JEAN MONNET CHAIR

EU INSTITUTIONS, RIGHTS AND JUDICIAL INTEGRATION

Jean Monnet Chair

EU Institutions, Rights and Judicial Integration

Working Paper

The theoretical justification for the existence of children's special rights for child offenders and their practical application

Dr. Elena Vassiliou Lefkariti

Lecturer in Law and Criminology

LLB (KCL), MSC (LSE), PhD (Kent)

Co-funded by the European Union

Funded by the European Union. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union or the European Education and Culture Executive Agency (EACEA). Neither the European Union nor EACEA can be held responsible for them.

The theoretical justification for the existence of children's special rights for child offenders and their practical application.

ABSTRACT

The paper examines the justifications for the existence and the application of special children's rights in the field of the criminal justice system, giving special focus to the UK, because it is a country that has often been criticized for not having adequate special procedures for its child offenders.[1]The first section of the paperanalyses the concept of what a child is, grouping various characteristics together to form four distinct profiles of the child, the Adult Child, the Unformed Child, the Romantic Child and the Savage Child. It is explained that that these profiles exist either at different points in time or simultaneously and they are expressions of what children are according to the beliefs of different societies, cultures and times. Their validity is not questioned as they are expressions of beliefs and social norms and not scientific data related to the biology of children.

The second part of the paper addresses the question why special children's rights exist for child offenders. It starts with an examination of various analyses of justifications for their existence,coming from the fields of legislation, politics and academia, which demonstrate an array of different, perhaps even conflicting, approaches. It is concluded that the explanation of these variations is situated in the assumptions upon which the justifications are founded, namely the different concepts of childhood discussed in the first part of the paper. When the input is different, it is a logical consequence that the output will vary. Accordingly, it is accepted that the different justifications offered for the existence of children's special rights are all valid and depend upon what characteristics a child is assumed to have. The significance of this, is that it determines that there is no one correct answer to the debate on which approach is more correct, simply because there is no one singlecorrect definition of what a child is.

The third and last part of the paperfirst observes that the adoption of different concepts of the child affects the application of the rights involved in the criminal justice process related to child offenders, causing a number of variations over time. Consequently, a rights approach, similar to the one followed by the European Court of Human Rights (ECtHR) in civil and family law cases, which considers children's special rights and balances them against the rest of the rights involved in the criminal proceedings against children, is examined as a potential alternative.The section concludes that this approach, in which all rights involved are given weights and balanced against each other in a special preliminary hearing, is an alternative worthy of consideration.

INTRODUCTION

Child offenders have been the subject of vast amounts of literature across numerous fields and disciplines. A particular challenge facing researchers, analysts and policy makers in the field of

[1]UN Committee, *Rights of the Child, United Kingdom of Great Britain and Northern Ireland* (CRC/C/15/Add 34, January 1995) para 18; Jane Fortin, Children's Rights and the Developing Law (Cambridge: CUP, 3rd ed., 2009) Ch.18, 678

human rights is that different types of rights are involved in dealing with child offenders, which need to be balanced against each other.The current paper examines three such types of rights, namely the rights child offenders have because they are offenders,[2]their special rights because they are children,[3]and the rights of third parties, that is, the victims and society. The justification of the existence of the special rights of children is first analysed in relation to different notions of childhood and then the potential practical application and interrelations of the three strands of rights is discussed.

CONCEPTS OF CHILDHOOD

A discussion regarding different categories of rights related to child offenders must begin from their source, the very foundations from which they originate. It is argued that those foundations can be found in what a child really is, though the answer to that question is not straight forward, since 'being a child is not a universal experience of any fixed duration'.[4]There is no one set of characteristics, which is universally accepted as defining a child, probably due to the evolving, dynamic nature of the concept, which is believed to be a 'social construct', an institution that represents the ways in which people during the first few years of their lives have been understood in different time periods and cultures.[5] This was an idea originally suggested by Philippe Ariès in 1960and has since been the subject of a large amount of literature.[6] According to this idea the significantly different and often conflicting characteristics attributed to children are the result of influences from various cultures and historical periods[7] and have little to do with either nature or 'biological immaturity'.[8] Accordingly, there exist a number of constructions or concepts of childhood, in order 'to serve the different theoretical models of social life from which they spring',[9] each of them built according to the experiences and understanding of children in their 'specific social context'.[10] The rights of children find their origins in these different concepts of what a child is and hence their plurality and diversity. Four distinct profiles of the child are constructed following an analysis of the relevant literature in the field, the Adult Child, the Unformed Child, the Romantic Child and the Savage Child. Evidence of their existence is found both simultaneously and at different chronological periods.

[2] rights such as a fair trial, to be heard, to participate in proceedings against them, to be informed regarding their case

[3] age of criminal responsibility, special hearing proceedings, lighter penalties that avoid detention as much as possible.

[4]Bob Franklin, Children's Rights and Media Wrongs, in B. Franklin (ed) The New Handbook on Children's Rights: Comparative Policy and Practice (Oxford: OUP, 2002), 17

[5] Jane Pilcher and Stephen Wagg, *Thatcher's Children? Politics, Childhood and Society in the 1980s and 1990s* (RoutledgeFalmer 1996) 1.

[6] ibid 210; Alison James and Chris Jenks, 'Public perceptions of childhood criminality' (1996) 47(2) The British Journal of Sociology 315, 317.

[7] James and Jenks (n 6) 317; Virginia Morrow, '"We are people too": Children's and young people's perspectives on children's rights and decision-making in England' (1999) 7 The International Journal of Children's Rights 149, 152; Michael King, 'The Child, childhood and children's rights within sociology' (2004) 15 K.C.L.J. 273, 276.

[8] John R. Morss, 'The several social constructions of James, Jenks and Prout: A contribution to the sociological theorisation of childhood' (2002) 10 The International Journal of Children's Rights 39, 43; Chris Jenks, *Childhood* (2nd edition, Routledge, New York, 2005), 7, 30.

[9]Chris Jenks, *Childhood* (2nd edition, Routledge, New York, 2005) 27.

[10]Jane Pilcher and Stephen Wagg, *Thatcher's Children? Politics, Childhood and Society in the 1980s and 1990s* (RoutledgeFalmer 1996) 1.

The Adult Child, as the name suggests, is the child who is attributed various adult like characteristics. Philippe Ariès argues that up until the Middle Ages there was little distinction between children and adults once children ceased being entirely dependent on their mothers.[11]Children dressed[12] and played[13] like adults, were educated alongside adults,[14] and were portrayed like 'small adults' in medieval art.[15] Up until the late 19th century, before compulsory schooling was introduced, children were present in the labour market alongside adults,[16]whereas in their daily lives, they were not physically separated from the adult world, since home living conditions did not allow for privacy and all ages mixed together within society.[17]

In modern times, especially in the 1980s and 1990s,[18]there was further evidence of the existence of the Adult Child.[19]There was a debate, on an academic level, especially supported by a group named 'child liberationists', whichwas in favour of the independence of children, assuming that they obtained capacity to make their own decisions from a very young age.[20] Holt and Farson, who were two of the most popular child liberationists,[21] maintained that children had an ability for self determination that was vastly underestimated[22] and they argued that childhood was a social construct that enabled the oppression of children and their 'unwarranted discrimination', by excluding them from the world of adults and the freedoms that participation in it entailed.[23] More specifically, Holt argued that children of all ages should have'the right to vote, to work for money, to buy and sell property, to travel, to be paid a guaranteed minimum state income, to direct their own education, to use drugs and to control their own private sex lives'.[24]

In the field of the press, during the 1990s, especially following the notorious case of the murder of the two year old James Bulger by two ten year olds in 1993, there was more evidence of the Adult child, since newspapers were describing children as 'small adults', to suggest that they were fully responsible and culpable of their criminal behaviour.[25]In the legal field, domestic legislation granted children in England various rights of autonomy and self-determination,[26] including the right to consent to surgical, medical or dental treatments,[27] to consent to sexual intercourse once they were above 16 years old[28] and to instruct solicitors and initiate residence order proceedings against their

[11] Philippe Ariès, *Centuries of Childhood* (Pimlico edn, Pimlico, 1996), 125; Arlene Stolnick, 'The Limits of childhood: Conceptions of child development and social context' (1975) 39 Law and Contemporary Problems 38, 64.
[12]ibid 48.
[13] ibid 70, 96.
[14] ibid 148.
[15] ibid 31.
[16] ibid 15.
[17]Hugh Cunningham, *Children and Childhood in Western Society since 1500* (2nd edn, Pearson Longman, 2005)) 31-32.
[18] ibid 188.
[19] Janet L. Dolgin, 'The fate of childhood: Legal Models of Children and the Parent- Child Relationship' (1997-1998) 61 Alb. L. Rev 345, 422.
[20]Lorraine Abernethie, 'Child labour in contemporary society: why do we care?' (1998) 6 The International Journal of Children's Rights 81, 107; Jane Fortin, *Children's Rights and the Developing Law* (3rd edn, Cambridge University Press 2009)4.
[21]Abernethie (n 20) 107; Jane Fortin (n.20) 4
[22] Fortin (n.20) 4.
[23] ibid 4.
[24] ibid 4.
[25] 'Killing the age of innocence' *The Guardian* (London, 30 May 1994) 18.
[26] David Elkind, 'The law and postmodern perceptions of children and youth' (1992) 69 Denv.U.L. Review 575, 577-578; Berry Mayall, 'The sociology of childhood in relation to children's rights' (2000) 8 The International Journal of Children's Rights 243, 248.
[27] Family Law Reform Act 1969, s 8(1).
[28] Sexual Offences (Amendment) Act 2000 reduced the age to which a person could consent to buggery and certain homosexual activities to sixteen.

parents.[29]On an international level, the United Nations Convention on the Rights of the Child in 1990 granted children the freedom of expression,[30] religion[31] and association,[32] all rights traditionally associated with adults.[33]Moreover, the abolition of the presumption in March 1998 in the UK, which removed the discretion as to whether ten to fourteen year old children would be treated as adults by the criminal justice system,was described as a sign that there was no need to 'make special provisions for them' any more.[34]

Similarly to the Adult Child, evidence of the Unformed Child exists in various chronological periods. The essence of the profile was expressed by the philosopher John Locke during the 17th century, who maintained that children are born *tabula rasa*, a 'blank slate' as far as ideas are concerned and that nine out of their ten parts are moulded into being good or evil by the education they receive.[35] Locke argued that children are not 'mature, rational and competent' as are adults, but are 'unfinished or incomplete'.[36] Predecessors of John Locke's described children as 'shapeless lumps' who are 'capable of assuming any form' and that it is up to their educators whether they are reared to become animals or 'godlike creatures'.[37]Further evidence of this profile emerged around the end of the 19th and beginning of the 20th centuries, mostly founded upon psychological research. Children were described as individuals born with 'some constructive and some destructive capacities', who develop gradually.[38] Good parenting, education and surrounding circumstances were said to bring out their positive characteristics and contain their destructiveness.[39]

Piaget, a structural psychologist,who conducted various studies in 1932 on the development of morality in children, concluded that morality develops gradually as children grow, depending on external influences.[40] He found that young children in the first stage of their moral developmentcannot evaluate the morality of their behaviourand follow a sense of morality dictated by the adults that surround them, especially their parents'.[41]Only when they grow out of this stage and into the second stage children are able to understand the spirit of the rules and evaluate them, in terms of their content and morality.[42]He concluded that this transition usually takes place around the age of ten, but it can vary considerably, depending on the child in question and his surrounding factors, education and influences.[43] Lawrence Kohlberg, expanded Piaget's work, arranging this process in three levels, each sub-divided into two stages, as opposed to the two-stage process

[29] Children Act 1989, s 8.
[30] United Nations Convention on the Rights of the Child (1990), art 13.
[31]ibid, art 14 .
[32] ibid, art 15.
[33] Fortin (n 20) 39.
[34] 'Killing the age of innocence (n 25).
[35]Arlene Stolnick, 'The Limits of childhood: Conceptions of child development and social context' (1975) 39 Law and Contemporary Problems 38, 45;Jeroen J.H. Dekker, 'The century of the child revisited' (2000) 8 The International Journal of Children's Rights 133, 139; Cunningham (n 17) 60.
[36] Jenks (n 9) ibid 19.
[37]Erasmus, who wrote various books and pamphlets during the 1520s on children's upbringing and education, as mentioned in Cunningham (n 17) 43.
[38] 'Encounter: Why little angels become monsters' *The Observer* (London, 8 March 1993) 55.
[39] Cunningham (n 17) 43
[40] Jean Piaget, *The Moral Judgment of the Child* (Routledge and Kegan Paul 1932) 395.
[41] ibid 61.
[42] Jean Piaget, *The Moral Judgment of the Child* (first published 1932, Marjorie Gabain tr, Free Press Paperbacks 1997) 65, 70-71.
[43] ibid 123-124.

described by Piaget.[44]Nonstructural psychologists, like Bandura (1990s), claimed that moral development follows erratic patterns, which do not fall into successive stages as maintained by structural theorists, but which are still gradual and age related.[45] In addition, the process is significantly influenced by external factors, such as the actions of people close to the children, especially their parents and peers whom they mimic.[46]The Unformed Child is thus the child who is born incomplete and underdeveloped, without inclination towards goodness or badness, the child who needs support and space to develop into the right direction and become a complete and decent adult.

The origins of the profile of the Savage Child are traced back to the church and the religious belief that children are born evil because they have been marked by the 'original sin'.[47] St Augustine, for example, maintained that children inherit the original sin from Adam and they have an inherent tendency to do evil upon their birth.[48] Similarly, Thomas Bacon, expressing the ideas of Protestantism, stated in 1550 that children were 'wicked' and that they were born with 'evil lusts and appetites'.[49] Moreover, Jonathan Edwards, a famous Protestant preacher of the 18th century, expressed the view that children were 'infinitely more hateful than vipers'.[50] The Calvinist theory, which was adopted by some Protestant sects, declared that children were inherently sinful and evil and hence had to be rigidly controlled by their parents in a way that would break their will,[51] thus justifying intervention, discipline and punishment into the lives of children because they had to be reformed.[52]

During the late 17th century in Bristol, in a more secular expression of the concept, children were described as 'lousing like swarms of locusts in every corner of the street' and in Buckinghamshire the poet Thomas Cowper wrote that 'children…infest the streets every evening with curses and with songs'.[53] Keith Thomas, a British historian, also argued that children in early modern England had 'a casual attitude to private property, an addiction to mischief and a predilection for what most adults regarded as noise and dirt'.[54] It was also said that children in some cases behaved like 'tribes of lawless freebooters', made 'the state of society more perilous than in any former day' and they became known as 'savages' or 'street arabs'.[55] Similarly, the media and the public during the second half of the 20th century expressed concern about juvenile crime and wondered how to protect society from the ominous threat of 'troublesome children',[56] the 'alien creatures' who posed 'a threat to civilisation'.[57] Likewise, Beryl Bainbridge, a novelist returning to Liverpool at the start of the 21st century, commented that she saw children 'so devoid of innocence' and 'undeniably corrupt' that it frightened her and Lynda Lee Potter, a columnist, maintained that the world of children had

[44] Hersh, Paolito and Reimer, *Promoting Moral Growth – From Piaget to Kohlberg* (Longman, New York, 1979) 62.
[45] ibid 65-66.
[46] ibid 54-55.
[47]Ariès (n 11) 129; Dekker (n 35) 140.
[48] Cunningham (n 17) 26.
[49] ibid 47.
[50] ibid 52-53.
[51]Stolnick (n 35) 44.
[52]Ariès (n 11) 129; Dekker (n 35) 140.
[53] Cunningham (n 17) 98.
[54] ibid 98.
[55] ibid 147-148.
[56] ibid 182-183.
[57] ibid 187.

become 'nightmarish', since children grew up 'virtually as savages'.[58] Michael Howard, Britain's Home Secretary between 1993 and 1997, stated that 'we are sick and tired of these young hooligans (...) we must take the thugs off the streets', referring to juvenile offenders.[59]Moreover, the Criminal Justice and Disorder Act 1994 imposed measures such as longer detention sentences and electronic tagging[60] in order to protect society and victims[61]from children who were repeatedly portrayed by the press as 'young offenders, muggers, ram-raiders, drug abusers, rapists and even murderers', allegedly 'beyond the control of the police, the courts, the criminal justice system and the communities in which they live'.[62]

Finally, evidence of the Romantic Child can be found in the work of many writers starting with Jean-Jacques Rousseau in 1762.[63] Rousseau was the first to refer to children as innocent, valuable, vulnerable and in need of protection[64]and he maintained that they must 'develop naturally towards virtue with minimum of adult training',[65] since their vices as adults are a result of them being 'perverted by society' as children.[66]

Many writers, poets and artists followed Rousseau in describing children along the lines of the concept of the Romantic child. Philippe Ariès in his book *Centuries of Childhood* wrote that children during the 18th century were often compared to angels.[67] Hugh Cunningham referred to the comparison of children to angels throughout the 18th and early 19th centuries,[68] and the painter Joshua Reynolds titled a painting of his young niece, in the 1780s, *The Age of Innocence*, suggesting that innocence was a fleeting characteristic possessed by children.[69]More recently, The *Sunday Times* in 1993, described the deaths of James Bulger and of the three-year-old Jonathan Ball by an IRA bomb as the death of innocence[70] and Ellen Key, in her book *The Century of the Child*, which was very influential in the education arena during the 20th century, mentioned innocence as one of the distinguishing characteristics of children.[71]

The Romantic Child also featured in the field of legislation. During the 19th centurysignificant restrictions on child labour were introduced[72] because it was believed to be unnatural for children to work,[73]since childhood was a right of all children[74]and could only be preserved by allowing play[75]or

[58] Deena Haydon and Phil Scraton, '"Condemn a little more, understand a little less": The Political Context and Rights Implications of the Domestic and European Rulings in the Venables-Thompson Case' (2000) 27(3) Journal of Law and Society 416, 424-425.
[59] ibid 426.
[60]Bob Franklin, Children's Rights and Media Wrongs, in B. Franklin (ed) The New Handbook on Children's Rights: Comparative Policy and Practice (Oxford: OUP, 2002), 37
[61]Ibid 35
[62]Ibid 31
[63]Stolnick (n 35) 45.
[64]Jean-Jaque Rousseau, *Émile* (First published 1762, Barbara Foxley tr, The Kindle Edition)46, 57, 76; Stolnick (n 35) 45; Dekker (n 35) 139; Jenks (n 9) 124, 318; Cunningham (n 17) 63, 162; Abernethie (n 20) 88.
[65] Rousseau (n 64) 46, 76; Stolnick (n 35) 45; Dekker (n 35) 139; Jenks (n 9) 124; Cunningham (n 17) 63.
[66] Rousseau (n 64) 97.
[67]Ariès (n 11) 109.
[68] Cunningham (n 17) 58-59.
[69] ibid 66.
[70] 'Tide that turned against evil' *The Sunday Times* (London, 28 March 1993).
[71] Dekker (n 35) 135.
[72] James and Jenks (n 7) 319.
[73] Cunningham (n 17) 144.
[74] ibid 161.
[75] ibid 141.

education.[76]The writer Bob Franklin talks about the special rights acquired by children, which separated them from the working force, the world of sexuality as well as politics and placed them in the school setting in order to protect them and their childhood.[77]Moreover, 20th century reformers referred to childhood as 'a garden of delight', within which children are happy and well cared for[78] and developed a strand of rights founded upon the idea that children were 'vulnerable and at risk', requiring 'nurturing and special protection from the adult world'.[79] In particular, case law provides that despite the right of children to determine their own medical treatment discussed within the concept of the Adult Child,[80] their decisions can be overridden when they prove to be life threatening, in the name of protection.[81] The Education Act 2002 provides that teachers are not, under any circumstances, to use physical punishment against their pupils.[82] The Sexual Offences Act 2003 makes sexual intercourse with a child under 13 years old a crime irrespective of his or her consent[83] and the Convention on the Rights of the Child provides that children are entitled to the 'highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health'.[84] Moreover, adult and child offenders are separated in terms of criminal punishment following The Children and Young Persons Act 1933[85] and The Children Act 1989 provides that the welfare of children should be the paramount consideration for the courts when they make decisions on the upbringing of children.[86]Consequently, the Romantic Child is the child born innocent, pure, vulnerable, happy, valuable and energetic to the point of being somewhat rough and mischievous, the child who can only be corrupted by the imposition of restrictions by adults.

Therefore, these four profiles express how different societies and cultures see children, either at different times or simultaneously. They express various positions of 'particular individuals at particular moments in the development of their societies', within which biological immaturity is 'differently shaped, interpreted and understood by distinctive societies and cultures'.[87]The profiles are not founded upon scientific data regarding the biology of the child, which are themselves conflicting and belong in a wholly different debate, but upon what society perceives a child to be. Accordingly, the profiles must not and cannot be evaluated as right or wrong, true or false. They exist because there is evidence that some societies and cultures, at some point or another, perceived children in that way.

THE JUSTIFICATIONS FOR THE EXISTENCE OF CHILDREN'S SPECIAL RIGHTS

[76]Abernethie (n 20) 100.
[77]Franklin (n 60), 17
[78] Cunningham (n 17) 172.
[79]Abernethie (n 20) 104-105.
[80] Gillick Respondent v West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security [1986] AC 112; R(Axon) v Secretary of State for Health and the Family Planning Association [2006] EWHC 37.
[81]Re R (a minor) (wardship: consent to treatment) [1992] Fam 11; Re W (a minor) (medical treatment: court's jurisdiction) [1993] Fam 64.
[82] Education Act 1996, ss 548-549.
[83] Sexual Offences Act 2003, ss 5-8.
[84] United Nations Convention on the Rights of the Child, art 24(1).
[85] Children and Young Persons Act 1933, s.31; Pilcher and Wagg (n 1) 61-62; Dekker (n 51) 133.
[86] Children Act 1989, s 1.
[87]Franklin (n.60) 17

Freeman rightly argues that the informal 'social practices of those who work with children' often lead to the creation of new rights to consolidate them.[88]These social practices depend on the assumptions made regarding what children are and hence the concepts of the child analysed in the previous section. By extension, rights of children are founded upon notions of what a child is, a proposition that underlies the discussion of the current section.

Children's special rights for the purposes of the current paperare those rights which facilitate the differential treatment of children within the criminal justice system, namely those which 'inform' rules on the minimum age of responsibility, different sentences for children, and increasing rehabilitation and resettlement.[89] This section of the paper analyses various justifications for their existence within the criminal justice system. It examines how significant is the fact that multiple approaches exist and what role the adoption of the four profiles of the child plays in their existence and variability.

Evidence of the argument that children should have special treatment and by extension special rights under the criminal law can be found as early as 397AD, when St. Augustine's writings maintained that the reason behind them was that children are not capable of pursuing sin voluntarily and freely because they are weak, ignorant, entirely unable to perceive the law, unable to reason or understand right from wrong and incapable of making moral judgments.[90] In the English criminal justice system, the existence of an age of criminal responsibility below which a child could not be responsible for an offence because he or she was incapable of understanding 'good and evil', first appeared in a case report of the Eyre of Kent in 1313, in which a seven year old defendant was found guilty of a felony but judgment was not passed because he could not know good from evil.[91]In 1830, the judge in the case of *Rex v.Owen* directed the jury that when defendants are under 14 years old there is a legal presumption that they do not have sufficient capacity to know that their actions are wrong and hence they cannot be convicted unless there is evidence that they had a 'guilty knowledge' that what they were doing was wrong.[92]In the 1845 case of*Reg. v. Smith (Sidney)* involving a ten year old boy charged with setting fire to a hayrick, Erie J directed the jury that children under seven years old had no criminal liability since they were presumed 'incapable of committing a crime'.[93] Statutory footing for the rule on the age of criminal responsibility was finally acquired during the 20th century, when s.50 of the Children and Young Persons Act 1933 raised the age of criminal responsibility from seven to eight years old. Mr. Oliver Stanley, the Under Secretary of State for the Home Office, explained the rationale behind the Bill in Parliament in 1932,[94]which was that children are 'immature' and 'unformed'.[95] He maintained that nobody would expect from children standards of behaviour that equaled those applied to adults and that accordingly the

[88]Michael Freeman, Why it Remains Important to take Children's Rights Seriously (2007) 15 International Journal of Children's Rights 5, 9

[89]Kathryn Hollingsworth, Theorising Children's Rights in Youth Justice: The Significance of Autonomy and Foundational Rights (2013) 76 (6) The Modern Law Review 1046, 1048

[90]Anthony Platt and Bernard L. Diamond, The Origins of the Right and Wrong Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey, 54(3) California Law Review 1227 (1966) Available at: http://scholarship.law.berkeley.edu/californialawreview/vol54/iss3/3, 1232

[91] ibid, 1233

[92]*Rex v. Owen* (1830) 172 E.R. 685.

[93]*Reg. v. Smith (Sidney)* (1845)1 Cox C.C. 260.

[94] HC Deb 12 February 1932, vol 261, cols 1167-1246, 1167-68.

[95] ibid, 1167-68.

punishments applied to them must differ.[96] He further claimed that offending behaviour is the result of life circumstances, comprising of the upbringing of children at home, the economic conditions they were exposed to and their peers, rather than inherent vices.[97] It is therefore evident that arguments in favour of treating children differently centered on the idea that children are not yet fully formed and do not yet have the requisite mental capacity to perform a crime, ideas founded upon an adoption of the profile of the Unformed Child.

In 1963, the Children and Young Persons Act, s. 16, raised the age of criminal responsibility from eight to ten years old. Insights into the rationale of the government motivating this change are found in the speeches of government ministers in both House of Lords and House of Commons Parliamentary Debates. During a House of Lords Debate on 20th November 1962, Earl Jellicoe, The Minister of State for the Home Office, expressed the view that the Government must play an increasingly active role in the protection of children and the promotion of their welfare.[98] Similarly, in a House of Commons Debate, the Joint Under Secretary of State for the Home Department, Mr. C.M. Woodhouse, argued that the Children and Young Persons Bill was 'inspired by a single purpose and a single guiding principle', namely the introduction or improvement of measures promoting the 'general welfare of all young people'.[99]In relation to the age of criminal responsibility in particular, Earl Jellicoe argued that it must be raised in order to protect young children from having their 'childish misdeeds' follow them for the rest of their lives, possibly damaging their future as adults.[100] Likewise, the Lord Chancellor, Lord Dilhorne, maintained that the needs of the child were the primary consideration in setting of the age of criminal responsibility at the age of ten.[101] The Lord Chancellor suggested that children under the age of ten merely offended because they naturally had high levels of energy, without proper outlets for it.[102] He expressed the view of the government that offending children up to the age of ten should be dealt with by the educational system and social services, rather than by the criminal justice system.[103] This approach originates from the adoption of the profile of the Romantic Child, since it focuses on the vulnerability and innocence of children.

In contrast, during the 1990s the discussions and the eventual abolition of the *doli incapax* presumption by s. 34 of the Crime and Disorder Act 1998 revealed a 180-degree turn in the approach towards young offenders. Both the Labour Government's discussion Paper *Tackling Youth Crime*[104]and the case of *C v DPP*[105] maintained that the *doli incapax* presumption must be abolished, since children aged ten to fourteen receive a compulsory education from the age of five and 'seem to develop faster both mentally and physically' than in the past, resulting in the fact that they are able to adequately distinguish between right and wrong and realise that their criminal actions are seriously wrong.[106] Furthermore, the Home Secretary, Jack Straw, argued in Parliament that ten to thirteen year old offenders have the capacity to realise when they commit a crime that their

[96] ibid 1167.
[97] ibid 1168.
[98] HL Deb 20 November 1962, vol 244, cols 803-74, 803.
[99] HC Deb 27 February 1963, vol 672, cols 1265-379, 1266.
[100] HL Deb 20 November 1962, vol 244, cols 803-74, 810.
[101] HL Deb 24 January 1963, vol 246, cols 174-238, 210.
[102] ibid 212.
[103] HL Deb 24 January 1963, vol 246, cols 174-238, 209, 212.
[104] Home Office, *Tackling Youth Crime* (Green Paper, HO 421/2, 1996).
[105] *C (a minor) v DPP* [1994] 3 W.L.R. 888.
[106] Home Office, *Tackling Youth Crime* (n 104) 3, 8; *C (a minor) v DPP* (n 228), 892, 894; *C v DPP* (n 199) 20, 30.

offending behaviour is wrong and that they ought to be punished for it.[107] This approach suggests an adoption of the profile of the Adult Child.

The Labour Government's White Paper in 1998,*No More Excuses,* proposed that young people should face progressively more serious sentences, including custody, if they re-offended.[108] Moreover, Jack Straw expressed the opinion that child curfews and Child Safety Orders, measures physically restricting and controlling children introduced by the Crime and Disorder Bill, would prevent children from entering a criminal lifestyle.[109] The Home Secretary specified that the ambition of the Bill was 'to build a safer and more responsible society', in which people would live 'free from fear and free from crime'.[110] He talked about how people complained to him about the trouble 'caused by children and young people who were out of control' and that his government 'promised a new approach to law and order: tough on crime and tough on its causes', which was 'overwhelmingly backed by the British people'.[111]The Criminal Justice and Disorder Act 1998 made children the subject of a number of measures that were aimed at controlling them and their families[112]because youth crime, following recurrent portrayals of 'persisting young offenders' by the media, caused increasing public fear.[113]Moreover, the government launched a campaign aimed at tackling the 'antisocial behaviour' of 'hoodies' and ' yobs', which led to increasing distrust and fear of young people, which in turn lead to further desire to restrict their rights.[114] The 1998 reforms were founded upon notions that children needed 'discipline and control'.[115]In this approach the adoption of the profile of the Savage child is evident, since it is presumed that children need to be punished out of bad behaviour to protect society from their misbehaviour and criminality.

Therefore, an overview of the actions of and justifications given by the legislators and the policy makers in the UK, indicate that various approaches have been followed over time, each adopting different notions of what a child is. In a more theoretical context,Freeman argues that children acquire agency from a very young age and thus they should also acquire rights at that age, because having agency means that they can exercise them.[116] He explains that children need not be dependent on adults for as long as they are, but this is done only because adults wish to maintain power over them.[117]He compares this with black people, who were kept in slavery and women who were kept in a lesser social status than men, concluding that all these situations are similar.[118] Freeman is thus adopting the profile of the Adult Child, since he supports the view that children are only deprived of their adult rights and are given special children's rights because it serves the best interests of the powerful members of society, whereas their characteristics justify being on an equal footing as them.

James Griffin argues that only people who have the capacity to exercise their rights(agency) should have them and thus children should acquire them in stages, 'the stages in which they acquire

[107] HC Deb 08 April 1998, vol 310, cols 370-452, 371, 372.
[108] Home Office,No More Excuses (White Paper, Cm 3809, 1997) para 5.1.
[109] HL Deb 27 November 1997, vol 583, cols 1121-32, 1122; HC Deb 08 April 1998, vol 310, cols 370-452, 375.
[110] ibid 370.
[111] ibid 370, 371.
[112]Fortin (n.3) 681
[113]Ibid 682
[114]Ibid 683
[115]Ibid 695
[116]Freeman (n.88) 8
[117]Ibid 7
[118]ibid

agency'[119]Furthermore, Fortin argues that child offenders are the result of the type of upbringing and the environment they were subjected to and that if offered a better alterative they might grow out of their offending behaviour.[120] Bothwriters adopt the profile of the Unformed Child in the development of their arguments.

The Capabilities Approach (CA), developed by Dixon and Nussbaum, advocates that children's rights are justified because children are especially vulnerable andit makes cost-effective sense for them to do so.[121]The authors maintain that children are born with a number of capabilities, which need a supportive environmentin which they can advance sufficiently to reach the level that will offer them sufficient capacity to pass the minimum threshold of the central capabilities necessary to maintain the human dignity to which they are entitled to.[122] Children depend entirely on adults to provide them with this supportive environment, physically, economically, legally and emotionally.[123]This dependence causes special vulnerability and hence justifies the existence of children's special rights for their protection.[124] An example is given of compulsory education laws in Scotland, which at the time secured the supportive environment for the growth of children, as opposed to children in England, where the absence of such special rights for children left them working in factories, a fact that'mutilated and deformed' their human capacities.[125] Therefore, the theory adopts the notion that childhood is a period of vulnerability, during which growth and development occur naturally, but the wrong circumstances and environment might halt them. This suggests that the child it envisions is one with the characteristics of the Romantic Child.

Moreover, regarding the second strand of the argument made by the CA, cost effectiveness,[126]the argument builds on the aforementioned assumption that there are events that might obstruct the natural growth and development of children, claiming that such obstruction will lead to a spiral of necessary and potentially costly interventions in the future to protect a number of their rights as adults.[127] Hence, it makes cost effective sense for a children's special right to exist that will prevent such obstructions from taking place.[128]In the case of the criminal justice system, this might signify that if a punishment is detrimental to the mental health of a child it might make multiple future interventions necessary to maintain the right to health. Accordingly, a right which prevents the imposition of such a punishment on children would be justified.Therefore, this aspect of the theory, as is the previous one,is also founded upon the profile of the Romantic Child.

Finally, Hollingsworth's approach deals more specifically with children as rights holders. She argues that the existence of special children's rights that enable children to be treated differently to adultscan be justified because childhood is a period during which people gather 'assets' that are 'essential'for them to acquire the ability to have a 'fully autonomous adulthood' and those rights ensure that this process is facilitated and not impeded.[129]She argues that a youth justice system that

[119]Ibid 18
[120]Fortin (n.3)
[121]Martha C. Nussbaum and Rosalind Dixon, Children's Rights and a Capabilities Approach: The Question of Special Priority (University of Chicago Public Law & Legal Theory Working Paper No. 384, 2012) 558-559
[122]Ibid 564-576
[123]Ibid 554, 575
[124]Ibid
[125]Ibid 549
[126]Ibid 554
[127]ibid
[128]ibid
[129]Holligsworth (n.89) 1049

supports human rights must protect the 'future capacity for full autonomy' of childrenand not just their 'current agency'as it does for adults.[130]She definesfull autonomy as the capability to make choices in order 'to pursue (their) own version of the good life', which is developed throughout a person's childhood and adolescence.[131]Until they reach the state of full autonomy and hence become adults and 'full rights-holders', they are considered to be 'semi-autonomous rights holders',[132]but not because they are less competent or more vulnerable than adults, but because the state has made a political/moral policy decision not to allow them to be able to invoke their own rights themselves,[133]because it presumes that they are still developing the 'requisite capabilities' to be 'fully autonomous'.[134]Hollingsworth argues that such decisions are political in nature and hence 'political and legal processes' must determine their 'precise articulation'.[135] Thus, as a matter of policy, adulthood is set by the lawusually at the age of eighteen, at which stage people attain their full independence, given that they have the 'necessary minimal competence which almost all adults possess'.[136]Prior to that age the law presumes that children are still developing the 'requisite capabilities' to be 'fully autonomous', whereas it presumes that after that age adults have attained them.[137]Consequently, actions that permanently restrict a child's future ability for full autonomy, including criminal punishment, would be illegitimate.[138] Children's special rights, ensure that such actions are prohibited and thus safeguard future full autonomy.[139]Accordingly, children's special rights, are justified not because they are founded upon the assumption that 'children are lacking something' but because they aim to 'maximise their potential to become something more'.[140]Hollingsworth believes that the answer as to why special children's rights exist lies in the 'child's status as a rights holder within the legal and political community'.[141]

Therefore, Hollingsworth theory presumes that children develop their capacities and capabilities gradually, via a process of gathering and assimilating from the environment that surrounds them. Accordingly, her theory originates from the profile of the Unformed Child. However, the novelty of it, is that it minimizes the importance of what a child is to the justification process, since the justification for children's special rights, according to her theory, lies in what the child will become rather than in what the child is, although this does not change the fact that she still assumes a particular set of characteristics possessed by children.

Therefore, it is observed thatwhen different justifications of children's special rights assume what a child is, they do not all share one, universal definition of it. This is, to a big extent, the reason for their variations, although it remains largely unexplored. Justifications focus on the results of having children's special rights, such as not disturbing growth, not impeding development, providing protection and ensuring fairness and proportionality, but hardly any reference is made to the critical fact that such results are contingent upon what one considers a child to actually be.

[130]Ibid 1047
[131]Ibid 1052
[132]Ibid 1060
[133]Ibid 1058
[134]Ibid 1052
[135]Ibid 1061
[136]Ibid 1060
[137]Ibid 1052
[138]Ibid 1052
[139]Ibid 1061
[140]Ibid 1060
[141]Ibid 1057

Accordingly, it should be accepted that special children's rights are generally justified because children are different from adults, however, more specific justifications and explanations can vary because they are founded upon different notions of what a child is.Freeman rightly argues that rights are the result of social practices within society and are a vehicle forbringing about 'social transformation' once formulated as such.[142]He maintains that the practices of the people who work with children can be essential in forming 'a new culture of childhood', articulated through rights.[143]It follows, that rights give 'entitlement' to common practices and social practices.[144]Similarly,Dixon and Naussbaum argue that the particularities of each society in relation to the 'economic and physical vulnerability of children' as well as what to expect from parents' are crucial in the application of their theory and by extension in the justification of children's special rights[145]and Hollingsworth maintains that the way in which the law treats children and their autonomy shows how children are viewed 'within the law and the political community'.[146]

In conclusion, different societies and cultures attribute different characteristics to children, hence the proposition that childhood is a social construct, and that those differences cannot be classified as right or wrong, since they are merely expressions of different cultural views. Consequently, it must also be accepted that justifications as to why special rights exist also depend on those differences and attempts to decide which is right and which is wrong are futile.

HOW TO APPLY SPECIAL CHILDREN'S RIGHTS – A RIGHTS APPROACH

This section of the paper moves away from the theoretical question of why special children's rights exist and towards the more practical question of how they are applied, especially in relation to other rights that come into play in the treatment of child offenders by the criminal justice system. The discussion begins with a brief historical analysis of how these rights were applied and balanced against each other through general policies and regulations in the UK. The variations in their practical application over time are linked to the adoption of different concepts of the child, simulating the conclusions of the previous sections. A proposition follows, of a possible alternative approach that might offer a more spherical consideration of all the rights involved on a routine, case by case basis. The approach of the ECtHR in civil and family law cases is discussed and the necessary adaptations to apply it to the treatment of child offenders are examined and evaluated.

A brief historical overview of the treatment of offenders by the criminal justice system reveals significant variations over time, which can be linked to the adoptions of different concepts of the child. In the 1850s in the UK orphaned children were confined in reformatories alongside vagrants and runaways because they were thought to be likely to offend and society needed to be protected from their potential criminality.[147] This approach gave weight and importance to the rights of society and victims and attributed no special rights to children at all. It was founded upon the profile of the Savage Child, who needs to be reformed and socialized in order to be able to enter society as a decent human being.

[142]Freeman (n.88) 9
[143]Ibid
[144]ibid
[145]Nussbaum and Dixon (n.121) 555
[146]Hollingsworth (n.89) 1059
[147]John Muncie, 'Children's Rights and Youth Justice' in B. Franklin (ed) The New Handbook on Children's Rights: Comparative Policy and Practice (Oxford: OUP, 2002) 81

The profile of the Savage Child gave way to the profiles of the Romantic and Unformed Child during the early and mid-20th century, when the Children Act 1908, 1933 and 1969 provided that the welfare of the childbecame the paramount consideration in the interactions of children with the judicial system.[148] Similarly, welfarist tribunals dealing with young offenders were set up in Scotland in 1968, where cases were decided by three lay members of the community, the parents or guardians of the child, social workers and the child himself, placing paramount consideration on the interests of the child.[149]Under this approach children's special rights became the primary and most important consideration in judicial dealings with children, including child offenders. The approach continued into the late 20th century, when the new Children's Act 1989 was said to favour the application of children's rights through the 'endorsement of the paramountcy principle', which provided that the best interests of the child should be the most important consideration in judicial deliberation.[150]

However, the end of the 20th and beginning of the 21st centuries brought about another significant shift, especially following the aforementioned murder of the two-year-old James Bulger.As Roce argues, ten years after the 1989 Act had come into force, research showed that 'some of the positive hopes for (it) failed to materialise'.[151]Youth Courts were remanding more and more children into custody and for longer periods of time[152]and policy makers were using the slogan 'prison works'.[153] By the end of the 1990s the criminal justice system in the UK was 'offering neither welfare nor progressive justice' to offenders.[154] The Criminal Justice and Immigration Act 2008, s.9(3), inserted into the Children and Young Persons Act 1933 a provision prescribing that welfare considerations can be 'overridden by the need to address prevention.[155]Children's special rights had evidently taken a back seat to the rights of society and victims in a re-adoption of the profileof the Savage Child.

These variations in the attitudes of policy makers and enforcers brought about several alterations, over time, related to the balance between the various rights involved in dealing with young offenders. Children's special rights have been oscillating between being non-existent, to being paramount, to being ignored. The reason, as with the justifications for their existence, is the adoption of different concepts of the child and hence, the debate on which approach is the right one, can be fought and won on any side, depending on what a child is considered to be. Accordingly, it is argued that a more spherical and individualized process to decide the balance of such rights, suited to the particular needs of each case, could be beneficial. That is not to say that general rules, such as the minimum age of criminal responsibility, should be abolished, but only that such a process could add to them. The process draws significantly from the one adopted by the ECtHR in civil or family law cases, which is thus now discussed.

[148]Ibid 82-83
[149]Ibid 83
[150]Jeremy Ross, The Children Act 1989: A critical assessment in B. Franklin (ed) The New Handbook on Children's Rights: Comparative Policy and Practice (Oxford: OUP, 2002) 63
[151]Ibid 65
[152]Fortin (n.3) 717
[153]Muncie (n.147) 85
[154]Ibid 86
[155]Ibid 715

The European Court uses a rights approach when a civil or family law case, involving children, comes before it. The approach is said to be quite adept at giving all rights involved a 'fair and transparent hearing',[156]because it enables much better visibility of issues that had been hidden in the past and to 'new stories being heard in public'.[157]More specifically, all the interests of the child are considered as rights, weight is attached to all of them[158]and they are weighted against each other, as well as the rights of the adult parties to the litigation, usually the parents.[159] In Re S (A Child) (Identification: Restrictions on Publication),[160]Lord Steyn set out the 'ultimate balancing test', which dictates that when two rights are in conflict, one is not presumed to have precedence over another.[161]Instead, they are compared in light of the particular facts of the case, the justifications for restricting either of them are examined closely and both rights are subjected to the proportionality test.[162]When some of the rights involved have to do with the best interests of the child, more weightcan be attached to them, though that will not be presumed, but decided upon on the facts of the case.[163] Bainham suggested that interests should be separated into primary and secondary interests and that the child's secondary interests should be secondary to a parent's primary interest.[164] He was writing before the HRA, however, his writings can be applied to the current test.[165]Eekelaar built on this approach, saying that the rights of the child should continue to be 'privileged' but not 'paramount.[166] Thus, if maintaining a child's right would mean a small benefit to him but a big detriment to the parent, and not maintaining it would mean a small detriment to the child but a big benefit to the parent, then it might not be maintained, even if this was not in the child's best interest.[167] Therefore, the ultimate balancing test places all parties under 'equal footing' and examines in detail all their rights, which are relevant.[168] Children themselves are considered to be rights holders, whose rights receive special consideration.[169] The United Nations Convention on the Rights of the Child (CRC) maintains that the child's best interests must have 'primacy' over other consideration, which is consistent with this approach, since it gives children's rights a special consideration but not a presumption of supremacy.[170]In other words, a rights approach attempts to reach a balance between the relevant rights of all members of the family, depending on the facts of the case, with the welfare of the child remaining a primary consideration.[171] It ensures that the rights of the child prevail only following a detailed evaluation of the facts and not after the blind application of one rule, namely that the child's best interests are paramount.[172]

[156]Shazia Choudhry &Helen Fenwick, Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act (2005) 25 (3) Oxford Journal of Legal Studies 453, 454
[157]Freeman (n. 88) 6
[158]Ibit 463
[159]Jane Fortin, 'Accommodating Children's Rights in a Post Human Rights Act Era' (2006) 69(3) Modern Law Review 299, 310
[160](2004) UKHL 47
[161]Fortin (n. 159) 308
[162]Ibid
[163]Choudhry and Fenwick (n. 156) 463
[164]Ibid 470
[165]ibid
[166]Ibid 470-471
[167]Ibid 470
[168]Ibid 471
[169]Ibid 472
[170]Ibid 477
[171]Ibid 479
[172]ibid

In contrast, in the UK, the judiciary adheres to the welfare or paramountcy principle, prescribed by the Children's Act 1989, when dealing with children in family or civil law cases.[173] It assumes that that by doing so, it also enforces the rights of children according to the ECHR.[174]In fact, in the current practice, the issue of the rights of children rarely comes into focus and if it does, it is usually when children themselves are the litigants.[175] Even then, the rights of children are usually raised vaguely under the paternalistic welfare principle, meaning in their best interests.[176]The welfare approach or paramountcy principle is not sufficient to resolve family disputes because it does not pay due consideration to a number of Convention rights that are relevant in such cases.[177]Freeman gives The Williamson Case[178]as an example of a case in the UK where had the rights approach been used, the deliberation of the case would have looked very different.[179]It was a case of Christian parents and teachers, who wanted to exercise their right to practice the corporal punishment in their schools, a practice that had been banned by legislation.[180]Since the children were not involved in the proceedings, the debate focused on the rights of belief of the parents and teachers.[181]The effects of such practices on the children and their rights were never brought up, whereas they would have great importance in a rights approach.[182]

The ultimate balancing test also works when it comes to giving teenagers rights to self-determination.[183] For example, medical treatment can be forced on a competent teenager who refuses it, infringing his rights to private life, because his right to life gets more weight.[184]The state has an obligation to safeguard life that can have more weight than the will of a teenager, given the facts of the case.[185] The risks of adhering to the will of the teenager will be considered alongside all other considerations and weight will be attached to them, it will be one of the factors making up the rights of the child and they will not be presumed as having primacy before considering all the facts of the case.[186] Similarly, Freeman, who declares that he follows the view of 'liberal paternalism', argues that there should be a commitment to the rights of children, but that should not prevent any interventions that would prevent children from making decisions that could harm their long term potential to autonomy.[187]Hence, once there is a conflict between different rights of the child, all should be considered and more weight must be given to the protection of the long term interests of the child.[188]

The rights approach seems to be a good alternative for balancing the various rights involved in family and civil law cases involving children. The question remains, whether it could be applied in

[173]Fortin (n.159) 304
[174]ibid
[175]Ibid 300-301
[176]Ibid 303
[177]Choudhry and Fenwick (n.156) 454; Fortin (n. 159) 309
[178]R(Williamson) v. Secretary of State for Education and Employment (2005) 2 FLR 374
[179]Freeman (n.88) 7
[180]Ibid 6
[181]Ibid 6-7
[182]Ibid
[183]Fortin (n.159) 316
[184]ibid
[185]Ibid 324
[186]ibid
[187]Freeman (n.88) 15
[188]ibid

criminal law and how. Fortin observes that the criminal law sets the age for which a child has criminal responsibility at the age of ten, whereas family and civil law maintain the age at which children are competent to make their own decisions (Gillick competent) variable, to ensure that the child in question is competent on the facts of the case.[189]This means that the criminal law gives priority to the rights of third parties rather than the rights of the child, probably in order to protect society from their 'evident lawlessness'.[190]It is currently maintained that the criminal law could maintain a minimum age of criminal responsibility, however, above that it should follow the example of the civil law in that each case can be decided on its facts.

More specifically, an informal judicial preliminary hearing can be established as the first step of the judicial process involving a child offender, prior to him officially entering the criminal justice system. The hearing should be deliberated by specialized judges, who receive 'on-going training and education' on the topic of 'children's rights',[191] which would be constantly audited and researched to determine its effectiveness and contribution to the promotion of these rights.[192] Its function would be to balance all the relevant rights and decide whether the child should have criminal responsibility and hence whether to enter the criminal justice system at all; and if so, whether to be tried in a children's court or not. A similar balancing exercise by specialized judges would also be conductedat the sentencing stage. In these decisions, all rights should be attributed weight, depending on the facts of the case, and weighted against each other to reach the best possible outcome. Special children's rights in criminal law would take the place of welfare rights of children in civil law, the offender (adult) rights of children in criminal law would substitute rights to self-determination in civil law cases and the rights of third parties would remain as the rights of third parties, though society and victim rights would replace the rights of third parties, such as parents or guardians.

Following the example of the ECtHR in civil and family law cases all rights should be considered on an equal footing, with weight attached to each of them. The child's special rights as well as his offender (adult) rights, would be given weight depending on factors such as his age, capacity, vulnerability and alternatives within and outside of the criminal justice system to deal with him. The rights of third parties, namely society and victims, would be given weight depending on the gravity and circumstances of the offence as well as the availability of ways withinand outside the criminal justice system to protect them. For example, the younger the child the more weight will be attributed to his children's rights, whereas the older and more capable, the more weight will be attached to his offender rights, the more serious the crime the more weight will be given to the rights of third parties. Factors such as the measures available within the criminal justice system to deal with the child offender, as well as the alternatives out of it would also play an important role in the process of attaching weights to the various rights.[193]If there are more progressive and effective alternatives within the criminal justice system, more weight would be attached to the offender rights of the child offender, whereas if there are more suitable alternatives outside of the criminal justice system, increased weight would be attached to his children's rights. Moreover, the existence of

[189]Fortin (n.3) 686
[190]Ibid
[191]Ursula Kilkelly, Using the Convention on the Rights of the Child in Law and Policy' in A. Invernizzi and J. Williams (eds) The Human Rights of Children: From Visions to Implementation (Farnham: Ashgate, 2011) 187-188
[192]Ibid 186-188
[193]Fortin (n.3) 687

safeguards outside of the criminal justice system, simulating the offender (adult) rights of the child offender,would also add to the weight attached to children's rights, since a fear of keeping children outside of the criminal justice system is that it makes them 'especially vulnerable to human rights violations'.[194]It should be noted that even though all rights are to be considered on an equal footing, at the stage of attaching weights, special consideration or even primacy can be given to children's special rights, similarly to the primacy given in civil law to the best interests of the child. At the sentencing stage, this exercise of attaching weights and balancing all the rights involved must be carried out again to determine what the best course of action would be, given the particular circumstances of the case.

Some similarities to the balancing exercise described may be encountered at the hearing which authorised the release of Thompson and Venables, the killers of James Bulger, from detention. Although this was neither a preliminary hearing, nor a sentencing hearing, the discussion and rationalization is relevant to the current argument. Lord Woolf maintained that both young offenders had shown significant progress academically and emotionally, genuine remorse for their crime and no further signs of violence and accordingly they no longer constituted a danger to society.[195]Moreover, he argued, they had turned 18 and were due to be transferred to a Young Offenders Institution, which would result in any progress achieved thus far during their detention being undone, since they would come into contact with many hardened criminals, in conditions similar to those in adult prisons.[196] He thus concluded that 'further detention would not serve any constructive purpose' and that due to their good behaviour they were entitled to a reduction in the tariff from ten years to eight.[197]The judge weighted the rights of society, referring to the fact that it was no longer in danger from Thompson and Venables, against the rights of the young offenders, making specific reference to the fact that they needed protection from the circumstances existing in Young Offenders Institutions. He attached more importance to the latter, meaning the children's special rights of the young offenders, and hence suggested their release.

It is not suggested that the above process would be impervious to variations due to the adoption of different concepts of the child. In fact, it is conceded that especially at the stage of attribution of weights to the various rights involved, it would continue tobe affected by it. Consequently, variations would continue to exist, to an extent. However, such variations would be much smaller because of two factors. Firstly, the process of adopting one profile or another would cease to be oblivious and subconscious, since specially trained judges would be deliberating the hearings and the existence and effect of different concepts of the child would constitute part of their training. Secondly, given that each case would be decided on its particular facts, preconceived notions on what a child would be superseded by the actual characteristics of the defendant before them.

Therefore, the application of the various rights involved in the cases of child offenders, similarly to the justifications of children's special rights, has varied considerably due to the adoption of different concepts of what the child is. Such variations might be significantly mitigated by adopting a rights

[194]Ibid 699
[195]*Re Robert and Another (tariff recommendations)* [2001] 1 All ER 737 (CA).
[196] ibid.
[197] ibid.

approach, which attaches weight and balances all relevant rights on an equal footing, albeit with special consideration to children's special rights.

CONCLUSION

The currentpaper demonstrates that the existence of children's special rights within the sphere of criminal law is justified in a variety of ways, depending on what a child is assumed to be. Since childhood is a social construct, which reflects the views of different cultures and societies regarding the characteristics of children, different concepts of the child cannot be labelled as right or wrong and consequently neither can different justifications for children's special rights.

The argument extends to the practical application of the children's special rights of child offenders. Significant variations are evident in the ways in which both policy making and legal enforcement balance these rights against other relevant rights, specifically the offender (adult) rights of child offenders and the rights of third parties, namely society and victims. These variations can be attributed, at least to a noteworthy extent, to the adoption of different concepts of the child and hence cannot be described as right or wrong. It is suggested, however, that an approach that would enable their consideration on a case by case basis, similar to the one adopted in civil and family law by the ECtHR, would have the potential of minimizing such variations. The approach would entail specialized preliminary and sentencing hearings, deliberated by specially trained judges.During the hearing the judges would attach weights to all rights involved based on the particular facts of the case and carry out a detailed balancing act to decide whether the child offender would enter the criminal justice system or not, whether he would be tried in a youth court or not and how he should be sentenced. It is accepted that such an approach would still be vulnerable to variations due to the adoption of different concepts of the child, but such variations would be significantly reduced.

BIBLIOGRAPHY

Reports of Committees: The White Paper: "The Child, the Family and the Young Offender"' (1966) 29 Modern Law Review 409.

Abernethie L, 'Child labour in contemporary society: why do we care?' (1998) 6 The International Journal of Children's Rights 81.

Ariès P, *Centuries of Childhood* (Pimlico 1996).

Ashworth A, *Principles of Criminal Law* (3rdedn, Oxford University Press 1999).

Augustine, *Edwarda; The Confessions of St Augustine* (first published 397 AD, Bouverie Pusey tr, Arc Manor 2008).

Bandura A, 'Social Cognitive Theory of Moral Thought and Action' in W.M. Kurtines and J.L. Gewitz (eds), *Handbook of Moral Behaviour and Development* (Laurence Erlbaum Associates Publishers 1991).

Choudhry S and Fenwick H, Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act (2005) 25 (3) Oxford Journal of Legal Studies 453

Cunningham H, *Children and Childhood in Western Society since 1500* (2nd edn, Pearson Longman 2005).

Dekker JJH, 'The century of the child revisited' (2000) 8 The International Journal of Children's Rights 133.

Dolgin JL, 'The fate of childhood: Legal Models of Children and the Parent- Child Relationship' (1997-1998) 61 Alb. L. Rev 345.

Elkind D, 'The law and postmodern perceptions of children and youth' (1992) 69 Denv.U.L. Review 575.

Fortin J, 'Accommodating Children's Rights in a Post Human Rights Act Era' (2006) 69(3) Modern Law Review 299

Fortin J, *Children's Rights and the Developing Law* (3rd edn, Cambridge University Press 2009).

Franklin B, , Children's Rights and Media Wrongs, in B. Franklin (ed) The New Handbook on Children's Rights: Comparative Policy and Practice (Oxford: OUP, 2002)

Freeman M, Why it Remains Important to take Children's Rights Seriously (2007) 15 International Journal of Children's Rights 5

Haydon D and Scraton P, '"Condemn a little more, understand a little less": The Political Context and Rights Implications of the Domestic and European Rulings in the Venables-Thompson Case' (2000) 27(3) Journal of Law and Society 416.

HC Deb 12 February 1932, vol 261, cols 1167-246.

HC Deb 27 February 1963, vol 672, cols 1265-379.

Hersh RH, Paolito DP and Reimer J, *Promoting Moral Growth – From Piaget to Kohlberg* (Longman, New York, 1979).

HL Deb 20 November 1962, vol 244, cols 803-74.

HL Deb 24 January 1963, vol 246, cols 174-238.

HC Deb 08 April 1998 vol 310, cols 370-452.

Holland P, '"I've just seen a hole in the Reality Barrier!": Children, Childishness and the Media in the Ruins of the twentieth century' in Jane Pilcher and Stephen Wagg (eds) *Thatcher's Children? Poitics, Childhood and Society in the 1980s and 1990s* (RoutledgeFalmer, 1996).

Hollingsworth K, 'Protecting Rights at the Margins of Youth Justice in England and Wales: Intensive Fostering, Custody and Leaving Custody' (2008) 8(3) Youth Justice 229

Hollingsworth K, 'Theorising Children's Rights in Youth Justice: The Significance of Autonomy and Foundational Rights' (2013) 76(3) Modern Law Review, 1046

Home Office, *Crime, Justice and Protecting the Public* (White Paper, Cm 965, 1990).

Home Office, *No More Excuses* (White Paper, Cm 3809, 1997).

Home Office, *Tackling Youth Crime* (Green Paper, HO 421/2, 1996).

Home Office, *The cautioning of offenders* (Circular 14/1985, 1985).

Invernizzi A and Williams J (eds), The Human Rights of Children: From Visions to Implementation (Farham: Ashgate, 2011)

James A and Jenks C, 'Public perceptions of childhood criminality' (1996) 47(2) The British Journal of Sociology 315.

Prout A, *Constructing and Reconstructing Childhood* (2nd edition, Routledge 1997).

Jenks C, *Childhood* (2nd edition, Routledge, New York, 2005).

Joint Committee on Human Rights, *The Government's response to the Committee's Tenth Report of Session 2002-03 on the UN Convention on the Rights of the Child* (2002-2003, HL 18, HC 18).

Kohlberg L, *The Philosophy of Moral Development: Moral Stages and the Idea of Justice* (Harper and Row Publishers 1981).

Mayall B, 'The sociology of childhood in relation to children's rights' (2000) 8 The International Journal of Children's Rights 243.

Morrow V, '"We are people too": Children's and young people's perspectives on children's rights and decision-making in England' (1999) 7 The International Journal of Children's Rights 149.

Nussbaum M and Dixon R, Children's Rights and a Capabilities Approach: The Question of Special Priority (University of Chicago Public Law & Legal Theory Working Paper No.384, 2012)

Piaget J, *The Moral Judgment of the Child* (Routledge and Kegan Paul 1932),

Piaget J, *The Moral Judgment of the Child* (first published 1932, Marjorie Gabain tr, Free Press Paperbacks 1997).

Pilcher J and Wagg S, *Thatcher's Children? Politics, Childhood and Society in the 1980s and 1990s* (RoutledgeFalmer 1996).

Platt A and Diamond BL, The Origins of the Right and Wrong Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey, 54(3) California Law Review 1227 (1966).

Rousseau JJ, *Émile* (First published 1762, Barbara Foxley tr, The Kindle Edition)

Stolnick A, 'The Limits of childhood: Conceptions of child development and social context' (1975) 39 Law and Contemporary Problems 38.

The Guardian - 30 May 1994)
The Observer, 8 March 1993
The Sunday Times, 28 March 1993
The Times, 28 March 1993