

# **Article 12 of the “UN's Convention on the Rights of the Child” and the Procedural Status of Children in Sweden**

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## 1 Introduction – the Status of the “Convention on the Rights of the Child” in Swedish Law

Obligations and rights are utmost enforced through court proceedings. Children that are capable of forming their own views have a right to freely express them in all matters affecting the child according to Article 12 of the United Nations' Convention on the Rights of the Child (hereinafter CRC). These views shall be given due weight in accordance with the child's age and maturity. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, whether directly, through a representative or an appropriate body.

Children may act in several different capacities in various proceedings. A child may for instance act as a defendant or as the injured party in a criminal case. The child's possibility to act and its influence varies in the different procedural capacities it may have. It may for instance also act as one of the parties in a civil case or as a witness. The present situation and the reasons behind it render it necessary to inquire whether a child is provided with sufficient possibilities to be heard. Further, should children at all be treated differently compared to adults from a procedural aspect? Is it plausible that the actions of other participants in the proceeding, e.g. those of the child's representative, may affect the child's possibility to be heard? Are children's procedural actions assessed differently than the procedural actions of adults, for instance if the child's action is not the most favorable from an objective perspective?

The CRC has its obvious relevance when discussing the procedural status of children. Sweden has not incorporated the CRC, i.e. accepted the wording of the convention as such by legislation as part of Swedish law. It is therefore not a directly applicable law in Sweden and the courts are not bound by the provisions of the CRC as Swedish law.<sup>1</sup> Nor is it, in my opinion, directly applicable as international customary law. For that it is too detailed. The core of the CRC may possibly consist of customary law.<sup>2</sup> It is, however, outside the realms of this paper to examine this issue here. But through the ratification in 1990, Sweden has accepted an obligation under international law to comply with the provisions of the CRC.<sup>3</sup> TSomalia and the United States of America are the only states that are not parties to the CRC. Both states, however, are signatories to the CRC. he CRC has further influenced several legislative changes, for instance the new provisions in 6:2 a and 6:2 b of the Children and Parents Code (in Swedish

1 *Mänskliga rättigheter. Konventionen om barnets rättigheter* (4th revised ed.) (in English *Human Rights: the Convention on the Rights of the Child*). Mrs Evelina Jannunger-Kaarme, LL.M, and doctoral student has translated and proof red the manuscript. I thank her very much. Any remaining errors in the text are of course my own responsibility.

2 See regarding conventions and customary law e.g. Sevastik, P, *Informell modification av traktater till följd av ny sedvanerätt och praxis* (in English *Informal Modifications Due to New Customary Law and Case Law*) p. 168 and North Sea Continental Shelf Cases (I.C.J. Reports 1969).

3 Prop. (Governmental Legislative Proposal) 1997/98:182 p. 8.

*Föräldrabalken*, hereinafter FB).<sup>4</sup> Provisions of conventions shall be interpreted according to the principle of interpretation in compliance with the convention when interpreting Swedish law so that interpretation is carried out in the light of the convention.<sup>5</sup> The CRC has been referred to in case law.<sup>6</sup> It is therefore of importance to consider the CRC when discussing the procedural situation of children. It is naturally also of interest to examine whether Sweden is complying with its international obligations. The purpose of this paper is limited exactly to this, namely, to assess whether Sweden is complying with the provisions set forth in Article 12 of the CRC in regard to the procedural status of children.

The Swedish Legislative Committee of the Child (in Swedish *Barnkommittén* hereinafter the Committee), was assigned partly to carry out a broad review on whether the Swedish legislation and case law complied with the provisions of the CRC, considered the question on whether to incorporate the CRC or not. The Committee was established after an announcement of parliament at the time when the parliament denied bills of parliament regarding incorporation. The parliament stated at the same time that a broad review of the Swedish legislation and case law ought to be carried out to examine whether the CRC was sufficiently complied with. The Committee had no express mission to consider the question of incorporation but did so anyhow, since it was found to be within the framework of the provision in Article 4 of the CRC which states that "States Parties shall undertake all appropriate legislative [...] measures for the implementation of the rights recognized in the present Convention".<sup>7</sup>

The Committee undertook a review of the advantages and disadvantages of incorporation alternatively transformation, i.e. that the convention is prepared and integrated into Swedish legislation, of *conventions in general*. It stated the following *advantages* with incorporation. Incorporation will automatically make the CRC directly applicable in Swedish courts and before other authorities. An individual may thus refer to rights stemming from the CRC. Courts or authorities have to make their decisions based on the provisions of the CRC. The national system will through incorporation be brought in complete conformity with the international obligation and the protection of the rights will be strengthened. An argument in favor of incorporation is the importance of a case law developing from the CRC. The CRC will through incorporation be a real element in the civil servant's everyday decision making.<sup>8</sup>

The Committee stated the following arguments *against* incorporation. A majority of the international conventions uses a different technique and are drafted in a language foreign to what is commonly used in Sweden and the *travaux préparatoires* are non-existent or incomplete. In most cases, the wordings are a result of a political compromise, and may sometimes hide strong

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4 Prop. 1997/98:7 p. 34, p. 47 and p. 103.

5 See e.g. prop. 1993/94:117 p. 37 and p. 74 and SOU (Governmental Official Study) 1997:116 p. 79 with references.

6 See e.g. NJA 1993 p. 666 and NJA 1996 p. 509 (NJA is the collection of judgments from the Swedish Supreme Court).

7 SOU 1997:116 p. 112.

8 SOU 1997:116 p. 112.

antagonisms. Notions may appear to have the same meaning, but may be understood and interpreted differently in different countries. The language difficulties are augmented by the fact that conventions are construed in several different languages with the same official status and that none of the languages has a right of precedence.<sup>9</sup>

The arguments usually put forward *in favor* of the method of transformation are the following according to the Committee. The convention is then introduced in the Swedish legal order in a manner familiar to the Swedish courts and authorities, which administer the application of the law. Further, the provisions are translated into the respective laws where they “naturally” belong. The legislation will be preceded by *travaux préparatoires*, where the purpose of the convention and its provisions is stated. Adjustments may be done in accordance with the Swedish conditions and the Swedish language etc. The legislation may be altered if the legal development turns out to diverge from its initial purpose.<sup>10</sup>

Arguments *against* the method of transformation usually set forth are the following according to the Committee. Transformation is an unusual method compared to what is commonly used in the majority of the countries in Europe. It may appear as if Sweden is indifferent to complying with its international obligations if the international convention is not directly incorporated as Swedish law. Sweden may further only guarantee that its obligations under the convention are complied with in Swedish law “as far as it is possible to foresee at present”.<sup>11</sup>

The Committee stated the following with regard to incorporation of the CRC:

During the work with a review of Swedish legislation and case law in relation to the areas that we consider comprised by the CRC, we have been able to establish that the CRC for the most part is well reflected in Swedish legislation. We will put forward suggestions for improvement, where we find that there are flaws. Besides this, there is a continuing legal development in our country. An example of this is that the principle of the best interest of the child has been integrated into the Aliens Act (in Swedish *Utlänningslagen*) recently. It will also be integrated into the Social Services Act (in Swedish *Socialtjänstlagen*) as of January 1, 1998. The principle of the child’s right to be heard has recently been introduced into several laws, where children are directly involved in the proceedings. There may be several reasons why the CRC is not being applied by the courts to the desirable extent - e.g. that the parties do not refer to the CRC, the way in which it is construed, the fact that it is not “well-known” and that there is no tradition in the courts to apply conventions. There is also a lack of education on the CRC. Another reason may be that the Swedish legislation in fact already safeguards children’s rights in a satisfactory manner, why it is unnecessary to refer to international conventions.

The CRC is a document of international law, which is legally binding for the state. The CRC contains several provisions of general characteristics that are

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9 SOU 1997:116 p. 112.

10 SOU 1997:116 p. 113.

11 SOU 1997:116 p. 113.

different compared to what is common in Swedish legislation. It provides an approach which must imbue the whole legislation. The message of the CRC may be concluded in four words: *children must be respected*. The CRC contains several relatively weak wordings and a non-insignificant part of target provisions, which aim to a gradual implementation, a political process. The fact that the CRC has been ratified by nearly all the states in the world is an argument against incorporation, since such a document naturally contains wordings that must be interpreted in each and every country depending on the situation in that country.

The European Convention on Human Rights has as such been incorporated into Swedish legislation. It is however different from the CRC since it does not contain the economical and social rights, which are difficult to give the importance of absolute legal standards. The CRC has also a greater element of provisions that may be gradually implemented within the framework of the state's resources. The European Convention on Human Rights is further being interpreted by a court common for the conventional states. A substantial case law in the area of the convention has therefore developed.

For a country with such extensive legislation on children's rights there is not much to gain in giving the CRC the status of national legislation. It is more important that a thorough review is undertaken, to assess whether the present legislation is in compliance with the provisions of the CRC, which is the task of this Committee, and that the CRC is taken into consideration in all future legislation.

We also see a risk with incorporation of the CRC that it would give the courts a too extensive burden of interpretation. A much too narrow legal interpretation of the CRC could therefore contribute to lessen rather than strengthening the rights of the child. This is especially so since the CRC contains several provisions that do not have the characteristics of absolute legal standards, but instead are to be implemented gradually. There is no tradition in Sweden, as may be found in other countries, that the courts develop the law through a "political" interpretation. The courts have, rather on the contrary, been acting as a restraining force. If a court is interpreting Swedish law in a way that is contrary to the general perception of the law or to the legislator's purpose with the law, the situation may be corrected through new legislation. The interpretation of an incorporated convention is, however, much more consistent. Using the method of incorporation means that the legislator has handed over the interpretation of the convention to the courts. The convention is then being interpreted by the courts through their case law, mainly that of the Supreme Court and the Administrative Supreme Court. A change in the interpretation of the convention in any regard will then be possible only through a change of the case law. Our opinion is that the interpretation of the CRC ought to be done in a political manner by the parliament, which may initiate legislation when necessary so that the rights of the CRC may be given the strongest impact. In that way it could be avoided that the CRC becomes a static instrument rather than the dynamic instrument it is intended to be. What has been stated does not alter the fact that parliament may go further than the courts' interpretation of the convention even after incorporation through new legislation. These changes may however not be referred to the convention.

The question of incorporation of the CRC may not be seen as a completely separate issue. A discussion regarding a possible incorporation of the CRC must be seen from a wider perspective, together with other conventions and obligations in the area of human rights. There is a possibility that an incorporation could be seen as an important signal that children's rights in particular are so significant that the CRC is more important than other conventions and that Sweden is

regarding it particularly serious. The states where the CRC is national statute do, however, have a different legal tradition than Sweden. Children's rights do not play a more significant role in those states. On the contrary, it is evident that in France for instance, it is necessary with national legislation in order so that children really are ensured the rights set forth in the CRC.<sup>12</sup>

The Committee's conclusion was that there were predominant reasons against an incorporation of the CRC. The children would not gain anything from such a measure, according to the Committee. It rather meant that the children and the CRC would gain positive effects if the CRC was to be used as an instrument for ongoing change with the purpose to improve children's situations in all areas.<sup>13</sup>

The Swedish government did not either propose an incorporation.<sup>14</sup> Thus, the CRC is not directly applicable in Sweden. Its provisions must be transformed into Swedish legislation in order for individuals to successfully refer to them before a court. Even if I understand the Committee's standpoints, I still think that it could be questioned whether an incorporation of the CRC would not have given it an even greater impact and, further, that it then would have been possible with direct applicability to the – supposedly insignificant – extent that Swedish legislation does not comply with the CRC. Swedish authorities shall not – disregarded the situations when competence has been transferred to the EC according to 10:5 of the Instrument of Government (in Swedish *Regeringsformen*) – comply with international obligations as such, but rather comply with the law and other statutes.<sup>15</sup>

There is also an European Council convention on the exercise of children's rights. It is a complement to the CRC and its purpose is to strengthen the situation of the children in *family law proceedings*. Sweden has not yet in August 2006 ratified the convention, but in the ministry memorandum "The Exercise of Children's Rights in Family Law Proceedings", it has been suggested that Sweden ought to do so.<sup>16</sup> The European Council's convention comprises and in principle corresponds to Article 12 of the CRC when it concerns family law proceedings.<sup>17</sup> The purpose is, in the best interest of the child, to enhance the children's rights, to safeguard children's procedural rights and to simplify the exercise of these rights by safeguarding that the children, by themselves or through other persons or agencies, are informed about and allowed to take part in proceedings that concerns them before courts and other authorities.<sup>18</sup> It is set out in the convention that family law proceedings are considered particularly important areas, especially those that concern the

12 SOU 1997:116 p. 113.

13 SOU 1997:116 p. 115.

14 Prop. 1997/98:182.

15 Holmberg & Stjernqvist, *Vår förfatning* (13th ed.) p. 184 (In English *Our Constitution*).

16 Ds 2002:13 (Ministry Memorandum).

17 SOU 1997: 116 p. 187.

18 Article 1.

exercise of parental responsibilities, e.g. housing and rights of visitation.<sup>19</sup> It is outside the scope of this paper to discuss whether Sweden is complying with the potentially more far-reaching demands of the European Council's convention.

## 2 Article 12 – the Child's Right to be Heard

It is stated in Article 12 of the CRC, paragraph 1, that the conventional states shall ensure a child capable of forming its own views a right to freely express them in all matters affecting the child. The child's views shall be given due weight in accordance with the child's age and maturity. Court proceedings are directly identified in the second paragraph of the Article. It is stated that for the purpose set out in the first paragraph, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, whether directly, through a representative or an appropriate body, in a way that is in accordance with the national law on procedure.

Regarding the child's right to be heard, it is of interest whether the child is to be heard in person before the court or if it could be protected against the discomfort that such experience may result in. The CRC does not set out any requirements that the child must be heard in person before the court. Here you may find a balancing of the child's need of integrity and self-determination on one hand, and its need of protection against possible discomfort on the other.<sup>20</sup> Two fundamental ideas that have had their imprints on the CRC are found already in the principle of the best interest of the child: That children have complete and equal human value and are not worth less than adults and that children are vulnerable and need special support and protection.<sup>21</sup> The Committee considered that the procedure in Swedish legislation on the child's right to be heard in family law proceedings and in social security proceedings was predominantly satisfactory. According to its opinion, it was an advantage that this order had been accomplished without it being necessary for children to be heard in court to any greater extent.<sup>22</sup>

The CRC does not provide answers to the question which of the different principles that carries the greatest importance, in particular in which way the child shall be heard, but only sets forth the different possibilities for the child's right to be heard. (Hence, it is possible that the best interest of the child may involve limitations to the child's right to be heard. I will get back to this shortly.)

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19 Article 1.

20 In Article 16 for instance is the child's need of protection predominant. According to this Article the child has a right to legal protection against arbitrary or illegal intervention in its private- and family life, its home or its correspondence and against assault on its honour and its reputation. In article 13 concerning freedom of expression is stated e.g. that it is the child's need of integrity and self determination that is in the foreground. Regarding Article 12, mainly from the perspective of Public International Law, see Stern, R., *The Child's Right to Participation – Reality or Rhetoric?*

21 Hammarberg, T., *Barnets rättigheter – en ny attityd*, p. 62 (In: FN och de mänskliga rättigheterna, ed. B. Dunér) (In English *The Child's Right – a New Attitude*).

22 SOU 1997:116 p. 202.

It is of outmost importance for the child and its possibilities to be heard how this is accomplished. When the child is not heard in person it will mean a form of filtration, whether conscious or unconscious. Swedish law aims in general at obtaining the shortest possible chain between the source of information and the court, but there are naturally situations when an intermediary link must be used.

There are arguments in favor as well as against that children are to be heard in person before the court. Arguments *in favor* of hearing children in person are the following. The child is being treated as an adult and is awarded capability and respect for its views. A direct hearing gives a better foundation for the decision. The foundation will improve because the risk of misunderstandings is lessened when no-one acts as intermediary for the child's oral testimony and since the court and the parties' representatives may ask questions and cross-examine the child and establish a direct contact, which simplifies the evaluation of evidence. An argument *against* hearing a child in person is the fact that children usually experience a great discomfort and even fright before and during such hearing. As a counter argument it may also be stated that it is not excluded that children will give more – or and perhaps more truthful – information if they are heard under less rigid forms and by experts in interrogating and talking to children. It has sometimes been stated that children, apparently more so than adults, do not know what they want and change their minds; this is so mainly in cases and matters affecting the child's person. Whether this is in favor or against hearing children in person is difficult to assess. It is however questionable to decide that hearing one way or the other will be the best in every different situation. I would rather wish that the proceedings could be flexible so that neither children nor adults would have to experience anxiety to be heard in person before the court and that experts on interrogations/conversations would interrogate both children and adults. However, this seems difficult to implement.

According to Article 3 of the CRC, the child's best interest shall be put first and foremost with regards to all measures being taken affecting children, irrespective of if they are being taken by public or private welfare institutions, courts, administrative authorities or legislative organs. One could sense a conflict between Article 3 and Article 12, since it for instance, may not always be in the child's best interest to really express its views in all matters affecting the child before, for instance, a court. A child might not want to express a view when it comes to the question on with whom it wants to live and it may not even be in the child's best interest to do so. If a child is suspected for or charged with a criminal offence, it is obviously not always in compliance with the child's best interest – if that is to avoid conviction – to express its view. It is, however, in a majority of situations an ostensible conflict. Article 12 gives the child the *right* to express its views and the child shall *be provided the opportunity* to be heard in proceedings before a court or an administrative authority. If the child declines to express its views, it cannot be forced to do so; the Article gives the child a right, it does not incur an obligation. The best interest of the child may limit the interpretation of the child's rights other than the most fundamental ones; for instance, the child's right to be heard may not be applied in a way that interferes

with the child's best interest.<sup>23</sup> If the child has an obligation to express its view, for instance as a witness (36:21 of the Code of Judicial Procedure, in Swedish *Rättegångsbalken* hereinafter RB), it is because the public interest takes precedence over the CRC's list of rights. During the drafting of the CRC, it was stated that there may be concurrent interest that may be just as important as or even more so than those of the individual child. Certain interests such as "justice and society at large, should be of at least equal, if not greater, importance than the interests of the child".<sup>24</sup>

### **3 Association of the Child to Civil Procedures and Some Administrative Procedures**

Is Sweden complying with the requirements in Article 12 of the CRC? Civil and similar cases shall be dealt with first, together with the administrative cases and the like. The next section will discuss the Swedish regulation of criminal cases.

A review of the provisions for family law cases and social cases and matters was done, against the background of the provisions in the CRC, with the purpose to ensure children a right to be heard. (Family law issues are dealt with by general courts as civil cases and social issues are dealt with by administrative authorities and/or administrative courts). There are express provisions on children's right to be heard in cases on custody and visitation rights, in adoption matters and in name matters as well as in social cases and matters according to the Social Services Act and the Care of Young Persons Act Special Provisions (in Swedish *Lagen 1990:520 med särskilda bestämmelser om vård av unga* hereinafter LVU). The purpose of the new provisions was, according to the *travaux préparatoires*, to create guarantees for children to be heard in cases and matters in the courts and other authorities.<sup>25</sup> The government held that the fact that children really do get to express their views and that they become visible in studies performed by the Social Services is of fundamental importance for the child's best interest, so that it could be taken into consideration in cases and matters under FB, the Social Services Act and LVU. The government found that it was of outmost importance to continue to develop and to create methods for talking to children, to improve the quality of child custody studies and to let the children become more visible in the studies and to create conditions so that children may always be heard in connection with studies performed by the Social Services.<sup>26</sup> In the Swedish legislation on procedures regarding individual children, it already exists a general right for children to be heard, according to

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23 Schiratzki, J., *Barnrättens grunder* (1st ed.) , p. 43. (In English *Fundamentals of Children's Rights*).

24 SOU 1997:116 p. 128.

25 Prop. 1997/98:182 p. 38 with references.

26 Prop. 1997/98:182 p. 37.

the government.<sup>27</sup> The government did however consider that an analysis ought to be done in connection with a review of LVU and of the Social Service possibilities to let the child be heard even in situations when the custodian opposes it.<sup>28</sup> A provision has now been introduced into LVU, according to which, the youth's opinion shall be clarified as far as possible.<sup>29</sup> This is of course excellent if Sweden is to comply with the obligations set forth in the CRC.

Even if it is not a requirement in the CRC that the children shall be parties in a case or by themselves have a right to initiate an action in all matters affecting the child, it is obviously of importance whether this is possible or not. The fundamental rule on who may be a party in civil cases in general courts is laid down in RB 11:1 para. 1. It states that anyone may be a party to a case. All natural persons, thus even children, may have capacity as a party.<sup>30</sup> It means that children may have capacity as a party from birth.<sup>31</sup> The capacity as a party coincides with the "legal subjectivity" (in Swedish *rättssubjektivitet*), i.e. the capacity to acquire rights and incur obligations.<sup>32</sup>

A completely different matter is whether children themselves may be allowed to initiate an action – and thus have procedural capacity – or if it may be done through a representative. RB 11:1 para. 2 states that if a party does not exercise control of the disputed property, or the dispute involves a legal transaction which the party is not competent to effect, the legal representative shall sue or be sued on his behalf. The principle rule regarding procedural capacity is rightly understood *e contrario*: if a party does exercise control of the disputed subject matter, then the party has procedural capacity.<sup>33</sup> The provision assumes that a natural person's legal capacity ought to coincide with the capacity to independently initiate an action.<sup>34</sup> What has been said means thus, that the civil rules on capacity decide whether children have procedural capacity.<sup>35</sup> This is the case for instance if the dispute concerns property that a child older than 16 years has achieved through its own labor (FB 9:3) or if it

27 Prop. 1997/98:112 p. 16. It may be questioned whether this was the case, compare Mattson, T., *Barnets mening i LVU-processen* p. 55 (In: Socialvetenskaplig Tidskrift 1998 p. 45-56.) (In English *The Child's Opinion in the LVU-procedure*).

28 Prop. 1997/98:182 p. 37.

29 Article 1 para. 6 LVU, compare prop. 2002/03:53 p. 79 and p. 105.

30 Ekelöf, P.O., *Rättegång II*, p. 48 (in English *Trial II*) compare NJA II 1943 p. 120 (NJA II is a collection of travaux préparatoires).

31 Ekelöf, P.O., *Rättegång II* p. 48.

32 NJA II 1943 p. 120.

33 Fitger, P., *RB-kommentaren* p. 11:18 (In English *A Commentary to the Code of Judicial Procedure*).

34 NJA II 1943 p. 121.

35 The situation on a child's capacity as a party and procedural capacity in onerous cases and the reasons for this is assessed in Eklund, H., *Barns och ungas parts- och processbehörighet i förmögenhetsrättsliga mål* (in English *The Procedural capacity of children and youth in Private Law*) (In: Vänbok till Torleif Bylund p. 73).

concerns a legal action undertaken by a minor, operating a business, within the area of the business (FB 9:5).

Any natural person may have capacity as a party in administrative proceedings.<sup>36</sup> Regarding the procedural capacity, there are no general age limits in the administrative procedure, but hence specific ones.<sup>37</sup> Every natural person may be a party in an administrative matter. Minors must in principle be represented by their representative.<sup>38</sup> The capacity to be a party in proceedings and the procedural capacity in cases and matters more directly related to the child's person are dealt in the following.

Children normally lack the right to initiate an action, i.e. capacity to be a party to a trial concerning the subject matter in question, in cases and matters concerning custody and visitation rights.<sup>39</sup> In matters concerning FB 6:9 para. 2, regulating the situation when one of the custodians is deceased, the child has been considered to have the right to initiate an action as a party to the case, through a competent representative.<sup>40</sup> Since the child is usually lacking the capacity to initiate an action in cases and matters on custody and rights of visitation, there are no rules regarding the procedural capacity in FB.<sup>41</sup> In FB 6:2 a, it is stated that the best interest of the child is of primary concern in decisions according to Chapter 6 regarding all matters on custody, habitation and visitation rights. It is further stated that during the assessment of what is the best interest of the child, particular consideration should be taken in regard especially to the child's need of a close and well-established contact with both its parents. The risk that the child may be assaulted, illegally taken away, being restrained or is at risk of being harmed in any other way shall be regarded in particular. The child's opinion shall be regarded in accordance with the child's age and maturity.

The court has an obligation to ensure that issues concerning custody, habitation and visitation rights are adequately investigated, the Social Board (in Swedish *socialnämnd*) shall be provided opportunity to give information before these issues are decided by the court and the court may appoint it to perform a study.<sup>42</sup> The person undertaking a custody study shall endeavor to clarify the child's opinion and, if it is not inappropriate, present it to the court and give a proposal for a decision. The child may be heard before the court if there are particular reasons to do so and it is obvious that being heard may not harm the child.<sup>43</sup> The court may thus hinder that the child is being heard in person before the court if there is no such risk. When executing judgments, decisions or

36 Wennergren, B., *Förvaltningsprocess* (3rd ed.) p. 93 (In English *Administrative Procedure*).

37 Wennergren, B., *Förvaltningsprocess* (3rd ed.) p. 94.

38 Strömberg, H., *Allmän förvaltningsrätt* (22nd ed.) p. 90. (In English *General Administrative Law*).

39 SOU 1997:116 p. 188.

40 NJA 1983 p. 170.

41 SOU 1997:116 p. 188.

42 FB 6:19.

43 FB 6:19.

agreements on custody, habitation or visitation rights, the best interest of the child shall be the primary concern. Due consideration shall be taken to the child's opinion in accordance with the child's age and maturity.<sup>44</sup> If the child has reached an age and maturity whereby its opinion ought to be regarded, there shall be no enforcement contrary to the child's opinion except when the court finds it necessary with regard to the best interest of the child.<sup>45</sup> The court shall refuse enforcement, if it is obvious that the enforcement is contrary to the best interest of the child.<sup>46</sup> Here is an example on how the legislator has solved the situations where there is a contradiction between what is subjectively felt as the best interest of the child and what is the best interest of the child from an objective perspective. The child's opinion is not always regarded as the most important. The child may be heard before the court in executorial matters if there are particular reasons in favor of it and it is obvious that being heard may not harm the child.<sup>47</sup> If that is not the case, then the court may prevent the child from being heard in person before the court.

In cases regarding revoking the presumption that the husband in a marriage is the father of the child, the child has capacity as a party if it is older than 15 years and has sufficient maturity and judgment. The child has a right to initiate an action.<sup>48</sup>

The child may by itself, if he or she is older than 16 years, apply for appointment or dismissal of a guardian (in Swedish *förmynndare*) (FB 10:18) and for appointment of a trustee (in Swedish *god man*) or an administrator (in Swedish *förvaltare*) (FB11:15). The child has in these cases even a right to initiate proceedings.

The ministerial memorandum "The Practice of Children's Rights in Family Law Proceedings" proposes some legislative changes, which mean that the child's right to be heard is strengthened in the proceedings and that the child's status is improved. The proposal holds that new provisions shall be introduced in some chosen areas, which means that the child shall have a right to information on matters of importance for the child. It is further suggested that provisions shall be introduced so that the child will have the right to present its opinion in every case and matter according to FB Chapter 6 (custody, habitation and visitation rights) and in cases and matters according to LVU. It is proposed that a new provision is introduced into LVU, that due regard is to be taken to the child's views and a provision on the assigned counsel's tasks. Finally, it is suggested that the child's right to an assigned counsel in cases and matters according to LVU shall be expanded and that it will, in certain cases and matters on custody, habitation and visitation rights, be possible for the court to – if there are extraordinary reasons – appoint a special assistant for the child (in Swedish

44 FB 21:1 para. 1.

45 FB 21:5.

46 FB 21:6.

47 FB 21:12 para. 2.

48 Singer, A., *Föräldraskap i rättslig belysning*, p. 159 (In English *Parenthood in a Legal Light*).

*särskilt biträde*). The assistant shall safeguard the child's interests in the case as well as help and support the child. It shall provide the child with necessary information on the subject-matter, if it is not unsuitable for the child, and if it may be considered to be of importance for the child. Further it shall undertake to clarify the child's opinion and present it to the court if it is not unsuitable. Another important task for the assistant is to try to make the parties reach a consentient solution. The assistant shall have the same right to insight in the case as the parties have and may pose questions to the parties and witnesses during the main proceedings. The proposal does not mean that the child will be given the capacity of party in the case.<sup>49</sup> A provision has been introduced in LVU thereafter, stating that the opinion of the youth shall be clarified as far as possible and that the youth's views is to be considered in regard to his or her age and maturity.<sup>50</sup> There is however, no unconditional right for the child to be heard in person before the court, compare what is stated above and below. No changes in the provisions on the right to an assigned council and the possibility to be appointed with one have been made.

The above stated task for the proposed special assistant for the child, to endeavor to make the parties to reach a consentient solution, has subsequently been afforded to the court or to a special mediator, appointed by the court.<sup>51</sup> The court or the mediator shall endeavor to make the parents reach a consentient solution, in accordance with the best interest of the child.<sup>52</sup> The parliament decided in the same draft legislation to order a law proposal from the government. It shall contain a provision that grants children the right to their own assistant in all cases concerning custody, habitation and visitation rights. The parliament states that this legal assistant may better guard the child's right, in relation to both its parents, than the parents' respective legal counsel.<sup>53</sup> It is rather unusual that the parliament leaves a mission like this to the government in Sweden.

Children do not have a right to initiate an action in adoption matters.<sup>54</sup> The applicant and the person to be heard in the adoption matters thus have a right to appeal.<sup>55</sup> A child over the age of 12 years may not be adopted without his or hers consent.<sup>56</sup> This ought to mean that even the child to be adopted has a right to appeal, if he or she is over 12 years old.<sup>57</sup> In such case, the child ought to

49 Ds 2002:13.

50 Article 1 para. 6 LVU, compare prop. 2002/03:53 p. 79 and p. 105.

51 RB 42:6 and 15 respectively FB 6:18 a.

52 Prop. 2005/06:99 p. 104 and FB 6:18 a.

53 Rskr (proposed writings from the Parliament to the Government) 2005/06:309, 2005/06:LU 27.

54 SOU 1997:116 p. 189.

55 FB 4:11.

56 FB 4:5.

57 Walin, G., *Föräldrabalken* (5th ed.) p. 170 (In English *The Code on Parental Rights and Duties*).

become a party in the matter.<sup>58</sup> Even when the child's consent is not necessary, the court must consider the child's views in regard to its age and maturity.<sup>59</sup> The Social Board, whose opinion shall be obtained, must, if it is not unsuitable, try to clarify the child's opinion and present it to the court.<sup>60</sup>

There are similar provisions as these concerning adoptions in Articles 45 and 48 of the Name Act (in Swedish *Namnlagen 1982:670*) regarding change of name. A child over the age of 12 years does in principle have a right to veto an application regarding change of name. Children have here the status as a party and are represented by the custodian according to Article 48 of the Name Act.<sup>61</sup>

In cases and matters according to the Social Securities Act and LVU, a child has the status as a party. Administrative courts deal with such cases. Children over the age of 15 years have procedural capacity themselves, while younger children must be represented by their legal representatives (11:10 of the Social Securities Act and Article 36 LVU). The children's custodians are their legal representatives. This is so irrespective of whether the child is over the age of 15 years or not.<sup>62</sup> A child under the age of 15 years ought to be heard in the proceedings if it could be of use for the investigation and it can be assumed that the child is not in danger of being harmed by being heard.<sup>63</sup> In certain cases and matters under LVU, the court shall assign counsels for the child and its custodians if it may be assumed that there is not a lack of need of an assigned counsel.<sup>64</sup> If an assigned counsel is necessary both for the child and its custodian, a joint counsel may be appointed if there are no conflicts of interest between them.<sup>65</sup> The child is hereby guaranteed an independent status as regards its custodian in a situation where they may have contradictory interests. If an assigned counsel is being appointed, he or she shall automatically act as the youth's special representative in the case or the matter covered by the appointment.<sup>66</sup> As has been stated above, there is in LVU a provision according to which the opinion of the youth shall be clarified as far as possible.<sup>67</sup>

When it comes to medical issues, inclusive abortions, an assessment of the child requesting medical treatment is undertaken to see whether the child has sufficient maturity to understand the relevant information and overview the consequences of its decision in a certain medical question. If this is so, then the child has a right to, by itself, decide on the actual question and the child is thus,

58 See also Dahlstrand, L., *Barns deltagande i familjerättsliga processer* p. 136 (In English *Children's Participation in Family Law Proceedings*).

59 FB 4:6.

60 FB 4:10.

61 Compare SOU 1997:116 p. 189.

62 See SOU 1997:116 p. 189 for this section.

63 11:10 Social Securities Act and Article 36 LVU.

64 Article 39 LVU.

65 Article 39 LVU.

66 Article 36 LVU.

67 Article 1 para. 6 LVU, compare prop. 2002/03:53 p. 79 and p. 105.

competent to demand a treatment.<sup>68</sup> In such case the doctor will allow the treatment. What is considered sufficient maturity in the individual cases depends on the nature and the urgency of the treatment the decision concerns.<sup>69</sup> In Sweden there is no possibility of a decision by a court whether a person, child or adult, shall have the right to a particular medical treatment or not.

The Social Services may take the child into custody to let it undergo the treatment, if the parents oppose to the medical treatment when their permission is necessary.<sup>70</sup> Such measure presuppose that there is an obvious risk for damage to the child's health or development and according to the principal rule a decision by an administrative court is necessary.<sup>71</sup> In urgent situations it may be possible for the Social Board or even its chairman to solely decide to take the child into custody. If the treatment is so urgent that it is impossible to wait for a decision from the Social Board or its chairman, it may sometimes be allowed to give treatment under the common provision on distress 24:7 of the Criminal Code (in Swedish *Brottsbalken* hereinafter BrB).<sup>72</sup>

Certain medical measures are so intervening that they may not be performed on children. This is so concerning, for instance, sterilization.<sup>73</sup>

In the Swedish Law on Abortion (in Swedish *Abortlagen* 1974:595) there are no special provisions concerning children. When the law was drafted it was already clear that the right to free abortion comprised women under the age of 18 years and that it could not always be considered reasonable to inform the custodians.<sup>74</sup> The fact that a woman under the age of 18 years, and with a sufficient maturity to understand relevant information and to overview the consequences of her decision, may have an abortion was set out above. The National Board of Health and Welfare (in Swedish *Socialstyrelsen*) has in connection with the issuance of general advice concerning the application of the Law on Abortion issued a special information sheet regarding women under the age of 18 years applying for an abortion. It is e.g. stated that if a young woman is opposing to the custodian being informed, the medical staff must, considering FB's rules on parental responsibilities, asses whether it is suitable to inform the custodian considering the woman's age and maturity. The National Board on Health and Welfare also pointed out the importance that the healthcare routines are drafted so that young women are not hesitating to contact abortion clinics out of fear that the custodians would be informed against their will.<sup>75</sup>

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68 Rynning, E., *Juridiska aspekter inom ungdomsmedicin* p. 109. In: Varken barn eller vuxen – ungdomsmedicin i praktiken (In English *Legal Aspects in Youth Medicine – Neither Child Nor Adult – Youth Medicin in Reality*).

69 Rynning, E., *Juridiska aspekter inom ungdomsmedicin* p. 109.

70 Rynning, E., *Juridiska aspekter inom ungdomsmedicin* p. 110.

71 Articles 2 and 4 LVU.

72 Rynning, E., *Juridiska aspekter inom ungdomsmedicin* p. 110.

73 Rynning, E., *Juridiska aspekter inom ungdomsmedicin* p. 112.

74 Rynning, E., *Juridiska aspekter inom ungdomsmedicin* p. 112.

75 Rynning, E., *Juridiska aspekter inom ungdomsmedicin* p. 112.

The Compulsory Mental Care Act (in Swedish *Lagen om psykiatrisk tvångsvård 1991:1128*) is also applicable to children. Hence, children may be forced to undergo mental treatment. If the patient is over the age of 15 years, he has a right to independently initiate an action in cases and matters according to the law.<sup>76</sup> It means that a person over the age of 15 years may independently appeal a decision on compulsory mental care. Administrative courts deal with such cases and matters. A patient younger than 15 years shall be heard, if it could be of use for the investigation, and it may be assumed that the patient is in no risk of being harmed by a hearing.<sup>77</sup>

According to the Professor in Medical Law, Elisabeth Rynning, the Swedish medical law is in conclusion considering the CRC's principles on the best interest of the child, while balancing between the protection for the child's health and the child's right to influence decisions in personal matters. She considers that it is desirable with a clearer rule on the child's situation in healthcare, both to strengthen the legal protection for this special group of patients and to make work easier for the medical staff.<sup>78</sup>

In cases under the Aliens Act, concerning a child, particular regard shall be taken to the child's health and development and what is for the rest required in the best interest of the child.<sup>79</sup> The child shall be heard when assessing questions on permits according to the Aliens Act and a child is concerned, if it is not unsuitable. The child's opinion shall be regarded as far as the child's age and maturity give grounds for.<sup>80</sup> The rule is drafted in such a way that the child might be heard directly or through a representative.<sup>81</sup> Anyone appointed as assigned counsel for a foreigner under the age of 18 years, who does not have a custodian in this country, is without an appointment the child's representative in the matter if a trustee is not appointed for the child.<sup>82</sup>

#### **4 The Association of the Child to Criminal Procedures**

In the area of criminal proceedings, the situation in Sweden is the following. The fundamental rules on who may be a party in a criminal case are set forth in RB 21:1 para. 1 and in the rules on injured party. RB 21:1 para. 1 states that the suspect may conduct his own case. If the suspect is a minor, the court shall hear the suspect's custodian when the character of the offence or other considerations so warrant. The custodian, furthermore, has the right to attend the case on behalf of the minor. If the injured party is minor and the offence concerns either

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76 Article 44 Lagen (1991:1128) om psykiatrisk tvångsvård.

77 Article 44 Lagen (1991:1128) om psykiatrisk tvångsvård.

78 Rynning, E., *Juridiska aspekter inom ungdomsmedicin* p. 115.

79 1:10 utlänningslagen (2005:716).

80 1:11 utlänningslagen (2005:716).

81 SOU 1997:116 p. 190, compare prop. 2004/05:170 p. 269.

82 18:3 utlänningslagen (2005:716).

property over which he does not exercise control or a legal transaction that he is not competent to effect, his legal representative may report or prosecute the offence. If the offence concerns the minor's person, the custodian has similar competences (RB 20:14).

No sanction shall be imposed in Sweden upon a person for a crime committed before attaining the age of fifteen (BrB 1:6). The prosecutors do not therefore prosecute children for such actions. The law does not contain any more detailed rules on the suspect's capacity as a party or his procedural capacity. The person, who according to the prosecution has committed the criminal offence, does always have capacity as a party. The rule that the suspect always may conduct his own case is without exceptions. He is then always capable of conducting his own case – thus has procedural capacity – even if he according to other rules lacks procedural capacity.<sup>83</sup> This is so even when prosecution on evidence (in Swedish *bevistalan*) is initiated against someone suspected of having committed an offence before the age of 15 years.<sup>84</sup> Such prosecution on evidence is rarely used. Under these circumstances the child has a right to appoint a defense counsel. The counsel is, however, appointed by the custodian according to 21:3 RB. If the custodian has not appointed a defense counsel for the child, then the court shall appoint a public defense counsel, if it is not obvious that the child is not in need of a defense counsel. When a public defense counsel is appointed, the head of the preliminary investigation shall report this to the court, see Article 24 the Code on young Offenders (in Swedish *Lag 1964:16 med särskilda bestämmelser om unga lagöverträdare* hereinafter LUL). Thus, this is done already during the preliminary investigation. The public defense counsel shall in principle be a barrister (in Swedish *advokat*), while a private defense counsel does not even have to be a lawyer. It is however unusual that other than lawyers act as private defense counsels.

When drafting RB 21:1 para. 1, the Commission on the Code of Judicial Procedure (in Swedish *Processlagberedningen*) considered that it was often of importance that the custodian was heard in the case so that the interest of the minor should be duly provided for. If the offence was minor or if the suspect had reached a certain maturity of mind he would, however, according to the Commission on the Code of Judicial Procedure, in many cases safeguard his own rights.<sup>85</sup> The Commission did not set out how this maturity was to be assessed and what level of maturity that would satisfy the demands. The custodian also has procedural capacity. The Commission on the Code of Judicial Procedure pointed out that a custodian should have a certain independent status in the proceedings, which may be understood from the legislation where it stated that the custodian may conduct the minor's case. There are no provisions regarding the suspect and the custodian jointly when they are both present in court.<sup>86</sup> If the custodian's actions and the suspect's actions would collide, the

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83 Fitger, p., *RB-kommentaren* p. 21:3 for supra this section.

84 Article 38 para. 2 LUL.

85 NJA II 1943 p. 277.

86 Fitger, P., *RB-kommentaren* p. 21:4 a, compare NJA II 1943 p. 277.

court would then have to base its decision on what would be the most favourable for the suspect.<sup>87</sup>

Why is it so important that the suspect always has procedural capacity? Well, it ought to coincide with the fundamental principle of a state governed by law, that a person accused of a criminal offence shall have a right to defend himself. Why is it then so important for the custodian to also have procedural capacity? This is since, as mentioned in the *travaux préparatoires*, the suspect's interests would not otherwise always be duly considered. Children may – depending on the nature of the crime in question and their maturity – not always have the experience and maturity necessary to defend themselves against a criminal charge.

Regarding children as injured parties, it is a suitable and practical order that they have procedural capacity regarding property that they themselves have control over, and over legal acts they may undertake. The civil and the criminal procedural capacity shall of course agree. If this is not so, the consequences would be very impractical when a private claim may joinder the case with the prosecution.

A child may not report an offence for prosecution even if it is an offence against the child's person. It has not been stated in the *travaux préparatoires* any reasons why this solution was chosen.<sup>88</sup> I consider it odd that a minor as an injured party may not even report an offence for prosecution and prosecute. If for instance a 16 year old has been assaulted, surely there must be reasons to give him a right to report the offence and to have procedural capacity. This capacity could preferably also be complemented with a corresponding right for the custodian. There may be situations in which the child out of fear does not wish to report the offence but the custodian considers that it must undertake legal measures against the crime.

Since January 1, 2000 there is a possibility to appoint a special representative for the child (in Swedish *särskild företrädare*) when there are reasons to assume that an offence for which the sanction may be imprisonment has been committed against a child under the age of 18 years, if a custodian may be suspected of the offence, or if it is suspected that the custodian, because it has a relation to the suspect will not be able to safeguard the child's rights.<sup>89</sup> It is obviously a suitable solution to the contradictory interests in this case. The purpose of the law is to strengthen the possibilities to safeguard the child's right when a custodian or someone close to the custodian is suspected of an offence against the child. The law aims to improve the conditions to investigate such suspicions of an offence. It also aims to prevent that assaults against the child continues.<sup>90</sup> The special representative shall, instead of the child's custodian, as a representative safeguard the child's rights under the preliminary investigation and in a trial.<sup>91</sup> If

87 NJA II 1943 p. 277.

88 NJA II 1943 p. 274.

89 Article 1 Lagen (1999:997) om särskild företrädare för barn.

90 Prop. 1998/99:133 p. 1.

91 Article 3 Lagen (1999:997) om särskild företrädare för barn.

the child has two custodians that are not married, nor live together under a marriage like arrangement, it may instead be possible to appoint one of them to solely represent the child.<sup>92</sup> The regulation on the special representative has of course strengthened the child's procedural status and its possibilities to be heard. In the case an injured party may himself conduct his case, he may appoint a counsel or a special representative.

At present there is no right for the defendant or the injured party to be supported by a psychologist or the like at the main hearing. The court does, however, usually accept that such a person is present. The main hearing is, as a principle rule, open to the public (RB 5:1). Interrogation of anyone under the age of 15 years may be held behind closed doors (RB 5:1). It may be interrogations with the injured party or witnesses. Persons under the age of 15 years shall not be prosecuted, as stated earlier. A case against a person that is under the age of 21 years shall, if the case concerns an offence for which the sanction may be imprisonment, as far as possible be dealt with by the court in a way which does not attract attention. If public hearing in a case against a person younger than 21 years confers an obvious inconvenience because of the attention the defendant may attract, the court may decide that the case shall be heard behind closed doors. The main hearing is under such circumstances not public. Even if a decision on closed doors is made, the court may permit that the defendant's relatives may attend the dealings, as well as other persons presence that could be of use (Article 27 LUL). It may for instance concern a person there to support the child.

Interrogation during a preliminary investigation with a person under the age of 18 years, who is suspected of an offence, an injured party or a witness shall, according to the provisions in the Decree on Preliminary Investigations (in Swedish *Förundersökningskungörelsen*), be planned and executed in a way that confers no risk of harm to the interrogated person. Special care shall be considered if the interrogation concerns intimate issues on sex. It should also be carefully controlled that the interrogation does not attract attention. Interrogations may not take place more often than is necessary in relation to the nature of the investigation and the child's best interest.<sup>93</sup> An interrogation with children should be carried out by a person with special competence for the task.<sup>94</sup> If the statement by a child is of decisive importance for the investigation, and if it is of importance with regard to the child's age and maturity and the nature of the offence, the interrogation should be assisted by a person with special competence in child and witness psychology or this person should give an opinion on the value of the child's statement.<sup>95</sup> When interrogating a child under the age of 15 years, the custodian should be present during the interrogation, if this can be done without detriment to the investigation.<sup>96</sup>

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92 Article 2 Lagen (1999:997) om särskild företrädare för barn.

93 Article 17 Förundersökningskungörelsen (1947:948).

94 Article 18 Förundersökningskungörelsen (1947:948).

95 Article 19 Förundersökningskungörelsen (1947:948).

96 RB 23:10 para. 4.

At the main hearing in a criminal case, the court will assess the issue whether someone under the age of 15 years that has been called as a witness may be heard as a witness.<sup>97</sup> Such a person must not take an oath before the interrogation if he is called as a witness.<sup>98</sup>

The Act Concerning Counsel for the Injured Party (in Swedish *Lagen 1988:609 om målsägandebiträde*) provides e.g. children as injured parties with a possibility to have their own legal counsel. Such a counsel will be appointed at the request of the injured party or when there are reasons to do so. The injured party's counsel may be appointed already during the preliminary investigation.

When an injured party at the time of the trial is very young, it will not be heard before the court. This is especially so concerning cases on sexual abuse of children. The testimony from the interrogation under the preliminary investigation may then be brought forward in court. This is preferably done through showing a video-recording of the interrogation.<sup>99</sup> It has been held that this may incur a weakness in the evaluation of evidence, since for instance; the defense may not pose any questions to the injured party. The injured party's testimony is weakened, which indicates that it should be assessed with particular care.<sup>100</sup>

A defendant in a criminal case in the district court shall be heard – or at least be given an opportunity to be heard – irrespective whether it is a child or not.<sup>101</sup>

The Committee points out that during the last years there has been an intense discussion on evaluation of evidence in cases concerning sexual assaults of children. It is a question on which standards are to be upheld in these types of cases as regards the strength of the evidence. An important question has been to what extent a witness psychologist should be used in incest cases and the importance of his or her opinions.<sup>102</sup> It may in criminal procedure be a question of engaging in and understanding the child's situation since the child has experienced something that may mark the child for life, according to the Committee. A significant competence on children and knowledge to listen correctly, evaluate and assess a child's testimony is therefore, continues the Committee, a condition to cope with the considerable difficulties when it comes to evaluating evidence in e.g. incest cases. It is thus, through a better evaluation of what the children express and not through lower requirements on the evidence in this type of cases that these problems should be solved, according to the Committee.<sup>103</sup>

The standpoint of the Committee is, with the starting point in the CRC's founding principles, the rules on criminal procedure are well balanced when a

97 RB 36:4.

98 RB 36:13.

99 SOU 1997:116 p. 191.

100 See SOU 1997:116 p. 191 with references.

101 SOU 1997:116 p. 191.

102 See SOU 1997:116 p. 191 with references.

103 SOU 1997:116 p. 203.

child shall be heard in court.<sup>104</sup> I am inclined to agree. The solution is to find a reasonable balance between the child's need of integrity and self-determination, respective its need of protection against the discomfort to be heard in person before the court. Such an interrogation is probably for the most part not a positive experience in those types of cases.

## 5 Conclusion

My own opinion is that Sweden on the whole is complying with the demands of the Article 12 CRC, particularly so when the provision, ordered by the parliament, on the child's own special assistant in family law cases and matters is introduced.<sup>105</sup> It may thus be questioned whether FB 4:10 para. 2, on the child's possibilities to be heard in adoption matters, in which its consent is not necessary, complies with the demands in the CRC. The starting point when dealing with exceptions from the rule on consent ought to be, as Singer pointed out, that the child has a right to bring forth its views also in questions concerning adoption. Limitations in that right may be done only if it can be shown that they are necessary and not as the situation is at present, namely that the Social Board shall, if it is not unnecessary try to clarify that child's opinion and present it to the court.<sup>106</sup> Lotta Dahlstrand points out in her dissertation that legislation on the child's right to be heard was drafted from the standpoint that children in disputed matters on custody, habitation and visitation rights should be heard in the study performed by the Social Board, which shall be obtained in the case according to FB 6:19 para. 3. The starting point in the CRC is instead that the child shall be heard in every matter affecting the child. Dahlstrand states that the Swedish legislation thereby contains a clear limitation compared to the CRC since it connects the possibility to be heard with the existence of a study. It is namely not obligatory to appoint that a study shall be obtained in a case on custody, habitation and visitation rights. Nor is it prescribed that, when drafting the legislation, a study shall be undertaken primarily or partly to provide the child a right to be heard. Whether a study is undertaken or not in a custody case ought to instead depend on the parent's joint relation and their personal qualities.<sup>107</sup>

A different matter to asses is Sweden's formal compliance with the CRC's requirements, whether it is a more of a mechanical adjustment to Article 12 that has been done, rather than an adjustment to the principles set forth in the CRC.<sup>108</sup> The CRC expresses a principal and fundamental opinion that children

104 SOU 1997:116 p. 203.

105 See supra at 53.

106 Singer, A., *Föräldraskap i rättslig belysning* p. 274.

107 Dahlstrand, L., *Barns deltagande i familjerättsliga processer* p. 282. The procedure is the same regarding adoptions and in the Names Act. It could be questioned whether the exception from the child's consent in FB 4:5 paragraph 2 is compatible with the CRC. See also Dahlstrand, p. 105.

108 Singer, A., *Föräldraskap i rättslig belysning* p. 95.

are independent subjects and carriers of rights.<sup>109</sup> It could naturally be discussed whether it is sufficient that a child has a right to be heard or if it ought to be awarded an even stronger procedural status, for instance to be a party and pursue a case through a representative that is not a parent/custodian, even in other than *certain* family law cases and matters. This is however not a requirement set forth by the CRC. Undeniably it may be understood as inconsistent that a child is a party in name matters, certain types of custodian matters, cases according to LVU and in certain types of social service cases (in the last two even with their own procedural capacity if they are 15 years old or older), but not in the majority of custody cases, and in cases on rights of visitation and on habitation.

At present it may be other ways to solve family law conflicts that ought to be considered, for instance outside the court. A suggestion has been put forth to establish the Office for the Best Interest of the Child (In Swedish *Byrå för barnets bästa*) in every municipality. Parents, unable to cooperate on matters on custody, may turn to the office that may appoint a guardian for the child who will investigate the child's situation and try to make the parents solve their conflict.<sup>110</sup>

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109 See supra.

110 Singer, A., and Rejmer, A, *Vårdnadstvister och barnet bästa – Om konfliktlösning på familjerättens område* (in English *Custodial Actions and the Best Interest of the Child*) (In: Rettfærd 2003 p. 63).