019:531. Since the main topic of this article is about the CJEU’s attitude regarding justifications based on Art. 6 FED, such omissions do not affect this study.

15. Case 88/08 *David Hütter v. Technische Universität Graz*, [2009] ECR I-05325.

16. *Ibid.*, Rec 49.

17. For a more elaborate discussion of these cases see section 4.3.

18. Case 190/16 *Werner Fries v. Lufthansa CityLine GmbH* ECLI:EU:C:2017:513.

19. Case 122/15 *Proceedings brought by C.* ECLI:EU:C:2016:391.

20. Case 378/17 *The Minister for Justice and Equality and The Commissioner of the Garda Síochána v. Workplace Relations Commission* ECLI:EU:C:2018:979.

Table 1 Overview of topics by age category and outcome of the CJEU's rulings

Category	Topic	Rulings CJEU – measure precluded	
		Yes	No
Old	Mandatory retirement; fixed age for retirement; automatic termination	<i>Commission v. Hungary</i>	Palacios de la Villa; Age Concern; Petersen; Rosenblatt; Georgiev; Fuchs & Köhler; Hörnvelde
	Severance payment, etc. when at retirement age	<i>Ingeniørforeningen i Danmark; Dansk Jurist; Rasmussen</i>	<i>Odar; Ingeniørforeningen i Danmark v. Tekniq</i>
	Retirement irt physical requirements capabilities	Prigge	
	Age-related retirement contributions/limited entitlements to retirement schemes/other limitations related to retirement schemes		HK Denmark; Parris; Kleinsteuber; Felber
	Prohibition combining retirement pension with other incomes		Florescu; SCMD
	Older workers and fixed-term contracts	Mangold	Hubertus
Young	Age limitation on calculating years of experience/development of pay grades/salary reductions	Kücükdeveci; Hütter	Lesar; Escribano Vindel; Horgan and Keegan
	Access to severance/compensation payments		O.
	Special types of employment contracts limited to age		Abercrombie
Middle-aged	Maximum age for recruitment	Vital Pérez	Wolf; Salaberria Sorondo
	Access limitations based on age		De Lange
Other	Reclassification measures to correct previously discriminatory measures/transitional system to protect established advantages	Starjakob; Schmitzer; Leitner	Hennings and Mai; Specht e.o.; Stollwitzer; Unland; Österreichischer Gewerkschaftsbund
	Relative age issues		Bartsch
	non-specific age- and experience-related issues		Tyrolean Airways; Bowman
	Miscellaneous		Pohl

about procedural issues to ensure compliance with the FED.

When reviewing the content of Table 1 what stands out the most is that in all four age categories the CJEU has found that the FED would preclude and not preclude a national measure. Second, regarding many of the widely defined topics the Court finds both measures that can be justified and measures that cannot be justified. This is even the case for the first topic in the category ‘old’ (*i.e.* mandatory retirement; fixed age for retirement; automatic termination), albeit that out of eight cases the Court concluded only once that EU law would preclude the national measure, namely *Commission v. Hungary*.²¹

Keeping in mind the focus of this study (is the CJEU ruling more favourable to young people than older people?), it is particularly interesting to note that in the ‘young’ category the CJEU not only finds measures that would be precluded by EU law, but also those that would not be precluded. Moreover, when we transpose the information of Table 1 from absolute numbers into relative numbers (percentage) of measures to be precluded (yes) and not precluded (no) by the FED, there is hardly any difference between the categories (see Table 2).

21. Case 286/12 *European Commission v. Hungary* ECLI:EU:C:2012:687. As the name of the case suggests, this is not a request for a preliminary ruling by the CJEU, but an action by the Commission against the state

Hungary for failing to fulfil its obligations under Arts. 2 and 6 of the FED. For an elaborate discussion of this case, especially its political sensitivity, see U. Belavusau, ‘On Age Discrimination and Beating Dead Dogs: *Commission v. Hungary*’, 50 *Common Market Law Review* 1145 (2013).

Table 2 Outcome of CJEU rulings by absolute and relative numbers by age category

Category	Absolute numbers		Relative numbers (%)	
	Yes	No	Yes	No
Old	6	16	27	73
Young	2	5	29	71
Middle-aged	1	3	25	75
Other	3	9	25	75

Given the rather insignificant difference between the age categories, especially between old and young, quantitatively, the proposition that the CJEU is more lenient in accepting discriminatory measures affecting older workers than younger workers seems false. However, these are just numbers. In the next section an analysis of the content of the cases will be made with a focus on the CJEU's reasoning.

4 Qualitative Analysis of Age Discrimination Cases

In this section the content of the cases identified in Section 3 will be analysed. The analysis will be done by age category, starting with old, followed by young, other and middle-aged. The results of the analysis will be discussed in Section 5, where they will be evaluated in light of the theoretical approaches described in Section 2.

4.1 Analysis of the Cases in the Category 'Old'

As already indicated in Section 3, half of the age discrimination cases (twenty-four out of forty-eight) are found in the category 'old'. Many of the cases in this category have been elaborately discussed in the literature,²² especially those dealing with mandatory retirement,²³ which form the majority of cases in this category. Merely three cases deal with 'just' older workers and

fixed-term contracts. However, the cases *Georgiev*²⁴ and *Hubertus*²⁵ actually also deal with retirement, since they are about national measures that allow for the postponement of the retirement – in *Georgiev* via a limited number of one-year fixed-term contracts and in *Hubertus* (as understood by the CJEU²⁶) by changing one condition in the existing (permanent) employment contract, with half a year per time such as agreed upon by both parties.²⁷ The CJEU considered that such measures are not precluded by the FED because they take the entitlement to a pension as an alternative source of income into account.²⁸ Additionally, in *Georgiev* the Court concluded that age was not the only criterion,²⁹ and in *Hubertus* it considered that the measure could not even be considered unfavourable in the sense of Article 2(2) FED.³⁰ The third case is *Mangold*, and even though the implementation period of the FED had not expired yet³¹ the CJEU did consider the content. It concluded that the measure would be precluded by the FED since it was too generic, *i.e.* neither proportionate nor necessary, to achieve the aim. As such, the measure did not take into account the structure of the labour market or the personal situation of the person in question.³²

When we focus on the majority of the cases in this category, which deal with retirement, we can see that only five cases were found to be precluded by the FED versus fourteen cases that would not be precluded. With respect to two wide subjects related to retirement, *i.e.* measures related to access to retirement schemes and measures prohibiting the combination of retirement pensions with other incomes, all national measures challenged were found not to be precluded (see Table 1). In the cases *SCMD*³³ and *Florescu*,³⁴ the CJEU concluded

22. *E.g.* among many others: Gyulavári, above n. 1; M. Schmidt, 'The Principle of Non-discrimination in Respect of Age: Dimensions of the ECJ's Mangold Judgment', 7 *German Law Journal* 505 (2006); L. Waddington, 'Case C-411/05, Félix Palacios de la Villa v. Cortefi el Servicios SA, Judgment of the Court (Grand Chamber) of 16 October 2007', 45 *Common Market Law Review* 895 (2008); C. O'Conneide, 'The Growing Importance of Age Equality', 11 *The Equal Rights Review* 99 (2013); E. Dewhurst, 'Proportionality Assessments of Mandatory Retirement Measures: Uncovering Guidance for National Courts in Age Discrimination Cases', 45 *Industrial Law Journal* 60 (2016); and J. Fudge, 'Dignity, Disadvantage, and Age: Putting Constitutional and Fundamental Rights to Work for Older Workers', in A. Numhauser-Henning (ed.), *Elder Law. Evolving European Perspectives* (2017) 55.

23. *E.g.* Dewhurst, above n. 22; M. Schlachter, 'Mandatory Retirement and Age Discrimination Under EU Law', 27 *International Journal of Comparative Labour Law and Industrial Relations* 287 (2011); and A. Numhauser-Henning, 'The EU Ban on Age-Discrimination and Older Workers: Potentials and Pitfalls', 29 *International Journal of Comparative Labour Law and Industrial Relations* 391 (2013).

24. Joined cases 250/09 and 268/09 *Vasil Ivanov Georgiev v. Tehnicheski universitet - Sofia, filial Plovdiv*, [2010] ECR I-11869.

25. Case 46/17 *Hubertus John v. Freie Hansestadt Bremen* ECLI:EU:C:2018:131.

26. *Ibid.*, Rec 44-6.

27. *Ibid.*, Rec 12-3.

28. *Georgiev*, above n. 24, Rec 63; *Hubertus*, above n. 25, Rec 57.

29. *Georgiev*, above n. 24, Rec 62-3.

30. *Hubertus*, above n. 25, Rec 32.

31. Germany had opted for the six-year implementation period.

32. *Mangold*, above n. 13, Rec 65 and 78.

33. Case 262/14, *Sindicatul Cadrelor Militare Disponibilizate în rezervă și în retragere (SCMD) v. Ministerul Finanțelor Publice* ECLI:EU:C:2015:336.

34. Case 258/14, *Eugenia Florescu and Others v. Casa Județeană de Pensii Sibiu and Others* ECLI:EU:C:2017:448.

that the national measure did not fall within the scope of the directive, because the distinction made in the legislation concerns different treatment on grounds not covered by the directive.³⁵

In *Parris* the CJEU dealt with a measure fixing an age for the entitlement to a survivor's pension. Such measures are covered by paragraph 2 of Article 6 FED and therefore do not constitute discrimination on the grounds of age.³⁶ In *HK Denmark*³⁷ the CJEU concluded that the measure setting requirements for contributions to a pension scheme could be justified by a legitimate aim. Interestingly, the aim concerned older workers as well as younger workers, namely by relating the height of the contribution to age all workers, young and old, starting to work at Experian should be able to build up reasonable retirement savings;³⁸ this the CJEU also found appropriate and necessary. The Court initially seems to reflect in this ruling a fair innings argument but concludes with a complete life view. The aim is for both young and old to be able to build up reasonable retirement savings in the time left till retirement.

Interestingly, in the case *Kleinsteuber* the CJEU concluded that there is a situation of difference in treatment owing to a combination of measures that 'abstractly' could result in a disadvantage to employees who were 'young when the employment relationship started, the periods of service were short and the ceiling of reckonable years of service was set low'.³⁹ Mars (the employer in this case), argued, however, that owing to the application of *pro rata temporis*, in effect the outcome is not always to the disadvantage of younger workers, because the measure is based on the length of service and not age.⁴⁰ In its final conclusion the CJEU indicates that such a measure would not be precluded by the FED; hence, the Court here shows a clear appreciation of a measure based on the complete life view.

Another group of cases that deserves separate attention concerns entitlements to, among others, severance payments when also eligible for an old-age pension. In total, five cases have been raised with the CJEU. In three of them the Court concluded that the national measure was precluded by the FED, and in two it found that such was not the case (see Table 1). The common issue in these cases is that, in general, severance payments are intended for workers who are expected or have to remain active on the labour market. Such is presumed not to be the case with persons who are (also) eligible for

an old-age pension. Therefore, in general, the (legitimate) aim of national measures precluding persons eligible for an old-age pension from a form of severance payment is to prevent persons claiming a benefit they will not need. The problem with such measures, however, is that they also preclude older workers who wish to remain active on the labour market.⁴¹ Furthermore, such measures may drive persons into early retirement, resulting in a lower pension scheme compared with when they would have been able to remain on the labour market.⁴² When reviewing the CJEU's rulings in these cases it can be concluded that the Court consistently finds measures not accommodating the interest of the persons who are excluded from a form of severance payment to be precluded by the FED⁴³ and measures taking into account the specific position of the worker as not to be precluded by the FED.⁴⁴ Especially when the national measure, in the long run, results in a reduction of income compared with the same age group that was not affected by the measure, the Court finds the measure unjustifiable.⁴⁵ Here we see again a complete life view approach by the Court.

Most of the cases in this category, however, deal with measures that have linked age to (mandatory) retirement. In only two out of the eight cases did the CJEU find the national measure to be precluded by the FED. In the first case, *Prigge*, a clause in a collective agreement was challenged that fixed the age of sixty as the limit up to which persons are considered to possess the physical capabilities to (safely) carry out the profession of pilot.⁴⁶ The measure was tested against Articles 2(5), 4(1) and 6 FED but could not be justified by any of them. The age of sixty was considered to be too low to protect public security or the protection of health as provided for by Article 5(2) FED, since internationally it is set at sixty-five.⁴⁷ With respect to Article 4(1) FED, the CJEU considered that possessing certain physical capabilities could be considered a genuine job requirement; however, a strict interpretation thereof results in an assessment of the measure being disproportionate and therefore precluded.⁴⁸ Lastly, with respect to Article 6(1) FED, the CJEU concluded that the aim of the measure (air traffic safety) could not be considered as a legitimate aim recognised by the FED. This is remarka-

35. In *SCMD* the difference in treatment is based on a choice public sector employees can make for earlier retirement (Rec 24-25), and in *Florescu* the difference in treatment was based on different public sector professions (Rec 64-5). For an interesting comment on other aspects of the case see *Florescu*: M. Rocca, 'Florescu: A Memorandum of Understanding Finally Before the Court', 4 *International Labor Rights Case Law* 98 (2018).

36. Case 443/15 *David L. Parris v. Trinity College Dublin and Others* ECLI:EU:C:2016:897, Rec 73-76.

37. Case 476/11 *HK Danmark acting on behalf of Glennie Kristensen v. Experian A/S* ECLI:EU:C:2013:590.

38. *Ibid.*, Rec 58.

39. Case 354/16 *Ute Kleinsteuber v. Mars GmbH* ECLI:EU:C:2017:539, Rec 56.

40. *Ibid.*, Rec 58.

41. E.g. Case 515/13, *Ingeniørforeningen i Danmark v. Tekniq* ECLI:EU:C:2015:115 (not precluded); and Case 499/08 *Ingeniørforeningen i Danmark v. Region Syddanmark*, [2010] ECR I-09343 (precluded).

42. E.g. Case 546/11 *Dansk Jurist- og Økonomforbund, acting on behalf of Erik Toftgaard v. Indenrigs- og Sundhedsministeriet* ECLI:EU:C:2013:603.

43. *Ingeniørforeningen i Danmark v. Region Syddanmark*, above n. 41, Rec 44-8; Case 441/14 *Dansk Industri (DI), acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen* ECLI:EU:C:2016:278, Rec 25-7; and *Dansk Jurist*, above n. 42, Rec 55, 62 and 72.

44. Case 152/11, *Johann Odar v. Baxter Deutschland GmbH* ECLI:EU:C:2012:772, Rec 48 and 53; *Ingeniørforeningen i Danmark v. Tekniq*, above n. 41, Rec 27 (not unreasonable) and 37-9.

45. E.g. *Ingeniørforeningen i Danmark*, above n. 41, Rec 46.

46. Case 447/09 *Reinhard Prigge and Others v. Deutsche Lufthansa AG*, [2011] ECR I-08003, Rec 14.

47. *Ibid.*, Rec 63.

48. *Ibid.*, Rec 75-6.

ble, because, in general, the CJEU is very lenient in accepting an aim as legitimate,⁴⁹ especially when it is set by social partners.⁵⁰ In *Prigge* the CJEU considered it too wide a stretch to accept ‘air traffic security’ as an aim related to employment policy, the labour market or vocational training.⁵¹ It seems that in this case the CJEU followed a more typical anti-discriminatory approach. In *Petersen*⁵² the CJEU considered that sixty-eight ‘may be regarded as sufficiently high to serve as the endpoint [...]’.⁵³ Furthermore, unlike in *Prigge* the measure could be justified by a number of legitimate aims that were not related to the capacity of the person to perform the profession.⁵⁴ For example, consideration was given to the situation of the (regional) labour market and control of the public health sector expenditure.⁵⁵ These reflect considerations that fit with the complete life view.

The second case in which the CJEU concluded that the national measure would be precluded by the FED is *Commission v. Hungary*.⁵⁶ The challenged legislation lowers the age of mandatory retirement from seventy to sixty-two for judges, prosecutors and notaries. The aim of the legislation is, first, to standardise the rules relating to retirement for all persons and, second, to facilitate the entry of young lawyers into the judicial system with a view to establishing a ‘balanced age structure’.⁵⁷ The Court, following its previous case law in granting Member States a broad margin of discretion in defining legitimate aims, considers both as a legitimate aim falling within the scope of Article 6 FED.⁵⁸ However, the Court finds the measure to be not necessary since it does not take into account the interests of the persons affected by the measure because the transposition period allows them ample time to prepare to leave office.⁵⁹ This is very clearly a fair innings argument.

All other cases were considered not to be precluded by the FED. These cases share the commonality that, in general, the national measures took into account the situation of older workers, either by providing them with a choice to retire or to continue to work after retirement age⁶⁰ or by taking into account the labour market situation.⁶¹ Most importantly, it was considered by the CJEU that the workers were entitled to alterna-

tive income, *i.e.* old-age pensions.⁶² What is of concern is not the exact amount of the pension but having access to an alternative income.⁶³ Other than some of the cases addressed previously,⁶⁴ in these cases there were no issues of unequal treatment with respect to the alternative income that would put these workers at a disadvantage compared with other workers of the same age group. All this reflects a complete life view, especially the fact that there is an acceptance that there is an end to working life and that this is acceptable for as long as the worker has been able to maximise his welfare, *i.e.* to the same pension as he would have received without the measure.

4.2 Analysis of the Cases in the Category ‘Young’

As already established in Section 3, quantitatively, out of the seven cases in this category, only two cases were considered to be precluded by the FED, whereas the other five cases were not to be precluded.

One of the cases not to be precluded by the FED is the case *O*.⁶⁵ The CJEU dismissed this case as being non-discriminatory, because the young person, O, was not in a comparable insecure employment position after the expiry of his fixed-term contract as other, older, workers.⁶⁶ Another case the CJEU found not to be precluded by the FED is *Abercrombie*,⁶⁷ which deals with the use of on-call contracts for young people up to the age of twenty-five, after which the contract is automatically terminated. The legitimate aim underpinning the Italian measure is to create a situation in which employers are encouraged to hire young persons in order to offer them opportunities to gain work experience that would create a springboard for young people to new, more permanent, employment opportunities.⁶⁸ The CJEU was sympathetic to the arguments of the Italian Government that such a measure is necessitated by persistent economic crisis and weak growth.⁶⁹ Moreover, the Court considered that being employed and gaining work experience is preferable over being unemployed when the flexibility of on-call contracts would not be offered. Hence, the Court concluded that the measure would not be precluded by the FED.⁷⁰ The arguments in both these cases reflect a typical fair innings argument approach.

49. Cf. B.P. ter Haar, ‘EU Age Discrimination Law: A Curse of a Blessing for EU Youth Policy’, in U. Belavusau and K. Henrard (eds.), *EU Anti-Discrimination Law Beyond Gender* (2018) 295, at 306. See also: Case 411/05 *Félix Palacios de la Villa v. Cortefiel Servicios SA*, [2007] ECR I-08531, Rec 68.

50. *Odor*, above n. 44, Rec 47, with reference to Case 141/11 *Torsten Hörmfeldt v. Posten Meddelande AB* ECLI:EU:C:2012:421, Rec 32.

51. *Prigge*, above n. 46, Rec 81-2.

52. Case 341/08 *Domnica Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, [2010] ECR I-47.

53. *Ibid.*, Rec 52.

54. *Ibid.*, Rec 78.

55. *Ibid.*, Rec 63 and 72-3.

56. *Commission v. Hungary*, above n. 21.

57. *Ibid.*, Rec 28-31.

58. *Ibid.*, Rec 61-63.

59. *Ibid.*, Rec 72.

60. Joined cases 159/10 and 160/10 *Gerhard Fuchs and Peter Köhler v. Land Hessen*, [2011] ECR I-06919; and *Hörmfeldt*, above n. 50.

61. *Petersen*, above n. 52.

62. *Palacios de la Villa*, above n. 49; Case 388/07 *The Queen, on the application of The Incorporated Trustees of the National Council for Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform*, [2009] ECR I-01569; Case 45/09 *Gisela Rosenblatt v. Oellerking Gebäudereinigungsges. mbH*, [2010] ECR I-09391; *Fuchs & Köhler*, above n. 60; and *Hörmfeldt*, above n. 50.

63. *Palacios de la Villa*, above n. 51, Rec 73; and *Rosenblatt*, above n. 62, Rec 73-76.

64. Especially the Danish cases *Ingeniørforeningen i Danmark*, above n. 43, *Dansk jurist*, above n. 44, and *Rasmussen*, above n. 43.

65. Case 432/14 *O v. Bio Philippe Auguste SARL* ECLI:EU:C:2015:643.

66. *Ibid.*, Rec 35.

67. Case 143/16 *Abercrombie & Fitch Italia Srl v. Antonino Bordonaro* ECLI:EU:C:2017:566.

68. *Ibid.*, Rec 33-4.

69. *Ibid.*, Rec 42.

70. *Ibid.*, Rec 47.

The remaining five cases in this category deal with (some form of advancement in) pay grades often in relation to the calculation of years of experience. The rulings of the CJEU in these cases vary with two cases to be found as being precluded by the FED and three cases not being precluded (see Table 1). From the cases, in the latter group *Lesar*⁷¹ is rather comparable to *Parris* since it concerned an issue of fixing an age for admission or entitlement to a pension scheme. In *Lesar*, unlike in *Parris*, access to the pension scheme is directly based on age, which results in a disadvantageous treatment of young people.⁷² However, as in *Parris*, the difference in treatment falls within the exception covered by paragraph 2 of Article 6 FED.⁷³

The other two cases, *Escribano Vindel*⁷⁴ and *Horgan & Keegan*,⁷⁵ are rather similar and seem rather typical for the financial crisis of 2008, which forced a number of EU Member States to make major financial cutbacks in the public sector.⁷⁶ Both deal with a lowering of the pay grade of judiciaries and of teachers, respectively. In *Escribano Vindel* it was argued that the measure affected young judiciaries more than older. However, following the arguments of the Spanish government,⁷⁷ the CJEU concluded that there was no issue of age discrimination, firstly, because the position of ‘ordinary’ judge is open for persons up to the age of retirement and, secondly, because there exists no obligation to move to higher judiciary positions. Moreover the Court found no evidence that a certain age group is more affected by the measure than other groups; neither by age nor by length of service.⁷⁸ In *Horgan & Keegan* the challenged Irish law reduced the pay by 10% for all new entrants into the public service, including newly appointed teachers, on or after 1 January 2011.⁷⁹ Even though it was clear that the majority of the new recruits were younger than twenty-five, the CJEU found that the date of 1 January 2011 as a distinguishing criterion is neither inextricably nor indirectly linked to age – especially since the age profile of the cohort of new entrance did not differ much from the cohort of entrance before the regime change.⁸⁰ The Court’s reasoning in *Escribano Vindel*

reflects a complete life view. In *Horgan & Keegan* it is not really possible to distinguish a certain approach, if any it could be the complete life view, since there is clearly no link to the fair innings argument, nor is there any sign of consideration of the harm the measure may cause for the young workers affected by the measure.

A commonality in the remaining two cases in this category, *Küçükdeveci*⁸¹ and *Hütter*,⁸² is that age is used as a determinant in the calculation of years of service – in *Küçükdeveci* to determine the notice period and in *Hütter* to exclude years of work experience gained before the age of eighteen. Another thing they have in common is that the national measures resulted in a difference in treatment between persons in the same age group. More particularly, the measure in *Küçükdeveci* served several aims, such as a longer notice period for workers over forty, a progressive extension of the notice period for all workers, and an age threshold of twenty-five in order to give employers a relief from lengthy notice periods for young workers.⁸³ The underlying idea was that younger workers are more flexible in finding new employment and therefore would not need lengthy notice periods and that a shorter notice period for younger workers would facilitate their recruitment as employers would be more willing to hire them.⁸⁴ While the measure serves a legitimate aim covered by Article 6 FED, the CJEU found it inappropriate since it would result in unequal treatment between young workers, in that those who entered the labour market at a young age would be disadvantaged compared with those who entered the labour market at an older age.⁸⁵ The measure in *Hütter* excluded work experience gained before the age of eighteen. Given the educational system in Austria, this would mean that students who gained work experience during an apprenticeship before the age of eighteen would not count, whereas it would count when the apprenticeship was taken after the age of eighteen. At what age the apprenticeship was done depended on the type of education chosen: vocational training or secondary education. The measure thus resulted in unequal treatment between young people based on the type of education, *i.e.* secondary education or vocational training. Consequently, the measure would negatively influence their starting position on the labour market. In both cases, thus, the CJEU concluded that the effect of the measure was that the disadvantaged group would be permanently be excluded from future opportunities, resulting in substantive inequality within the same age group. This reflects the fair innings argument.

4.3 Analysis of the Cases in Category ‘Other’

Many of the cases in this category are related to the CJEU’s ruling in *Hütter*, which resulted in adjustments of several measures, especially in Austria and Germa-

71. Case 159/15, *Franz Lesar v. Beim Vorstand der Telekom Austria AG eingerichtetes Personalamt* ECLI:EU:C:2016:451.

72. *Ibid.*, Rec 21, with reference to *Hütter*, above n. 15, Rec 38.

73. *Lesar*, above n. 71, Rec 31.

74. Case 49/18 *Carlos Escribano Vindel v. Ministerio de Justicia* ECLI:EU:C:2019:106.

75. Case 154/18 *Tomás Horgan and Claire Keegan v. Minister for Education & Skills and Others* ECLI:EU:C:2019:113.

76. See in general: special issue of the *Industrial Law Journal*, 41(3) (2012); and F. Vandenbroucke, C. Barnard & G. De Baere (eds.), *A European Social Union after the Crisis* (2017). More specifically related to the cases addressed here, among others: A. Baylos and F. Trillo, ‘Social Dimension of European Union and the Situation of the Labour Law in the Member States: Evaluation of the Spanish Experience’, *Revista de Evaluación de Programas y Políticas Públicas* Num 1 54 (2013); and E. Achtsioglou and M. Doherty, ‘There Must Be Some Way Out of Here: The Crisis, Labour Rights and Member States in the Eye of the Storm’, *20 European Labour Law Journal* 219 (2014).

77. *Escribano Vindel*, above n. 74, Rec 76.

78. *Ibid.*, Rec 49, 56 and 58.

79. *Horgan & Keegan*, above n. 75, Rec 5.

80. *Ibid.*, Rec 26.

81. Case 555/07 *Seda Küçükdeveci v. Swedex GmbH & Co. KG*, [2010] ECR I- 00365.

82. *Hütter*, above n. 15.

83. *Küçükdeveci*, above n. 81, Rec 34.

84. *Ibid.*, Rec 39.

85. *Ibid.*, Rec 42.

ny.⁸⁶ As briefly addressed in Section 3, these cases cannot be linked to a particular age category because it concerns transitional legislation that aims to correct a previously discriminatory measure. What these measures have in common is that they aim to protect the acquired rights and legitimate expectations of workers that were favoured under the previously discriminatory legislation. This from the principle that changes in the legislation to correct a wrongdoing should not be to the detriment of the workers who were previously not in a disadvantaged position.⁸⁷ To illustrate the reasoning of the CJEU in these cases, two cases will be addressed in more detail: *Schmitzer*⁸⁸ and *Specht e.o.*⁸⁹

Schmitzer concerns an Austrian transitional measure that purported to serve several aims: objectives of procedural economy, respect for acquired rights and the protection of legitimate expectations, and budgetary constraints.⁹⁰ With respect to the last aim, the CJEU referred to its judgment in *Fuchs & Köhler*⁹¹ and argued that, similarly to private businesses, budgetary issues of administrative nature ‘cannot in themselves constitute a legitimate aim within the meaning of Article 6(1) of Directive 2000/78’.⁹² With regard to the acquired rights and the protection of the legitimate expectations, the Court considered that these could constitute a legitimate aim that can justify the maintenance of different treatment in a transitional period.⁹³ However, even though the measure in this case preserves the acquired rights and legitimate expectations of the civil servants who will not be subject to the new advancement rules (especially the five-year period for the first advancement instead of two years under the previous rules), it cannot justify a measure that maintains the age-based difference in treatment.⁹⁴ Such a measure ‘is not appropriate for the purpose of establishing a non-discriminatory system for civil servants who were disadvantaged by that previous system’.⁹⁵

In *Specht e.o.* the CJEU had to consider national legislation that introduced a new remuneration system for civil

servants to correct a previously discriminatory wrong. The starting point for further advancement within the new system, however, was based solely on the amount of pay under the old system. Consequently, the civil servants that were treated less favourably by the previous system would start at a disadvantage in the new system. The new system compensates partly for the disadvantage because all civil servants would be entitled to one additional (transitional) step based on which they would then be placed into the new pay step that corresponds the closest with an additional round-up of the pay to that step. Although this means an advancement for all civil servants, the effect of the previous discriminatory rule is not neutralised completely.⁹⁶ Similarly to *Schmitzer*, the Court acknowledged that preserving acquired rights can be a legitimate aim as an ‘overriding reason in the public interest’.⁹⁷ Moreover, the CJEU found the measure appropriate also because without it many civil servants would have incurred a loss in salary equivalent to one step (*i.e.* 80–150 EURO).⁹⁸ The Court also considers the measure necessary, among other reasons, because of the administrative burden if, retrospectively, the position of every civil servant would have to be reviewed individually. Second, for as far as there would still be some differences, these would fade away after a few years since the transitional measure provided in a more favourable repositioning in the wage-scale.⁹⁹

What we can get from these two cases is that the CJEU is sensitive to the argument that the transitional measure aims to preserve acquired rights by those that were favoured by the previous measure. Therefore, the transitional measure does not have to completely neutralise the discriminatory effect of the previous measure (*Specht e.o.*); however, there is a margin that needs to be observed. In *Schmitzer* the transitional measure clearly exceeded that margin, since it maintained the difference in treatment on the grounds of age, and, moreover, it actually created a new difference of treatment that could directly be related to age. Since these cases are based on the *Hütter* ruling, in which the Court clearly reflected a fair innings argument, the same is found here: it is all about creating substantive equality in order to provide all persons with equal opportunities in working life.

The cases *Pohl*¹⁰⁰ and *Starjakob*¹⁰¹ are also related to *Hütter* since they too deal with transitional national measures to correct a previously unjustifiable discriminatory measure. The issue addressed in these cases, however, is not the correcting measure itself, but the periodic limitations to reassess accrediting periods for

86. *E.g.* Case 24/17 *Österreichischer Gewerkschaftsbund, Gewerkschaft Öffentlicher Dienst v. Republik Österreich* ECLI:EU:C:2019:373, Rec 11.

87. Cf. Joined Cases 501/12 to 506/12, 540/12 and 541/12 *Thomas Specht and Others v. Land Berlin and Bundesrepublik Deutschland* ECLI:EU:C:2014:2005, Rec 64, with reference to Case 456/05 *Commission v. Germany* ECLI:EU:C:2007:775, Rec 63.

88. Case 530/13 *Leopold Schmitzer v. Bundesministerin für Inneres* ECLI:EU:C:2014:2359.

89. *Specht a.o.*, above n. 87.

90. *Schmitzer*, above n. 88, Rec 39 and 40.

91. *Fuchs & Köhler*, above n. 62, Rec 73-4.

92. *Schmitzer*, above n. 88, Rec 41.

93. *Schmitzer*, above n. 88, Rec 42, with reference to joined cases 297/10 and 298/10 *Hennings and Mai* ECLI:EU:C:2011:560, Rec 90-1.

94. Owing to the change in the period for first advancement from two years to five years, civil servants who were disadvantaged under the previous system and who opted for a reassessment of their advancement under the new system would again be discriminated against in relation to the favoured group because the first advancement period for the disadvantaged civil servants would be three years longer, putting them again at a disadvantage compared with the same group of civil servants.

95. *Schmitzer*, above n. 88, Rec 44.

96. *Specht a.o.*, above n. 88, Rec 53-8.

97. *Ibid.*, Rec 64, with reference to Case 456/05 *Commission v. Germany* ECLI:EU:C:2007:755, Rec 63 and *Hennings and Mai*, above n. 93, Rec 90.

98. *Specht a.o.*, above n. 88, Rec 65-7.

99. *Ibid.*, Rec 80-3.

100. Case 429/12 *Siegfried Pohl v. ÖBB Infrastruktur AG* ECLI:EU:C:2014:12.

101. Case 417/13 *ÖBB Personenverkehr AG v. Gotthard Starjakob* ECLI:EU:C:2015:38. This case also dealt with a newly adopted measure that aimed to right a previously unjustifiable discriminatory measure. The newly adopted measure was found discriminatory as well.

advancement. Pohl's request for a reassessment of his periods of service that should have been taken into account for his advancement on the salary scale was refused because the statutory period of thirty years starting from the moment the employment contract commenced had elapsed. The CJEU clarified that whether the starting point of a limitation period would be changed was a matter for national law and that

the fact that the Court may have ruled that the breach of European Union law has occurred generally does not affect the point at which that period starts to run.¹⁰²

The Court repeated this in *Starjakob*.¹⁰³ Again, since these cases are about creating substantive equality by correcting the effects of a previously discriminatory measure, these fit with the fair innings argument.

The remaining three cases in this category are not related to *Hütter*. *Tyrolean Airways*¹⁰⁴ and *Bowman*¹⁰⁵ show similarities in that both deal with lengths of service and experience rather than a particular age group. In *Tyrolean Airways* this became an issue because workers with similar length of work experience were treated differently, the only experience taken into account for advancement being that gained in employment with Tyrolean Airways. This would put experienced cabin crew members who previously worked for Austrian Airlines or Lauda Air in a disadvantaged position; hence it indirectly discriminates older workers.¹⁰⁶ The CJEU considered that even though the challenged measure falls within the scope of the directive,¹⁰⁷ it does not constitute discrimination on grounds of age, since the differential treatment is based purely on the date of recruitment.¹⁰⁸ The fact that work experience is not taken into account at the moment the employment contract commences is not related to age.¹⁰⁹ It applies to everyone who starts to work for Tyrolean Airlines, irrespective of whether someone is young, old or middle-aged. No distinction by age, direct or indirect, means no age discrimination. In *Bowman* the CJEU also concluded that there is no issue of age discrimination since

the inclusion of periods of school education and the extension of the period for advancement within the first step of the salary scheme, applies in the same way to all workers who make a request for such inclu-

sion, including, retroactively, workers who have already reached higher steps.¹¹⁰

These rulings reflect again a more complete life view since they reflect a rather egalitarian appreciation of the measures.

Differing completely from any of the previous cases in this category is *Bartsch*,¹¹¹ which deals with an issue of 'relative' age, meaning that there exists an age requirement in legislation not defined by an absolute age but by age related to the age of another person. More concretely, the measure in *Bartsch* stipulated that widower pensions would not be paid if 'the widow/widower is more than 15 years younger than the former employee'.¹¹² Unfortunately, at the time the facts of the case took place and the case was brought to court, the implementation period for the FED had not expired yet, and the CJEU therefore found the case inadmissible and gave no ruling.¹¹³

4.4 Analysis of the Cases in the Category 'Middle-Aged'

The last category to address is 'middle-aged'. What links these cases is that all national measures set a maximum age, owing to which older workers are denied access either to education/training or employment. Often the age limit lies around thirty or thirty-five; hence the classification as middle-aged.

In this group the CJEU found only the national measure in *Vital Pérez*¹¹⁴ to be excluded by the FED (see Table 1). The measure fixes a maximum age of thirty for recruitment of local police officers. It could be considered as a genuine job requirement within the meaning of Article 4(1) FED, given the particular physical capacities needed for the job,¹¹⁵ but, given the fact that there is no need to maintain a particular age structure within the police service¹¹⁶ and that the physical requirements are not 'exceptionally high',¹¹⁷ the CJEU concluded that the age requirement cannot appropriately be justified as a genuine job requirement.¹¹⁸ Secondly, the CJEU considered whether the measure could be justified by Article 6(1) FED. As a legitimate aim, the referring court pointed out that the age limit was related to training requirements for the post in question and 'the need for a reasonable period of employment before retirement or transfer to another activity'.¹¹⁹ However, as no (concrete enough) evidence has been presented to support the measure in the main proceedings as appropriate or nec-

102. *Pohl*, above n. 100, Rec 31, with reference to Joint Cases 89/10 and 96/10 *Q-Beef NV v. Belgische Staat and Frans Bosschaert v. Belgische Staat, Vleesgroothandel Georges Goossens en Zonen NV and Slachthuizen Goossens NV*, [2011] ECR I-07819, Rec 48.

103. *Starjakob*, above n. 101, Rec 59-75.

104. Case 132/11 *Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH v. Betriebsrat Bord der Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH* ECLI:EU:C:2012:329.

105. Case 539/15, *Daniel Bowman v. Pensionsversicherungsanstalt* ECLI:EU:C:2016:977.

106. *Tyrolean Airways*, above n. 104, Rec 20, preliminary question 1.

107. *Ibid.*, Rec 24.

108. *Ibid.*, Rec 29.

109. *Ibid.*

110. *Bowman*, above n. 105, Rec 31.

111. Case 427/06, *Birgit Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*, [2008] ECR I- 07425.

112. *Ibid.*, Rec 7.

113. *Ibid.*, Rec 17 and 25.

114. Case 416/13 *Mario Vital Pérez v. Ayuntamiento de Oviedo* ECLI:EU:C:2014:2371.

115. *Ibid.*, Rec 37 and 41, with reference to *Prigge*, above n. 46, Rec 67; and *Wolf* (case 229/08, ECLI:EU:C:2010:3), Rec 41.

116. *Vital Pérez*, above n. 114, Rec 56.

117. *Ibid.*, Rec 54.

118. *Ibid.*, Rec 57.

119. *Ibid.*, Rec 64.

essary to achieve that aim, the CJEU indicated that such a measure could not be justified by Article 6(1) FED.¹²⁰ In *Salaberria Sorondo*,¹²¹ a similar measure as the one in *Vital Pérez* was challenged; however, the facts were different, resulting in the outcome that the age requirement constituted indeed a justifiable genuine job requirement.¹²² The CJEU considered that the measure was much better substantiated with statistical evidence, in particular the need for ‘(re-)establishing a satisfactory age pyramid’, which ought to be taken dynamically, that is with a view to the future.¹²³ Secondly, the Court considered that the functions were different in that for the latter young recruits would be assigned the physically most demanding jobs.¹²⁴ With reference to *Wolf*, in which case the measure set an age limit (of thirty) for the recruitment of firefighters,¹²⁵ the CJEU acknowledged that when physical requirements are ‘exceptionally high’ it is clear that these can be performed only by young workers.¹²⁶ Furthermore, the CJEU acknowledged that to ensure the efficient functioning of the fire service it may be necessary that the majority of the workers are younger than forty-five or fifty. In this light, the CJEU argued that the age at which a fire fighter is recruited determines how long he will be able to perform the job.¹²⁷ Hence, under such conditions an age limit can be considered as a genuine job requirement.¹²⁸ The Court’s reasoning in these cases comes closest to a more typical anti-discriminatory approach. The last case in this category, *De Lange*,¹²⁹ deals with an income tax measure that allows full reduction of vocational training costs for persons under thirty and limits this to the amount of 15,000 EURO for persons older than thirty. The measure aims to make it more attractive for young persons to pursue vocational training in order to improve their position in the labour market, which qualifies as a legitimate aim under Article 6(1) FED.¹³⁰ Moreover, the CJEU found the measure appropriate and necessary, since, as argued by the Dutch government, in general persons over the age of thirty have

had the opportunity to undertake prior training and to pursue a professional activity, with the result that, being in a better financial position than young people who have recently left the school system, they are able to bear at least in part the financial burden of new training.¹³¹

120. *Ibid.*, Rec 70-3.

121. Case 258/15 *Gorka Salaberria Sorondo v. Academia Vasca de Policía y Emergencias* ECLI:EU:C:2016:873.

122. *Ibid.*, Rec 50.

123. *Ibid.*, Rec 47.

124. *Ibid.*, Rec 46.

125. *Wolf*, above n. 115.

126. *Ibid.*, Rec 41.

127. *Ibid.*, Rec 43.

128. *Ibid.*, Rec 45.

129. Case 548/15 *J.J. De Lange v. Staatssecretaris van Financiën* ECLI:EU:C:2016:850.

130. *Ibid.*, Rec 29.

This is very clearly a fair innings argument.

5 Evaluation and Conclusions

In this section I evaluate the reasoning of the CJEU against the background of the theoretical approaches presented in Section 2, *i.e.* complete life view, fair innings argument and a more typical anti-discriminatory approach. For this evaluation it is important to understand, in general, the arguments of the CJEU in deciding that a measure would or would not be precluded by the FED. The analysis of this is summarised in Table 3.

[Click here for a PDF-version of Table 3.](#)

A number of conclusions can be drawn from this table: First, a good number of cases are not precluded by the FED because they do not deal with age discrimination (*Pohl*), fall outside the scope of the directive (*Bartsch*), are not an issue of age discrimination (*Florescu*, *SCMD*, *Escribano Vindel*, *Horgan and Keegan*, *Tyrolean Airways*, and *Bowman*) or fall within the exception of Article 6(2) FED (*Parris and Lesar*). Second, a few reasons for preclusion or not are reflective of each other. These are as follows:

- age is indirectly involved because it is connected to the length of service that is taken as a differentiating criterion (*HK Denmark*, *Kleinstauber*) versus age directly and as a sole differentiating criterion (*Man-gold*);
- age as genuine job requirement/balanced age structure being appropriate and necessary (*Wolf*, *Salaberria Sorondo*, *Fuchs & Köhler*) versus not being appropriate and necessary (*Prigge*, *Vital Pérez*); and
- sufficient (*Hennings and Mai*, *Specht e.o.*, *Stollwitzer*, *Unland*, and *Österreichischer Gewerkschaftsbund*) versus insufficient (*Starjakob*, *Schmitzer*, and *Leitner*) neutralisation of the effect of a previously discriminatory measure.

Furthermore, this table clearly shows that some reasons are more typical of a certain age category, *e.g.* whether there is access to an alternative source of income seems to be typical of older workers, and the sufficient neutralisation of a previously discriminatory measure is typical of the category ‘other’.

In Table 4 the arguments of the CJEU have been related to the theoretical approaches. Indications on this have already been given in Section 4; the table merely summarises it.

[Click here for a PDF-version of Table 4.](#)

131. *Ibid.*, Rec 33.

Table 3 Summarised analysis of the CJEU's arguments in cases on age discrimination

Reasons not precluded	Old	Yng	M	Other	Reasons precluded	Old	Yng	M	Other
Not in scope / not on age	C			Bartch; Pohl					
No discrimination on grounds of age	SCMD; Florescu	O; Escribano; Vindel; Horgan & Keegan		Tyrolean airlines; Bowman					
Exception Art. 6(2) FED	Parris	Lesar							
Access alternative income / income security	Palacios de la Villa; Age Concern; Rosenblatt; Georgiev; Hörneveldt; Hubertus; Odar; Tekniq	Horgan and Keegan			Reduction in (alternative) income / interest persons not sufficiently taken into account	Ingeniørforening i Danmark; Rasmussen; Dansk Jurist; Commission v Hungary			
Labour market situation taken into account	Petersen; Felber	Abercrombie	De Lange		Measure results in unequal treatment of persons in same age group		Küçükdeveci; Hütter		
Age indirectly – length of service (pro rata temporis)	HK Denmark; Kleinsteuber				Age sole criterion	Mangold			
Age as job requirement / balanced age structure	Fuchs & Köhler; Werner Fries		Wolf; Salaberria Sorondo		Age as job requirement is inappropriate	Prigge		Vital Pérez	
Sufficient neutralisation previously discriminatory effect, incl. protection established advantages				Hennings & May; Specht e.o.; Stollwitzer; Unland; Österreichischer Gewerkschaftsbund	Insufficient neutralisation previously discriminatory effect				Starjakob; Schmitzer; Leitner

Table 4 CJEU's case law ordered by theoretical approach

	Not Precluded				Precluded			
	Old	Young	Middle-aged	Other	Old	Young	Middle-aged	Other
Complete life view	Palacios de la Villa; Age Concern; Hubertus; Petersen; Kleinsteuber; Rosenblatt; Hörnveldt; Odar; HK Denmark; Ingeniørforeningen i Danmark v Tekniq; Felber; Parris;	Lesar; Escribano Vindel; Horgan and Keegan		Tyrolean Airlines; Bowman	Mangold; Ingeniørforeningen i Danmark; Rasmussen; Dansk Jurist			
Fair innings argument	Georgiev; Fuchs & Kohler; Florescu; SCMD	O; Abercrombie	De Lange	Pohl; Hennings & May; Specht e.o.; Unland; Stollwitzer; Österreichischer Gewerkschaftsbund	Commission v Hungary	Hütter; Küçükdeveci		Starjakob; Schmitzer; Leitner
Traditional anti-discrimination approach	Werner Fries		Salaberria Sorondo; Wolf		Prigge		Vital Pérez	

NB: The cases C and Bartch are not in this table because the CJEU did not consider them on their merits.

What stands out from this table is that many measures (twelve out of sixteen) treating older workers less favourably have not been precluded by the FED, whereas only four of them have been precluded. The contrast becomes even stronger when we realise that the three cases in the age category ‘young’ that reflect a complete life view approach either did not constitute age discrimination because something else was found (more) distinctive (*Escribano Vindel*; *Horgan and Keegan*) or fall under the exception of Article 6(2) FED (*Lesar*). In absolute numbers it means that older persons have had to accept disadvantageous treatment more often than younger persons.

When evaluating the cases that seem to reflect the fair innings argument the CJEU seems to favour the posi-

tion of young workers over that of older workers. This is the situation in cases affecting young people, as well as middle-aged and old people. While in *Hütter* it was an issue of unequal treatment within the age category ‘young’, in *Küçükdeveci* it was an intergenerational matter that provided stronger protection for older workers than younger workers and was found by the CJEU to be precluded by the FED. In the cases *Georgiev* and *Fuchs & Kohler* the situation was reversed since the measures that were challenged aimed to improve the position of young persons at the cost of older persons who had already had their chances. The same is true for *De Lange* with regard to access to education: the challenged tax measure favoured people under the age of thirty, since people older than thirty were presumed to have

had chances to study and gather more resources to pay for their education. Add to this the cases *Wolf* and *Salaberria Sorondo*, both setting an age limit with respect to access to employment, and the picture of young people being favoured over older people in the CJEU's case law becomes even more resilient.

What we get is what I have already indicated at the beginning of the paper as being a toxic combination: under the complete life view more measures have been accepted that negatively affect old people rather than young people; and under the fair innings argument more measures have been accepted that positively affect young people to the detriment of middle-aged and old people. The overall image of this combination is that the CJEU is more lenient in accepting disadvantageous measures for older people and more strict in protecting young people. Thus, while the relative numbers of measures that the CJEU found to be precluded by the FED do not indicate a significant difference in treatment between young and old, the reflective evaluation of the CJEU's rulings based on the theoretical approaches, especially the complete life view and fair innings argument, does indicate a significant difference. Maybe the CJEU is not aware of its bias, but by not having made a clear choice on how to evaluate age discrimination cases, a practice of unequal treatment has grown. The conclusion is, therefore, that the CJEU indeed discriminates in age discrimination cases.

Age Barriers in Healthcare

Rachel Horton*

Abstract

Age limits, minimum and maximum, and both explicit and 'covert', are still used in the National Health Service to determine access to a range of health interventions, including infertility services and cancer screening and treatment. Evidence suggests that chronological age is used as a proxy for a host of characteristics in determining access to healthcare: as a proxy for the capacity of an individual to benefit from an intervention; for the type of harm that may result from an intervention; for the likelihood of such benefit or harm occurring; and, in some cases, for other indicators used to determine what may be in the patient's interest. Age is used as a proxy in this way in making decisions about both individual patients and wider populations; it may be used where no better 'marker' for the relevant characteristic exists or – for reasons including cost, practicality or fairness – in preference to other available markers. This article reviews the justifications for using age in this way in the context of the existing legal framework on age discrimination in the provision of public services.

92 **Keywords:** age discrimination, age equality, health care

1 Introduction

Over the past few decades there has been a significant reduction in the use of age limits as explicit barriers to access medical treatment, medication or other healthcare services in the UK. Thus, for example, while a 1991 study found 19% of coronary care units used explicit age-related admissions criteria, by 2001 this had fallen to less than 1%.¹ By 2009, a review commissioned by the Department of Health found very few remaining policies that explicitly determined access on the basis of age.² Nonetheless, uses of age to determine access do remain. This article explores the compatibility of some of these remaining age barriers with UK anti-discrimination law, which has prohibited age discrimination in the provision of public services, including healthcare, since 2012.

* Lecturer University of Reading.

1. Centre for Policy on Ageing, *Ageism and Age Discrimination in Secondary Health Care in the United Kingdom* (2009). This reduction in the use of age can be attributed, at least in part, to the introduction of the (non-legally binding) National Service Framework for Older People, in 2001, which included 'rooting out age discrimination' as the first of its eight standards: Department of Health, *National Service Framework for Older People* (2001).
2. I. Carruthers and J. Ormondroyd, *Achieving Age Equality in Health and Social Care: A Report to the Secretary of State for Health* (2009).

The article is organised into two halves. The first half identifies some of the ways in which age is used – directly or indirectly – to organise access to medical intervention and treatment, and, as far as is possible, discusses the reasons age is used in this way. The second half assesses whether, and under what conditions, these uses of age may be permitted within the existing legal framework and considers how commissioners and service providers may best ensure that age is used in ways that are compatible with the law. For this reason the focus will be on practices that those involved in the provision of healthcare may plausibly wish to justify. Although there is also ample evidence of other forms of age discrimination in healthcare – including widely publicised accounts of neglect – these are not considered here.

As a preliminary note, it is important to bear in mind throughout that the use of age to organise and limit access to services takes place in the context of a publicly funded health care system with limited resources. It should also be pointed out that, in most cases rationing decisions are taken at the local rather than national level. Policies determining access to treatment are normally developed at the local level by Clinical Commissioning Groups (CCGs) although non-binding guidance is set by the National Institute for Health and Care Excellence (NICE.) In some cases – and particularly in relation to public health programmes such as vaccination and screening – parameters for access are set nationally. The implications of both of these issues for the question of legal justification are discussed in what follows.

2 Uses of Age to Determine Access to Medical Intervention

2.1 Quality Adjusted Life Years (QALYs)

QALYs are a measure used to calculate the cost-effectiveness of a particular medical intervention. They combine the (health-related) quality of life a patient may expect to have post intervention with their remaining life expectancy. The number of QALYs generated by an intervention can then be combined with the cost of that intervention to create a cost-effectiveness ratio – the cost per QALY. In this way QALYs provide a 'common currency' to allow those with responsibility for resource allocation to compare the costs and benefits of a range of interventions and to set priorities accordingly. QALYs are used to inform decisions about resource allocation by

NICE, particularly in their evaluation of new and existing health technologies, and are used more widely in research that informs commissioning decisions nationally and locally.³

There are several ways in which the use of QALYs in allocating resources may amount to *prima facie* age discrimination. First, and much discussed in the academic literature, is the fact that given the use of remaining life expectancy in the calculation of the number of QALYs an intervention produces, the method is potentially indirectly discriminatory. Other things being equal, a fifty-year-old will normally produce less QALYs than a thirty-year-old and more than a seventy-year-old. Further, given the increased likelihood of comorbidity (multiple health conditions) in the older patient, their health-related quality of life is likely to be lower pre- and post-intervention. This, also, will serve to reduce the number of QALYs an intervention is capable of producing.⁴ For both of these reasons, the cost per QALY of an intervention for an older patient will often be higher than the cost per QALY of the same intervention for a younger patient. When QALYs are used to inform decisions about which interventions should be funded, and what the access criteria for interventions should be, the methodology has the potential to disadvantage older patients.

This is compounded by concern that the method used to calculate the health-related quality of life may itself be indirectly discriminatory by failing to take into account the experiences and priorities of older patients and overstating the importance of physical functioning.⁵ This may lead to underestimation of quality of life in older people, which, in turn, will impact on the number of QALYs an intervention is capable of generating in an older patient.

For these reasons, then, the use of QALYs to inform resource allocation certainly has the *potential* to give rise to indirect discrimination on grounds of age. It is argued, however, that while this theoretical potential exists, the context in which QALYs are used in practice – and in particular their use in health technology appraisals by NICE – means that the methodology does not in fact disadvantage older people.⁶ One reason for this is that NICE generally operates at a ‘macro’ level – determining which of a range of possible treatments or interventions are most cost effective for society as whole, rather than at an individual level – determining those members of society who should be eligible for a

particular treatment. Because of this, it is claimed, it is NICE’s normal practice, when evaluating an intervention, to ‘assume that what applies to one age group within a particular appraisal will apply *inter alia* to others’⁷ and to aggregate the QALYs an intervention produces across a range of ages. Thus, most of NICE’s recommendations do not restrict access by age – treatments are generally recommended for all ages or for none – and much of the theoretical potential for QALYs to generate discriminatory results is thereby avoided.

This does not eliminate the potential for discrimination altogether, however. While there are very few age-stratified results among NICE’s recommendations (where access to a particular intervention is recommended only for a particular age group), some do exist;⁸ and it remains the case that interventions that would primarily benefit the older population (rather than society as a whole) are able to produce fewer QALYs (although, so far, there are no examples among NICE’s decisions of interventions being turned down for this reason).⁹

2.2 In Vitro Fertilisation (IVF)

An example of NICE guidance where recommended access to treatment is determined by age is IVF. Public funding for IVF – at any age – is controversial and raises interesting issues about the boundaries of ‘health’ and the circumstances in which public funding should be provided to assist individuals and couples to conceive.¹⁰ In February 2013 NICE published revised guidance on access to IVF and other fertility treatment.¹¹ Among other recommendations, the revised guidance suggests that where other clinical criteria are met, women between the ages of forty and forty-two should be eligible for one free cycle of IVF treatment, while women under forty should be offered up to three cycles. Women aged forty-three and over are not eligible for treatment. There is no lower age limit. The previous recommended lower and upper age limits for access to treatment had been twenty-three and thirty-nine. The revised guidance was based on an economic model that used maternal age both as a predictor of the likelihood of success of treatment and (via a QALY analysis) as a proxy for the duration of any improvement in the health state of a couple gained through the IVF treatment.

Local commissioners are not obliged to follow this guidance¹² and many currently do not. Some CCGs offer no funded IVF treatment at all, and others use different age

3. www.nice.org.uk.

4. The same difficulty is also faced by those with pre-existing disabilities whose quality of life score may be lower, post intervention, notwithstanding the success of the intervention itself. See discussion in C. Newdick, *Who Should We Treat? Rights, Rationing and Resources in the NHS* (2005).

5. A. Hickey et al., ‘Measuring Health Related Quality of Life in Older Patient Populations: A Review of Current Approaches’, 23(10) *Pharmacoeconomics* 791-793 (2005); See also R. Edlin et al., *Cost Effectiveness Analysis and Ageism: A Review of the Theoretical Literature* (2008).

6. A. Stevens et al., ‘National Institute for Health and Clinical Excellence Appraisal and Ageism’, 38 *Journal of Medical Ethics* 258-262 (2012).

7. *Ibid.*

8. *Ibid.* One example – access to IVF – is discussed in more detail later.

9. Edlin, above n. 5, at 72.

10. See, e.g. E. McTernan, ‘Should Fertility Treatment Be State Funded?’, 32(3) *Journal of Applied Philosophy* 227-240 (2015).

11. National Institute for Health and Clinical Excellence, *Fertility: Assessment and Treatment for People with Fertility Problems* (February 2013) (updated September 2017), Clinical Guideline 156), <https://www.nice.org.uk/guidance/cg156> (last visited January 2020).

12. NICE technology appraisals are binding on local CCGs. However, CCGs may depart from other forms of NICE Guidance only where they have good reason to do so (see *R v. North Derbyshire Health Authority ex parte Fisher*, [1997] 8 Med. L.R. 327 and *R (on the application of Rose) v. Thanet Clinical Commissioning Group*, [2014] EWHC 1182 (Admin) discussed further below in relation to proportionality).

limits to those recommended by NICE, resulting in what is often termed a postcode lottery.¹³ The decisions of (the then) Berkshire East Primary Care Trust to retain thirty-five as the upper age limit and of (the then) Portsmouth City Primary Care Trust to make thirty the lower age limit for access to IVF treatment were both reported to be subject to possibly the first legal challenges under the age discrimination provisions of the Equality Act 2010.¹⁴ Since then both CCGs have removed the lower age limit from their assisted conception policies, but have retained thirty-five as the upper age limit for referral for treatment, notwithstanding the NICE recommendations.¹⁵ The minutes of the Board meeting at which Portsmouth CCG confirmed the upper age limit (among other eligibility criteria) note that the decision was taken as a result of the clinical evidence that the effectiveness of IVF declines after the age of thirty-five and not because of cost.¹⁶ Elsewhere, lower age limits remain, including, for example, Wiltshire CCG, who currently offer IVF only to women between the ages of thirty and forty.¹⁷ The lower limit in this case is explained as being based on 'affordability grounds and prioritising treatment for couples where the woman is over thirty five when the success rate of live births begins to decline'.¹⁸

2.3 Screening

Several of the few remaining examples of explicit rationing by age within the NHS relate to national screening programmes. Existing national screening programmes for adults screen for breast, bowel and cervical cancer and for vascular disease. All include both upper and lower age limits for access, although in some cases those outside the age band are able to request screening tests despite being excluded from routine screening invita-

tions.¹⁹ However, where screening is available on request but not by invitation, there is evidence that take-up is much lower.

Women between the ages of fifty and seventy are invited for breast cancer screening every three years. Women over the age of seventy do not receive an invitation for screening but are able to request a mammogram every three years, while those below the age of fifty are able to access screening only after referral by their general practitioner (GP) for specialist intervention, where, for example, family history or other clinical factors suggest this would be beneficial. An extension of this age range to forty-seven to seventy-three is currently being trialled nationwide.²⁰ In 2013 the All Party Parliamentary Group on Breast Cancer recommended that the trial be extended to those aged seventy-four to seventy-six and, should take-up in this age group be sufficient, to those aged seventy-seven to seventy-nine in a second phase.²¹ However, in 2015, a follow-up report expressed disappointment that these recommendations had not been implemented and that while Public Health England remained supportive in principle, as did healthcare professionals, funding remained an issue.²²

Bowel Cancer Screening is offered every two years to those between the ages of sixty and seventy-four and a new test is currently being introduced for men and women between fifty-five and sixty with plans to reduce the lower age limit to fifty in time.²³ Cervical cancer screening is currently offered to women between the ages of twenty-five and sixty-five, or beyond for those who have a history of abnormality or who have never been screened.²⁴ The vascular screening programme is now available to those between forty and seventy-four.²⁵ In addition to these uses of age limits for access to screening, it is also worth noting that the UK National Screening Committee does not currently recommend prostate cancer screening.²⁶ While this clearly applies to all age groups, and thus does not involve any direct discrimination, prostate cancer is a disease that is particularly prevalent in older men, and thus the decision not to provide a national screening programme for this particular cancer is an example of potential indirect discrimination. It is not easy to find clear explanations for the use of age limits in each case – or of the particu-

13. Neither Croydon nor Cambridge and Peterborough CCGs currently routinely fund IVF, though this is under review in Cambridge and Peterborough: <https://www.croydonccg.nhs.uk/get-involved/public-consultation-and-engagement/Pages/The-future-of-IVF-services.aspx> and <https://www.cambridgeshireandpeterboroughccg.nhs.uk/news-and-events/latest-news/statement-on-ivf/> (last visited January 2020).
14. L. Donnelly, 'Couple Sue for IVF in Landmark 'Age Discrimination' case', *The Telegraph* (London, 1 December 2012), www.telegraph.co.uk/news/health/news/9716432/Couple-sue-for-IVF-in-landmark-age-discrimination-case.html; J. Brown and J. Lawrence, 'Too Young to Have IVF; 24 Year Old Andrea Heywood Fights for Her Right to Fertility Treatment', *The Independent* (London, 4 June 2012), www.independent.co.uk/life-style/health-and-families/health-news/too-young-to-have-ivf-24-year-old-andrea-heywood-fights-for-her-right-to-fertility-treatment-7814790.html (last visited January 2020).
15. SHIP 8 Clinical Commissioning Groups' Priorities Committee (Southampton, Hampshire, Isle of Wight and Portsmouth CCGs), *Policy Recommendation 002: Assisted Conception Services* (September 2014), www.portsmouthccg.nhs.uk; NHS South, Central and West Commissioning Support Unit, Berkshire East, *Policy Statement 11g: Assisted Reproduction Services for Infertile Couples* (November 2013), www.fundingrequests.ccsu.nhs.uk/berkshire-east/cosmetic-and-other-surgeries-berkshire-east/ (last visited January 2020).
16. Portsmouth CCG, AI 03 Minutes of Governing Board Meeting of 21 January 2015, 210115, GB180315, item 13, www.portsmouthccg.nhs.uk/About-Us/march-2015_2.htm (last visited January 2020).
17. www.wiltshireccg.nhs.uk/wp-content/uploads/2013/12/IVF-policy-2016.09.28.pdf.
18. *Ibid.*

19. There is some minor variation in the upper and lower age limits in England, Scotland, Wales and Northern Ireland – the age limits given later are those that apply in England. See www.cancerscreening.nhs.uk.
20. *Ibid.*
21. All Party Parliamentary Group on Breast Cancer, *Age is Just a Number: The Report of the Parliamentary Inquiry into Older Age and Breast Cancer* (2013).
22. All Party Parliamentary Group on Breast Cancer, *Two Years On: Age is Just Still a Number: Progress Report on the All Party Parliamentary Group on Breast Cancer's Enquiry into Older Age and Breast Cancer* (2015).
23. <https://www.nhs.uk/conditions/bowel-cancer-screening/> (last visited January 2020).
24. www.cancerscreening.nhs.uk/cervical/about-cervical-screening.html (last visited January 2020).
25. www.nhs.uk/Conditions/nhs-health-check/Pages/NHS-Health-Check.aspx (last visited January 2020).
26. www.cancerscreening.nhs.uk/prostate/ (last visited January 2020).

lar age limits used – in the available public policy materials. However, what follows attempts to summarise the reasons that are provided.

First, the upper and lower age limits chosen may reflect the evidence on the incidence of the relevant disease in particular age groups. Chronological age is used as a proxy for the likelihood of an individual developing the condition the screening programme is intended to detect. The national cancer screening website suggests that the incidence of the disease is the reason for the upper age limit for cervical cancer screening – ‘Generally speaking, the natural history and progression of cervical cancer means it is highly unlikely that women of 65 and over will go on to develop the disease.’²⁷

Second, even where evidence suggests that those in a particular age group may be at risk of developing the condition, screening tests may be unavailable because of evidence that the screening test itself is likely to be ineffective in that age group owing to the changes in the body associated with changes in age. This appears particularly relevant in the case of cervical and breast cancer, where the lower age limits are both justified by reference to the inability of existing screening tests to generate reliable results in particular age groups.²⁸

Third, and related, there is concern that, in certain age groups, the risks and disadvantages of the screening tests may outweigh the benefits. There is a concern both that ‘false positives’ (more likely to be generated by screening in age groups where the screening test is less reliable) may increase anxiety and lead to unnecessary and potentially harmful treatment and that ‘true positives’ may likewise result in avoidable anxiety and intervention where the age of the patient and the normal progression of the disease mean that the disease would be unlikely to manifest itself naturally during the lifetime of the patient. Thus, a review of the lower age limit for cervical cancer concluded that extending testing to women below the age of twenty-five could lead to adverse psychological impacts and to an increase in unnecessary treatment, which in turn could have harmful side effects in relation to future childbearing.²⁹ Similarly, for both bowel³⁰ and prostate³¹ cancer screening it has been argued that, given that most older patients in whom screening would detect cancer are likely to die of something else before the cancer reaches its advanced stages, the negative impacts of screening in older age outweigh the benefits.

27. www.cancerscreening.nhs.uk/cervical/faqs.html (last visited January 2020).
28. www.cancerscreening.nhs.uk/breastscreen/faqs.html (last visited January 2020).
29. Minutes of the Advisory Committee on Cervical Screening, 19 May 2009, <https://webarchive.nationalarchives.gov.uk/20150505172923/http://www.cancerscreening.nhs.uk/cervical/cervical-review-minutes-20090519.pdf> (last visited January 2020).
30. C. Quarini and M. Gosney, ‘Review of Evidence for a Colorectal Cancer Screening Programme in Elderly People’, 38(5) *Age and Ageing* 503-508 (2009).
31. D. Burford et al., *Prostate Cancer Risk Management Programme; Information for Primary Care: PSA Testing in Asymptomatic Men: Evidence Document* (NHS Cancer Screening Programmes) (2010).

Fourthly, it has been argued, at least in relation to cervical cancer screening, that using age as the entry point into the screening programme, rather than determining when screening is appropriate for an individual patient based on other factors, ensures that the system is fair, consistent and workable. There was a real danger of stigmatising women if the first screen was to be based on sexual activity or smoking – lifestyle-based risk factors that would, in fact, be the best indicator for when the first cervical screen would be beneficial.³²

Finally, there is cost-effectiveness. The national screening programmes do not come under the auspices of NICE guidance, and there is no clear explanation of how cost-effectiveness is determined in relation to the various screening programmes or of how information on cost-effectiveness is then used in decision-making in relation to age limits. Clearly, many of the other reasons discussed previously are relevant to cost-effectiveness. Research on cost-effectiveness is certainly evident in research that informs the decisions about the ages at which the various screening programmes should be offered. Thus, in relation to the lower age limit for vascular screening, and upper and lower age limits for breast cancer screening, QALYs were used to model the cost-effectiveness of a range of lower age limits.³³

2.4 Mental Health Services

Age discrimination in mental health services has been the subject of recent research and political focus. Weaknesses in mental health provision are particularly likely to affect the older population: 30% of mental health inpatients are aged over sixty-five.³⁴ It is clear that some of the failures in provision of mental health services in the older population are the result of ageist stereotypes or misconceptions – a view of mental health problems such as depression or dementia as a ‘normal’ part of ageing, for example.³⁵ However, an important cause is normally identified as stemming from the segregation of mental health service provision for working age and older adults; in many (though not all) localities, mental health services are divided into ‘adult mental health’ for adults up to the age of (usually) 65 and ‘older people’s mental health’ for those over sixty-five.³⁶ While this division was originally intended to offer better and specialised services to those in different age groups, reflect-

32. Minutes of the Advisory Committee on Cervical Screening, above n. 29, at 7.2.
33. Department of Health, *Putting Prevention First – Vascular Checks: Risk Assessment and Management* (2008); A. Rawdin and J. Madan, *An Initial Assessment of the Merits of Extending Breast Cancer Screening Aged 47-49 Years to Assist the Appraisal of Options for Extending the NHSBSP with Appendix Considering Women Aged 71-73* (2008).
34. Healthcare Commission, *Count Me in 2008: Results of the 2008 National Census of Inpatients in Mental Health and Learning Disability Services in England and Wales* (2008).
35. Centre for Policy on Ageing, above n. 1. Royal College of Psychiatrists, *Suffering in Silence: Age Inequality in Older People’s Mental Health Care* (College Report 221) (2018).
36. *Ibid.* Mental health provision for children and adolescents is also organised as separate services but will not be discussed here. Under-18s are not covered by the age discrimination provisions of the Equality Act 2010.

ing the (often) different health needs of each group, the implementation of the segregated services is generally agreed to have resulted in poorer services for the older group. In 2009, a consultation by the Government Equalities Office found that in some trusts older people were unable to access services that were available to younger adults.³⁷ Thus, while working age adults in some areas are able to access services such as crisis care, out of hours and occupational health, older adults are not.³⁸ For some patients this means that once they reach sixty-five they are transferred from the care of adult mental health to older people's mental health services and thereby excluded from services from which they had previously benefited. These – among other – features of the difference in service provision have led some commentators to conclude that 'mental health services in the NHS provide one of the few remaining examples, in many localities, of overt, institutional direct age discrimination'.³⁹

However, while most agree that current divergence in the quality and quantity of service provision is unacceptable, there is debate over whether the solution lies in integrated or segregated-but-better services. One reason for the initial segregation of services was that the profile of mental health problems in the working age and the older populations is significantly different. In particular, as adults reach later life, there is a decline in the prevalence of psychoses and a rise in dementia, with dementia accounting for over one-third of hospital mental health patients aged sixty-five and over, and over half of those aged seventy-five and over.⁴⁰ Further, according to the Royal College of Psychiatrists, older people may develop mental health problems related to social and lifestyle changes brought about by ageing, which require a specialised response.⁴¹ Age is therefore agreed to be a good proxy for mental health needs.

The different mental health needs that may arise in the older population have led to calls to retain – but improve – separate service provision for older people. Indeed, there is a concern that failure to do so could itself amount to (indirect) age discrimination by failing to recognise and respond appropriately to the needs of the older population. Thus, the Department of Health, following a consultation on this issue, concluded that specialist older people's mental health services should continue because the ageing population has particular needs; many adult mental health services are designed to meet the needs of working age adults with severe mental health problems and would fail to meet the needs of older adults with different conditions. The conclusion was that what was needed were specialist services of equiva-

lent quality.⁴² Similarly, the Royal College of Psychiatrists, while arguing that an arbitrary age limit should not be used to determine the services a person is entitled to receive, were clear that age-appropriate mental age services should be retained:

it is unacceptable to offer a single, age inclusive mental health service that is not designed to meet the need of older people and to do so would be discrimination.⁴³

Solutions have been suggested and, in some places, implemented that attempt to retain age-appropriate services without using chronological age as the (only) criterion for determining access. These include formal agreements between working age and older adult mental health services that provide – for example – for reassessment of mental health needs at 65, rather than automatic transfer.⁴⁴ However, it appears that there is no consensus on whether older people's mental health services should be organised as a separate service.⁴⁵

2.5 Non-overt Discrimination

The previous sections have assessed some of the few remaining examples of explicit age differentiation in access to services. In addition to these examples of explicit use as age as a criterion for access to services, there is evidence that age serves as a factor in determining whether and which services to offer in a wide range of situations involving individual clinical judgment. Age appears to affect preventative care, the likelihood of investigation and referral and the type of care and treatment subsequently available, across a range of specialities.

A clear example is in the case of cancer services. Most cancers are more prevalent in later life. Over half of all cancers diagnosed are in people aged sixty-five or over; a third of all cancers diagnosed are in those aged seventy-five or over.⁴⁶ Despite this age profile, however, a 2012 study by the Department of Health concluded that there is a marked decline in referral for more 'intensive' treatment – including surgical intervention – as patient age increases. Thus, for example, the incidence of breast cancer peaks in the 85-plus age group, but surgical intervention for breast cancer declines sharply after the age of seventy.⁴⁷ This is despite the relevant NICE guideline, which is explicit that surgical intervention should be offered regardless of chronological age.⁴⁸ The

37. Government Equalities Office, *Equality Bill: Making It Work. Ending Age Discrimination in Services and Public Functions – A Consultation* (2009).

38. Centre for Policy on Ageing, above n. 1.

39. *Ibid.*

40. *Ibid.*

41. Royal College of Psychiatrists, above n. 35.

42. Department of Health, *New Horizons: Towards a Shared Vision for Mental Health – A Consultation* (2009).

43. Royal College of Psychiatrists, *Age Discrimination in Mental Health Services: Making Equality a Reality* (position statement PS2/2009) (2009).

44. Centre for Policy on Ageing, above n. 1.

45. *Ibid.*

46. Department of Health, *The Impact of Patient Age on Clinical Decision Making in Oncology* (2012). See also Royal College of Surgeons, *Access All Ages: Assessing the Impact of Age on Access to Surgical Treatments* (2013).

47. *Ibid.* Department of Health.

48. National Institute for Health and Clinical Excellence, *Clinical Guidance for Early and Locally Advanced Breast Cancer (CG80)* (2009).

low rate of surgical intervention is thought to be one of the reasons cancer outcomes in those over the age of seventy-five may be poorer in the UK than in other comparable countries. The study concluded that, in making decisions about access to oncology services, and, in particular, in determining the level of intensity of the treatment that should be provided ‘clinicians may over rely on chronological age as a proxy for other factors which are often but not necessarily associated with age, such as comorbidities or frailty’.⁴⁹ Similar patterns emerge in respect of other service, including cardiology, stroke and mental health.⁵⁰

Clinical assessment of a patient on the basis of chronological age – rather than on the basis of actual frailty, comorbidity and polypharmacy – may, of course, involve unwarranted ‘ageist’ judgments such as, for example, mistaken assumptions about the preferences or lifestyle needs of an individual patient. It may also involve the use of chronological age as a proxy for the risks and harms a course of treatment may produce in an individual patient where, for example, there is a strong statistical correlation between age and risk and no reliable test for assessing biological age.⁵¹ There is relatively little research on the ways in which age is used by individual clinicians, but that which there is suggests that chronological age may be used as a proxy for a number of indicators, including risk or capacity to benefit. Thus, for example, some clinicians participating in a study of the influence of patient age on decision-making on coronary care noted that a patient’s chronological age may influence their views on whether to refer them for surgery as it served as a proxy for the risk of mortality or the development of complications. Some clinicians in the same study also used patient age as a marker for wider concerns about what may be in the patient’s best interests. One, for example, noted that ‘they wouldn’t want an angiogram if they were over 70’; another, that ‘I don’t think bypass surgery in an 87 year old is in their interests’.⁵²

2.6 Summary

The foregoing review suggests that chronological age is used as a proxy for a host of characteristics in determining access to treatment: as a proxy for the capacity of an individual to benefit from an intervention; for the type of harm that may result from an intervention; for the likelihood of such benefit or harm occurring; and, in some cases, for other indicators used to determine what may be in the patient’s interest. Age is used as a proxy in this way in making decisions about both individual patients and wider populations; it may be used where no

better ‘marker’ for the relevant characteristic exists or where – for reasons including cost, practicality or fairness – age may be used in preference to other available markers. The next section now considers how these reasons for using age may fit with existing anti-discrimination law.

3 Legislative Framework

Under the Equality Act, service providers must not discriminate directly or indirectly on grounds of age. However, they may adopt measures that would otherwise amount to direct or indirect age discrimination if they can show that the measure in question is a ‘proportionate means of achieving a legitimate aim’.⁵³

There have, as yet, been no reported cases on age discrimination in the provision of healthcare. In order to understand the way the justification may operate in this context, therefore, we must look to other case law for guidance on the likely approach to be taken by the courts on the scope of the test for justification. A number of sources are likely to be particularly helpful.

The first is the case law on age discrimination in employment where a significant body of case law has emerged both in the UK and in the European Court of Justice (CJEU). There has been some judicial consideration of whether the meaning of discrimination, and the approach to interpretation to be taken by the Court, should be the same across the various areas of life regulated by anti-discrimination law. Thus, by way of example, the House of Lords, in the disability discrimination case of *Lewisham v. Malcolm*, concluded that the test for establishing ‘disability related discrimination’ must mean the same in relation to housing and to employment, despite the different overall scheme of the different sections of the (then) Disability Discrimination Act 1995.⁵⁴ Likewise, in *Elias*, a case concerning indirect race discrimination the administration of a government compensation scheme for prisoners of war, it was held that the appropriate test of proportionality under the 1976 Race Relations Act was that developed by the CJEU in *Bilka* in the context of a claim of sex discrimination in the workplace, even though the claim in *Elias* was not one to which EU anti-discrimination law applied.⁵⁵ There is therefore good reason to think that the approach developed to justification in the case law on age discrimination in employment, both in the UK Courts and in the CJEU, will inform the approach taken to discrimination in healthcare.

A second useful source is case law on discrimination in public services, both under the Equality Act 2010 (where, again, case law is very limited) and under Article 14 of the European Convention on Human Rights (ECHR.) The ECHR has not proved fruitful territory in

49. Department of Health, above n. 46.

50. Royal College of Surgeons, above n. 46; Royal College of Psychiatrists, above n. 35.

51. See e.g. Department of Health, above note 46, which suggests that the lack of an objective way of assessing biological age in some contexts may lead to clinicians using chronological age as a proxy.

52. C. Harries et al., ‘Which Doctors are Influenced by a Patient’s Age? A Multi Method Study of Angina Treatment in General Practice, Cardiology and Gerontology’, 16 *Quality and Safety in Health Care* 23-27 (2007).

53. Sections 13 and 19.

54. *Malcolm v. Lewisham LBC*, [2008] UKHL 43.

55. *R. (on the application of Elias) v. Secretary of State for Defence*, [2006] EWCA Civ 1293.

establishing a positive right to healthcare treatment – the European Court of Human Rights (ECtHR) having confirmed in *Sentges* and in *Pentiacova*⁵⁶ that Article 8 is generally not engaged in situations that involve a decision not to provide a particular form of treatment. Indeed in the UK case of *Condliff* the Court of Appeal noted that

[a]lthough the Strasbourg Court has recognised that in principle Article 8 may be relied on to impose a positive obligation on a state to take measures to provide support for an individual, including medical support, there is no reported case in which the court has upheld such a claim by an individual complaining of the state’s non-provision of medical treatment.⁵⁷

As a result, there is very little that can be said with confidence about the obligations of healthcare providers in relation to Article 14, and the implications for the interpretation of the Equality Act. Nonetheless, ECHR case law will be instructive in relation to approaches to age discrimination and to the bounds of permissible justification in relation to the provision of public services and the allocation of scarce resources.

The situation is further complicated by the fact that courts have often tended to treat age differently from other protected grounds of discrimination and to engage in lighter touch review of justification in consequence.⁵⁸ Thus, for example, in consideration of Gurkha pensions entitlements in the Court of Appeal, Kay LJ decided that ‘stronger justification’ would be required for discrimination on grounds of nationality than it was on grounds of age. Nationality was a suspect ground, whereas age was not. Arguments by the counsel for the appellants that age should be given ‘suspect’ status because ‘it is innate, unalterable, closely connected with personal development and central to a person’s individuality’ were rejected as unsupported by domestic or Strasbourg authority.⁵⁹ In *Carson* age was identified as a ‘contemporary example of a borderline case’ between these two categories of ‘suspect’ and ‘non-suspect’ characteristics.⁶⁰ It is therefore difficult to be confident in assessing the extent to which judicial reasoning on other grounds of discrimination will be relevant to cases on age.

With those caveats in mind, the next two sections will assess the way the test for justification may apply to the instances of potential age discrimination identified previously – first, by considering whether the aims given

for the uses of age are likely to be ‘legitimate’ and, second, by assessing whether using age boundaries is likely to be a proportionate means to achieve them.

3.1 Legitimate Aims

3.1.1 Cost-effectiveness

Behind many decisions to restrict access to health interventions, however this is done, is of course the need to ration limited resources. The use of age to determine access is no different. It was seen earlier that behind the restriction on IVF services and screening programmes by age, and indeed the design of the QALY methodology, is a desire to allocate resources cost-effectively.

In a public law context, as Herring notes, challenges to healthcare rationing decisions in the UK are rarely successful: courts are unwilling to intervene where issues of resource allocation are concerned unless manifestly irrational.⁶¹ Where judicial review succeeds it tends to be on procedural grounds rather than because a refusal of any particular treatment is substantively unfair. This is the case even where the treatment involved is potentially life-saving.⁶² Where challenges have succeeded they have tended to involve procedural failures such as, for example, a failure to adequately define what would constitute an exceptionality in relation to the refusal to provide an expensive cancer drug⁶³ or a policy that allowed no room for the exercise of discretion and consideration of individual facts in relation to gender reassignment surgery⁶⁴ – matters that, in a discrimination law context would more likely fall to be determined under the question of proportionate means, discussed later.

Is the approach of the courts likely to be any different when considering justification of age discrimination under the Equality Act? We know that in an employment law context, cost saving, without more, is unlikely to amount to legitimate aim – employers may not engage in discriminatory behaviour simply because it is cheaper to do so. However, courts have treated aims expressed in terms of prudent use of resources more sympathetically. Thus, while the Court of Appeal in *Woodcock* agreed that ‘considerations based on cost alone, or on economic or financial factors alone, cannot justify treatment that is discriminatory on grounds of age’,⁶⁵ subsequent cases have noted that it is ‘legitimate for an organisation to seek to break even year on year and to make decisions about the allocation of its resources’.⁶⁶ The CJEU has made similar comments.⁶⁷

56. *Sentges v. Netherlands*, [2004] 7 CCL Rep 400; *Pentiacova v. Moldova*, [2005] 40 EHRR SE23.

57. *R (on the application of Condliff) v. North Staffordshire Primary Care Trust*, [2011] EWCA Civ 910, at 41.

58. For discussion see R. Horton, ‘Justifying Age Discrimination in the EU’, in U. Belavusau and K. Henrard (eds.), *EU Anti-Discrimination Law Beyond Gender* (2018) and S. Goosey, ‘Is Age Discrimination a Less Serious Form of Discrimination?’, *Legal Studies* 1-17 (2019).

59. *R (British Gurkha Welfare Society and Others) v. Ministry of Defence*, [2010] EWCA Civ 1098, at 11.

60. *R (on the application of Carson) v. Secretary of State for Work and Pensions* and *R (on the application of Reynolds) v. Secretary of State for Work and Pensions*, [2006] 1 AC 173.

61. J. Herring, *Medical Law and Ethics* (2012). See also Newdick, above n. 4; C. Foster, ‘Simple Rationality? The Law of Healthcare Resource Allocation in England’, 33 *Journal of Medical Ethics* 404-407 (2007).

62. *R v. Cambridge Health Authority ex parte B*, [1995] 2 All ER 129, CA.

63. *R (on the application of Rogers) v. Swindon NHS Primary Care Trust and another*, [2006] EWCA Civ 392.

64. *R v. North West Lancashire Health Authority, ex p A, D & G*, [2001] 1 WLR 977.

65. *Woodcock v. Cumbria PCT*, [2012] EWCA Civ 330, at 55.

66. See, most recently *Heskett v. Secretary of State for Justice*, [2019] UKCAT/0149/18/DA, at 25.

67. See Case C159/10 *Fuchs and another v. Land Hessen*, [2011] 3 CMLR 47.

Against this background, then, it is difficult to imagine courts challenging the aims of targeting scarce resources most efficiently to those most likely to benefit. Any challenge is more likely to arise in relation to the means chosen to do so.

3.1.2 Protection of Patients

More difficult, perhaps, are those aims, identified previously, that aim to protect patients from some form of distress. It will be remembered that these kinds of reasons featured in the justification for the upper and lower ages for access to screening, where decision makers expressed a preference to shield patients from the distress of ‘false positives’ or of ‘true positives’ where the progress of the disease meant individuals were likely to die of something else before the cancer became fatal. There was also a desire to protect young women from the stigma of invitations to screening for cervical cancer based on lifestyle. Reasoning based on the assumed wishes or interests of older patients was also evident in the limited evidence available on the ways in which clinicians may use age in deciding on the most appropriate treatment pathway.

The UK Supreme Court did accept an – arguably – comparable reason as a legitimate aim in *Seldon*⁶⁸ following the guidance of the CJEU. Mr Seldon, a solicitor and partner in the respondent law firm, had been required to retire from the partnership at the age of sixty-five. The respondent firm claimed that their treatment of Mr Seldon was justified by a number of aims, one of which was to limit the need to expel partners by way of performance management, thus contributing to a congenial and supportive culture in the respondent firm. By the time the case reached the Supreme Court, this aim was expressed in terms of a concern for preserving the dignity of the individual partner or employee by avoiding potentially humiliating performance management and disputes about competence. The Supreme Court was unanimous that this aim, among others, was legitimate and indeed had been held to be so by the CJEU.

This decision (and this feature of it in particular) have proved controversial, not least because it rests on assumptions about what older people may want and who is best placed to decide this.⁶⁹ While avoiding performance management and disputes is likely to be in the interests of the employer, the aim was also expressed as being to ensure the best outcome for employees. Thus, it seemed to reinforce a stereotype of older people as being not only more vulnerable to potentially humiliating capability proceedings and in need of protection from them but also as not best placed to choose for themselves whether or not to remain in the workplace and to risk a capability assessment at some point in the future. Age UK, intervening in *Seldon*, had argued that the dignity of each individual was the philosophy under-

lying all the anti-discrimination laws and that this amounted to a right not to be treated on the basis of stereotypical assumptions. Dignity included respect for the autonomy.⁷⁰ Lady Hale expressed some sympathy with this position, but she concluded that the CJEU’s acceptance of dispute avoidance/preserving dignity as a legitimate aim was the end of the matter.

While there is reason, therefore, to believe such aims may be considered legitimate, they are perhaps more vulnerable to challenge. This may be particularly the case in relation to decision-making by clinicians in respect of individual patients. In related areas of law regulating the doctor-patient relationship, such as informed consent, there has been, in recent years, a marked move away from ‘medical paternalism’ and towards patient autonomy; doctors may not withhold information from patients for fear of causing them distress unless in exceptional circumstances and may certainly not do so in order to prevent ‘the patient from making an informed choice...which the doctor considers to be contrary to her best interests’.⁷¹

3.1.3 Meeting the Needs of Different Groups

In relation to mental health services, it is evident from the foregoing discussion that there is an ongoing debate over whether age-specialist services are appropriate and indeed whether a failure to provide age-specialised services may create disadvantage to older patients such as to amount to indirect discrimination.

Targeting services to particular groups in order to meet need is very likely to amount to a legitimate aim. In respect of other characteristics – where no justification for what may otherwise amount to direct discrimination is permitted – the Equality Act includes exceptions that permit different treatment in specified circumstances. For example, the provision of separate services to different sexes is permitted where it can be shown that a joint service would be less effective and the provision amounts to a proportionate means of achieving a legitimate aim. The positive action provisions of the Act also permit different treatment for groups sharing a protected characteristic where it is shown that the aim of the treatment is to meet the needs of the relevant group or to overcome disadvantage connected to the characteristic and the treatment is a proportionate means of achieving that aim.

In relation to age discrimination in employment, both the CJEU and the UK courts have been happy to accept as legitimate aims that relate to redressing disadvantage faced by particular age groups in the labour market and/or improving intergenerational equity.

There seems little doubt, therefore, that an objective of improving services for a particular age group will be legitimate and the provision of age-specialised services will be justified provided the means of achieving the aim are proportionate.

68. *Seldon v. Clarkson Wright & Jakes (A Partnership)*, [2012] UKSC 16.

69. See A. Blackham, ‘Interrogating the ‘Dignity’ Argument for Mandatory Retirement: An Undignified Development?’, 48(3) *Industrial Law Journal* 377-415 (2019).

70. Submission of Age UK (Second Intervener), at 31.

71. *Montgomery v. Lanarkshire Health Board*, [2015] UKSC 11, at 91.

3.2 Proportionality

Once a legitimate aim has been established as a first step, the test for proportionality, although not always applied wholly consistently,⁷² tends to consist of three further steps. Second and third – as drawn from the case law of the CJEU going back to *Bilka* – are the questions of whether the chosen measure is appropriate for achieving the chosen objective and no more than necessary to accomplish it. However, as recently noted by Lady Hale,

[t]he concept of proportionality, which has found its way into both the law of the European Union and the European Convention on Human Rights, has always contained a fourth element. This is the importance, at the end of the exercise, of the overall balance between the ends and the means: there are some situations in which the ends, however meritorious, cannot justify the only means which is capable of achieving them.⁷³

This section assesses whether it is possible to identify a number of features that case law suggests may be relevant to determining whether and when the use of age as a proxy criterion in accessing healthcare intervention is proportionate. These features are the accuracy of the proxy and – related – the impact on those excluded; the availability of an alternative – less discriminatory – test; and whether there is scope for considering whether an exception to a rule should be made in the case of a particular individual.

3.2.1 Accuracy

Courts have rejected the use of some protected characteristics, including sex and race, as proxies, even where their use has been statistically well evidenced. In *Test Achats*, for example, the use of sex as a proxy for risk in calculating motor insurance premiums was rejected even though this could be substantiated by accurate actuarial and statistical data.⁷⁴ In relation to age, however, courts have appeared far more prepared to accept the use of age as a proxy, in principle at least. In these cases the question of the accuracy of the proxy then becomes potentially relevant to the question of proportionality. Accuracy should matter in proportionality assessment. The less accurate the proxy, the more people are likely to be on the ‘wrong side’ of the line and excluded from access to the benefit in question. Along with the nature of any hardship caused – which will also depend on the nature of the benefit to which access is denied – the accuracy of the proxy will be one of the considerations relevant to balancing the aim of the measure against the impact on those affected.

The CJEU has been prepared to challenge the accuracy of the use of age as a proxy in a number of cases.⁷⁵ In *Hennigs* the Court found the use of an age-graded pay scheme to be unjustified. It rejected the argument that older workers had greater financial needs than younger workers, noting that

it has not been shown that there is a direct correlation between the age of employees and their financial needs. Thus a young employee may have substantial family burdens to bear while an older employee may be unmarried without dependant children.⁷⁶

Presumably, had a direct correlation been established, the Court would have taken a different view. In *Prigge* the Court was asked to consider a rule in a collective agreement requiring compulsory retirement of airline pilots at sixty, where age was used as a proxy for a decline in the physical capacities needed to perform the role safely.⁷⁷ While not challenging the argument that age can stand as a proxy for physical capacity, the Court found the choice of sixty to be disproportionate in this case because there was no evidence to support it. National and international legislation permitted pilots to continue working in certain circumstances until sixty-five, and no evidence had been provided to justify a departure from this standard.

Evidence aside, the use of age as a proxy in relation to health is always going to present difficulties with regard to accuracy in relation to health for at least two reasons. First, there is a widely acknowledged difference between ‘chronological age’ and ‘biological age.’ Grimley Evans has argued that chronological age does not serve as an accurate proxy for health-related risks or capacity to benefit, because there can be wide variance between the chronological age of an individual and their biological age; and because even though there may be correlation between age and health, age is not the cause of anything:

We have grown so inured to using a patient’s age as an excuse for laziness in investigating him or her properly that we have failed to build into our scientific paradigms proper identification of the true physiological determinants of outcome... If one knows enough about the physiological condition of the patient, age should drop off the end of the predictive equation for outcome.⁷⁸

Second, even where chronological age does serve as a good proxy for some other characteristic, it is difficult to imagine that it can ever adequately capture all and only those having that characteristic, because, as the House

72. A. Baker, ‘Proportionality and Employment Discrimination in the UK’, 37(4) *Industrial Law Journal* 305-328 (2008).

73. *Akerman-Livingstone v. Aster Communities Ltd*, [2015] UKSC 15, at 28.

74. Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v. Conseil des ministres*, [2011] 5 CMLR 36; see also *Timishev v. Russia*, [2007] 44 EHRR 37 on the use of race as a proxy.

75. However not consistently so. See, for example *Kucukdeveci v. Swedex GmbH & Co KG*, [2010] 2 CMLR 33.

76. C-297/10 *Hennigs v. Eisenbahn-Bundesamt*, [2012] 1 CMLR 18, at 70.

77. C-447/09 *Prigge v. Deutsche Lufthansa AG* EU:C:2011:573.

78. J. Grimley Evans, ‘Age Discrimination: Implications of the Ageing Process’, in S. Fredman and S. Spencer (eds.), *Age as an Equality Issue* (2003), at 19-20.

of Lords accepted in *Carson and Reynolds*, ‘there could be no relevant difference between a person the day before and the day after his or her birthday’.⁷⁹ In that case the House of Lords considered whether a provision restricting certain social security benefits to those under the age of twenty-five was in breach of Article 14 of the ECHR. Finding that the use of age was a relevant proxy for financial need (the government had argued that many more under twenty-fives lived with their families or in shared accommodation and therefore had lower expenses), the Court accepted that the choice of any particular age here could only ever be an ‘arbitrary line’. However, it was argued,

[A] line must be drawn somewhere. All that is necessary is that it should reflect a difference between the substantial majority of the people on either side of the line.⁸⁰

In relation to the examples of the use of age, above, there is certainly cause for concern about the accuracy of the age limits chosen in some cases. A review of the literature on the use of age in access to screening programmes concluded that

while some (screening programmes) have a sound evidence base and for others there is no available evidence, some are clearly discriminatory and are not justifiable by disease prevalence or any other clinical indicator.⁸¹

Thus, for example, while the upper age limit for vascular screening is currently seventy-four, most strokes occur in those aged seventy-five or over, and therefore it is important to monitor hypertension in this age group too;⁸² and the upper age limit for cervical cancer screening is explained – as noted previously – as reflecting the fact that those over sixty-five are ‘highly unlikely to go on to develop the disease’, whereas research suggests that more women in their seventies die from cervical cancer than women under thirty and that there is a second ‘peak’ in the incidence of cervical cancer in those over the age of eighty-five.⁸³ Thus, the proportionality of the choice of the current age limits certainly seem open to challenge for this reason.

It is also interesting to consider how this might apply in relation to the ‘postcode lottery’ for access to IVF services. It was seen that different age limits for access are used by different CCGs and that many depart in this respect from the guidance on age limits issued by NICE. In respect of their public law obligations, it was held in *Rose v. Thanet* that while CCGs are not obliged to follow NICE guidance, they must have regard to them and must provide clear reasons for departing from them.

79. *R (on the application of Carson)*, [2006] 1 AC 173, at 41.

80. *Ibid.*

81. Centre for Policy on Ageing, above n. 1, at 22.

82. G. Xavier, ‘The New Health Checks Must Not Be Allowed to Increase Inequalities’, 105(14) *Nursing Times* 9 (2009).

83. C. White, ‘Upper Age Limit Should be Raised for Cancer Screening’, 318 *British Medical Journal* 831 (1999); www.cancerresearchuk.org.

Notably, it was held that they will be in breach of their public law obligations should they depart from the guidance solely on the basis of disagreement with NICE over the current state of medical science. A similar obligation could be argued to exist in relation to justifying the choice of a particular age limit for IVF. It was seen that in *Prigge* a departure from internationally accepted age limit for pilots, without good reason, was a reason for finding the relevant measure disproportionate. Likewise, given NICE’s conclusions on the effectiveness of IVF in particular age groups, CCGs may be argued to be acting disproportionately, taking a different view on this issue and choosing different age limits accordingly. A choice of different age limits should therefore be justified by reference to other reasons relevant to local needs and priorities.

3.2.2 Availability of Less Discriminatory Measure

Given that a measure must be ‘necessary’ in order to be proportionate, the existence of a less discriminatory alternative to the use of a particular age limit may signal that the measure in question is not proportionate. An alternative measure may include using a different criterion (which may include, for age, a different age limit), testing each individual to see whether those concerned do indeed possess the necessary characteristics to qualify for whatever benefit is at stake, or asking individuals about their preferences.

The CJEU has not been consistent in its approach to this issue. There was no suggestion, for example, in *Petersen*, that the use of age to determine when a dentist was no longer safe to practise was disproportionate because it could have been replaced by an individual fitness to practise test, administered to all dentists.⁸⁴ However, in *Vital Perez* the CJEU took a different view in considering a measure that set a maximum recruitment age of thirty for a local Spanish police force in order to guarantee a certain level of physical capacity among recruits.⁸⁵ The Court rejected the measure as disproportionate because the use of an age limit to achieve the aim here was unnecessary – the police force *already* used stringent physical tests as part of the recruitment process. This made the use of the age limit unnecessary to establish the aim and therefore disproportionate.

In relation to Article 14, it has been suggested that ‘necessity’ is neither necessary nor sufficient but instead is simply one of the ‘tools of analysis in examining the cogency of the reasons put forward in justification of a measure’.⁸⁶ At least in relation to non-suspect categories, it seems, the existence of a less discriminatory alternative does not mean a measure will fail the proportionality test; and the administrative workability and cost of alternatives are certainly relevant. *Bibi*, for example, concerned the application of a language test to applicants for long-term residence. Nationality was used

84. C-341/08 *Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, [2010] 2 CMLR 31.

85. C-416/13 *Vital Perez v. Ayuntamiento de Oviedo* EU C:2014:2109.

86. *R (on the application of Wilson) v. Wychavon DC*, [2007] EWCA Civ 52.

as a proxy to determine who should be exempt from the test and who should not – nationals from English-speaking countries were exempt. The possibility of an alternative approach, including individual testing, was considered. The Court held that

it would be absurd to suggest that a person should have to undergo a test to prove that he or she meets the language requirement in order that he or she should be entitled to benefit from an exemption from the requirement to undergo a language test... in this context, it is administratively sensible and permissible to draw relatively 'broad' or 'bright' lines in terms of selecting those who can be considered as already sufficiently meeting the requirement to justify being exempted from the provision. What is necessary is that the particular 'bright line' adopted be a rational one.⁸⁷

Likewise, even where a feasible alternative test is conceivable, the cost and administrative inconvenience involved may incline the Court to decide that a failure to choose the alternative was not disproportionate.⁸⁸

Interestingly, in *Seldon*, age was used as a proxy, among other things, for declining capacity. The argument was that the mandatory retirement age in question was justified as a means of preserving the dignity of older workers by preventing their dismissal for incapacity. There was a notable and somewhat frustrating lack of discussion on this issue in the case, which makes conclusions harder to draw. However, it was accepted that age should be used as a proxy for declining capacity in order to *avoid* an actual capacity test. The purpose of the age limit was to protect individuals from this assumed humiliation. Thus, the nature of the alternative test was deemed a reason to find the measure proportionate.

The theoretical possibility of testing each individual rather than applying an age limit is therefore unlikely to be enough to make the use of an age limit disproportionate. Rather, the cost and workability of administering individual testing will be relevant to a determination of proportionality – particularly where, it is imagined, the legitimate aim in question involves the efficient targeting of scarce resources. Thus, for example, in relation to cancer screening, analogous with *Bibi*, if screening cannot be available to everybody then the use of individual testing to determine access to screening makes little sense. However, in cases where individual assessment does not incur significant costs or present other significant difficulties – and in particular, where individual assessment is *already* undertaken (as was the case in *Vital Perez*) – then a case might be made that the imposition of age limits is unnecessary and therefore disproportionate. This is likely to be the case in relation to the use of age by individual clinicians. Chronological age

may be a useful starting point, in some cases, for diagnosis or choice of treatment pathway. However, clinicians should have the opportunity to assess, in some respects at least, whether what may generally be true of patients of a particular age is in fact true for the patient in front of them. So too, in relation to the division of mental health provision into age group-specialised services, there seems no reason why, in most cases, choice of the most appropriate service for the particular patient cannot be assessed by the referring clinician or (in the case of transfer between services) the existing care team. Indeed this is the approach recommended by the Joint Commissioning Panel for Mental Health, which notes that older people should not be precluded from accessing services provided for working age adults where assessment of their needs indicates that this would be appropriate.⁸⁹

3.2.3 Exceptionality

Another potentially important – and closely related – consideration is that of exceptionality. Given that proportionality requires a balancing between the aim of a measure and the impact on those disadvantaged by it, the possibility of making exceptions to a general rule for individuals who can demonstrate a good reason for doing so means that the harmful impacts of the rule may be reduced.

A concern for making exceptions has not been evident in the cases considering the justification of age limits in employment law. Indeed in *Seldon* the Supreme Court was asked to decide whether, in addition to having to justify a general rule that discriminated directly on grounds of age, an employer had to justify the application of that rule to the particular applicant. The applicant argued that even if the use of the mandatory retirement age was in general a proportionate means of achieving a legitimate aim, its application to him could not be justified. The Court held, however, that 'where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it'. Requiring employers to justify the application of rules to individual employees would, it was argued, normally negate the value of having a rule in the first place.⁹⁰

The possibility of an exception being made has, however, been a relevant consideration in determining proportionality under Article 14 of the ECHR. In *AL (Serbia)*, for example, it was one of the features that led the Court to conclude that the government policy of using family status to determine eligibility for indefinite leave to remain was justified. The measure was proportionate because, among other things, 'it permitted compelling

87. *R (Bibi) v. Secretary of State for the Home Department*, [2013] EWCA Civ 322, at 42 citing J. Beatson, at first instance, [2011] EWHC 3370 (Admin), at 132.

88. *R (on the application of Hooper) v. Secretary of State for Work and Pensions*, [2002] EWHC 191 (Admin).

89. Joint Commissioning Panel for Mental Health, *Guidance for Commissioners of Older People's Mental Health Services* (May 2013), www.jcpmh.info (last visited July 2019).

90. Above n. 67, at 65 and 66.

claims by those falling outside the policy to be recognised and accommodated'.⁹¹

The relationship between exceptionality and proportionality – and how these considerations may be applied to the use of age barriers for access to healthcare – therefore remains unclear. It seems at least that, while not a requirement of proportionality, the existence of an opportunity for individuals to make a case for being an exception to the rule may be a relevant consideration in any balancing exercise.

As public bodies, healthcare commissioners are already under a public law duty not to fetter their discretion through the strict application of a blanket rule (*R v. North West Lancashire Health Authority, ex p A, D & G*, [2001] 1 WLR 977). Rather, they are obliged to have some mechanism whereby exceptions to the rule can be made for patients who can demonstrate exceptional circumstances. Accordingly, CCGs operate a system whereby individuals who do not otherwise qualify for a particular intervention may submit an individual funding request (IFR) to seek treatment on the basis of exceptionality where they do not otherwise qualify for treatment. Although there remains a lack of clear legal guidance on what may amount to exceptional circumstances,⁹² commissioners tend to restrict these to clinical factors only.

It is not known whether there have been IFRs that have succeeded because an individual patient has shown that they have exceptional circumstances in relation to an age limit.⁹³ It is not clear whether evidence showing that – for example – the biological age of the patient is significantly different from their chronological age in relevant respects would be sufficient to demonstrate exceptionality. If so, it may provide an opportunity for women denied IVF because of age to demonstrate that, as is sometimes the case, their biological ovarian age differs significantly from their chronological age.

In relation to screening services, it was seen that, in some circumstances, screening may be available to those not in the age group routinely invited, either where they are able to self refer, or where a GP may refer on the basis that the risk is higher for them than for others of their age. While there is evidence that the take-up of self-referral is low, in part because individuals may not be aware of the option, these opportunities – at least if adequately publicised – may again mitigate the impact of the use of age limits and render their use more proportionate as a result.

91. *AL (Serbia) v. Secretary of State for the Home Department*, [2008] UKHL 42, at 3; See also *R v. Entry Clearance Office ex parte Abu-Gidary*, [2000] 2000 WL 741931 QBD.

92. A. Ford, 'The Concept of Exceptionality: A Legal Farce?', 20 *Medical Law Review* 304-336 (2012).

93. There has been one case reported in the press, but the basis of the successful appeal was not reported. <https://www.telegraph.co.uk/women/womens-health/8965796/Couple-win-IVF-funding-battle-with-NHS.html>. See *R v. Sheffield HA ex parte Searle*, [1995] 25 BMLR 1 – pre Equality Act 2010 – where a judicial review challenge to the application of an age limit for IVF services and refusal to consider each case on an individual basis, failed.

4 Conclusion

This article has aimed to assess, as far as is possible, the compatibility of some uses of age in the allocation of healthcare with the existing legal framework. It was seen that age is still used as a proxy for a range of factors, including need, risk and capacity to benefit. The analysis suggests that, in most cases, these uses of age may be legally justifiable. However, it suggests, in order to ensure that the use of age is proportionate, that care should be taken to ensure that it is evidence based and as accurate as possible, is used consistently and is only used where the opportunity for individual assessment is unworkable. It is also important that meaningful provision exists for individuals to make a case for accessing the healthcare in question even when they fall on the wrong side of a limit.

Perhaps the most legally questionable example of the use of age discussed previously is where clinicians use it to determine treatment pathways for individual patients. This may not be compatible with the law where it is done for 'paternalistic' reasons and where, because of the opportunity for assessment of and discussion with the individual patient, the use of a patient's chronological age to determine access to treatment is less likely to be proportionate. Further research to understand more about when – and how – individual clinicians use chronological age in decision-making would be welcome, not least because it would help determine whether the correlation identified between age and treatment offered is in part a result of unlawful age discrimination.

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