A Response to Rebecca Adami

Katrin Lainpelto

In the chapter ‘Childism – on adult resistance to children’s rights’, Adami discusses childism as barrier to the realization of children’s rights. This question is highly relevant in the context of criminal proceedings. For young offenders, criminal proceedings expose how several, sometimes conflicting, interests need to be taken into account and balanced within a single legal context. Examples of such considerations include the need for an effective law enforcement, the function of retribution, general and individual preventive aspirations, victim reparations, and the particular vulnerability and protection needs of young offenders.

In the handling of criminal proceedings concerning young offenders, therefore, a multifaceted and complicated legal figure emerges: the child as an underdeveloped adult, in need of support and protection; the child as an immature and therefore ‘dangerous criminal’ with a high risk for relapse; and the child as a mouldable lump of clay who can be reintegrated into society. In the context of criminal proceedings, these aspects mean that in some parts of the criminal proceedings, children should be treated as adults, while in other parts of the process children should be protected against being treated as adults. The latter position is possible because the juvenile justice system contains accepted deviations from the right to equality before the law. This differential treatment is justified with reference to the immaturity of children and young adults and their underdeveloped capacity to understand rules and societal norms, in addition to a great need for protection against the negative consequences of a legal penalty.

The legal reasoning behind the general characterization of the child as a multifaceted and complex legal figure seems to be based on a conflict between the equal-treatment argument and the protection argument. Critiques of the protection argument argue that acknowledgement of the child’s vulnerability and need for protection is based on a child-adult classification and a negative stereotyping of children as a group. Through such an adult-centric perspective, childhood is viewed as an unavoidable stage – ‘a necessary evil’ – through which children need to pass to develop into competent and capable adults. Furthermore, differential treatment of young offenders can reinforce already existing negative stereotypes of children: deviations from the equal-treatment principle can evoke and strengthen beliefs about the inferiority of children in relation to adults. Therefore, in a worst-case scenario, differential treatment
of children and young people can lead to stigmatization and even discrimination. Furthermore, a view of children as a homogeneous group can lead to the negation of an individually tailored treatment of children in legal proceedings, where the possibility to adapt and adjust measures can determine the success of such measures and the possibilities for the child’s reintegration in society.

From a legal procedural perspective, the opposition between the equal-treatment argument and the protection argument can lead to factual consequences for a child accused of a crime. The conflict between these arguments can be found in the Convention on the Rights of the Child (CRC) and in the General Comments of the Committee on the Rights of the Child concerning children in conflict with the law. An example to be mentioned is Article 40 of the CRC, which in turn is based on the right to a fair trial as the right is stated in the ECHR, through which children are assured the same procedural safeguards as those given to adult offenders. A conclusion that could be drawn in relation to the CRC, at least to a certain degree, is that the Convention advocates equal treatment from a rights perspective.

On the other hand, both the CRC and the Committee on the Rights of the Child allow exceptions from the equal-treatment principle, and these exceptions are justified by the need for protection of children in the legal context of criminal proceedings. However, these exceptions – such as measures that aim to steer the child away from the ordinary criminal proceedings or limit the child’s participation – can lead to a child not being granted the due-process protection stated in Article 40 of the CRC.

In other words, the legal handling of young offenders, which is considered to promote the best interests of the child, can de facto lead to a child not being able to enjoy his or her procedural rights to the same extent as an adult offender. Conversely, an emphasis on the rights perspective and procedural formality could hinder both a child-adopted treatment and fulfilment of the need for individually tailored diversion measures. Assigning adult due process-protection to children can also lead to adult liability principles, which stand in stark contrast to the child’s need for protection as well as the importance of the reintegration of the child in society.

Overall, the conflicts of interest in the child-penalty process pose a risk that young offenders will be placed in procedural vacuum of sorts, where the attempts to achieve balance between the fairness of the process and the child’s need for protection could lead to a child being ensured neither his or her procedural rights nor due access to a child-adapted criminal proceeding. The slightest imbalance between a rights perspective and a protection perspective will lead to noticeable procedural after-effects for the child – effects for the child as a rights holder or for the child as being just a child. The question, however, is...
whether one perspective or the other needs to be excluded, or whether the one perspective could paralyze the other. If we consider the objectives of the CRC, assuring the possibilities to reintegrate the child into society seems to be the desirable goal. Achieving this goal requires increased implementation of child-adapted and individually designed diversion measures. At the same time, such an arrangement highlights the urgency of a rights perspective.

The chapter by Adami on childism seems to introduce a third position, which might provide a solution to the conflict between a protection perspective and equal-treatment perspective within the juvenile justice system. An anti-childist analysis and theory might help us determine when either benevolent or hostile prejudices about children influence adult arguments against a strengthening of children’s rights. This approach is in line with my argument: what is needed is a restructuring of the processes as such, so they do not reflect solely an adult perspective in courts, and assurance of necessary support that is sensitive to children’s unique conditions, in order to ensure child equity instead of mere formal equality for children.