Constitutional Rights for Children in Sweden

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1 Introduction

Since the beginning of the twenty-first century, children's rights have been increasingly seen as a central public concern in many parts of the welfare sector in Sweden, such as healthcare, schools, social services, police, courts, etc. No longer are children's rights regarded – as they often were in the late twentieth century – as something of concern mainly to the central government and national legislature. In this regard, children's rights seem gradually to be gaining wider acceptance and understanding. Today, pretty much all persons who work with children in one way or another in the municipalities, county councils, and private sector are aware of such issues in connection with their own area of responsibility.

The Convention on the Rights of the Child (CRC) has been central for this increasing concern for children's rights at the national level in Sweden. No other international document has had such an impact in terms of increasing public awareness of these issues. However, the CRC is not the only international document that has contributed to the development of a children's rights discourse in Sweden. The general 'internationalisation trend' in law – thanks in large part to the ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), in 1995, of the Convention on the Rights of Persons with Disabilities (CRPD), in 2008, and of other human rights conventions¹ – has been an eye-opener for many (legal and other) practitioners. Increasingly, therefore, the practitioners have focused on issues of human rights, including children's rights. For example, the rights to family life and to decisions in accordance with the best interests of the child have been rigorously tested at the European Court of Human Rights.²

1 At this point, Sweden has ratified most of the human rights conventions that have been prepared within the United Nations and the Council of Europe.

2 See further Johanna Schiratzki, 'Children's Right to Family Life and the Swedish Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Part of the trend towards stronger rights for children involves demands that they be accorded constitutional rights. Sweden is still in the beginning stages of this project, and there is a potential for further deliberation and debate on the pros and cons of specifying children's rights at that level. This chapter aims to advance this discussion.

My objective in this chapter is to introduce and discuss the issue of constitutional rights for children in Sweden. This is an aspect of children's law in Sweden that appears to have been overlooked. I proceed in the following way. First, I describe the extent to which children's rights are enumerated in the country's fundamental laws, and I examine the standing of those rights. Sweden seems to be a country with few constitutional rights for children. An interesting follow-up question is why the Swedish Constitution enumerates so few rights specifically for children. On the other hand, the weight given to children's rights in quasi-constitutional documents – CRC, ECHR, and EU Charter – must be noted. With quasi-constitutional legislation, I mean regulation that is given a certain precedence compared to ordinary regulation without having the formal status of constitutional regulation. Particularly this takes the expression that ordinary laws are interpreted in accordance with the aim and goals of the quasi-constitutional legislation. Some rights are implemented through case law and some through national law; in other words, in specific acts such as the Parental Code and the Social Services Act. Thus, some rights are enforceable – in case law, practice, and statutory law. In my concluding discussion, I ask whether constitutional rights for children really matter in light of the current implementation of the CRC as Swedish law, and I offer a conclusion as well.

2 The Swedish Constitutional Framework: the General Picture

2.1 *The Relationship between National and International Law*

Constitutional legislation regularly contains provisions for the protection of democracy, human rights, and the rule of law.³ There is thus a connection between human-rights issues and constitutional issues. Human rights are developed and realised nationally through some degree of constitutional protection. In order to ensure compliance with these rights, for example, the state must determine which obligations and restrictions apply to different actors in

3 Mattias Derlén, Johan Lindholm and Markus Naarttijärvi, *Konstitutionell rätt* (Wolters Kluwer 2016) 28.

society, and, of course, what consequences follow if one violates such rights. In part, therefore, a country's protection of the rights of its citizens resides specifically in its regulations, laws, and constitutional statutes. EU law, moreover, contains special protections for democracy, human rights, and the rule of law. So do conventions such as the ECHR and CRC. Thus, there is a web of international regulation that interacts with national legislation and complements it. As noted in the introduction to this volume, the ECHR has been particularly influential in this respect in Sweden. Together with EU law, it enjoys greater and greater influence as to how individual rights are claimed in the courts.

At the same time, the method in question here – claiming individual rights in courts – has certain limits when it comes to creating improvements for the many.⁴ From a policy-making perspective, namely, the cases that come to court are not necessarily the most urgent ones from the standpoint of a given group. Instead, a certain issue is brought to court by an individual with his or her particular legal interest in mind. As a consequence, the trial of individual cases risks producing *ad hoc* outcomes for the legal system as a whole. In the case of children, moreover, we have the additional problem that they generally have only a very limited legal capacity to bring cases to court by themselves. In some cases, a legal issue involving a child without legal standing in the courts may be tried anyway – by guardians, municipalities, or other relevant persons and agencies. A further problem with a system that relies heavily on vindicating individual rights in court is that it often takes a long time. Childhood is a relatively brief period in life, and it may take several years to get a case to the highest legal level.⁵ However, the possibility of vindicating a right in a court is often the only available option (adults as well as children). The question of children's participation is therefore of central importance for the exercise and fulfilment of children's rights and is discussed further in a separate chapter.⁶

There is a close relationship between international law, on the one hand, and national legislation and legal practice, on the other. International law is based on notions of sovereignty and the consent of states. Thus, international law is only binding on an individual state to the extent that said state has agreed to be bound. It is ultimately the state in question – meaning mainly the

4 See further discussion in Titti Mattsson, 'National Ombudsman for the Elderly: A solution for a more responsive welfare state?' (2013) 3 *Retfaerd* 9–24.

5 Comp Pernilla Leviner, 'Barnkonventionen som svensk lag: en diskussion om utmaningar och möjligheter för att förverkliga barns rättigheter' (2018) 2 *Förvaltningsrättslig tidskrift* 287.

6 See Pernilla Leviner, 'Voice but no Choice – Children's Right to Participation in Sweden' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

country's government and its agencies – which is responsible in the end for respecting the rights set out in international legal documents.⁷ Thus, constitutional law, together with other national legislation, is of utmost importance for the realisation of international conventions and other legal treaties. Within the nation, moreover, responsibility for ensuring that rights are respected often rests with local and regional authorities. In practice, many of the obligations connected with children's rights and other human rights devolve upon the entire public administration, including the municipalities, county councils, and the courts. All of these organs are bound to ensure that the rights enumerated in the nation's Constitution, as well as those set out in other types of legislation governing their areas of responsibility, are respected.

2.2 *The Four Constitutions in Sweden*

There are four constitutional laws in Sweden. This is a rather unusual constitutional feature.⁸ They are the Instrument of Government (*Regeringsformen*) from 1974, the Act of Succession (*Successionsordningen*) from 1810, the Freedom of the Press Act (*Tryckfrihetsförordningen*) from 1949, and the Fundamental Law on Freedom of Expression (*Yttrandefrihetsgrundlagen*) from 1991.

The Instrument of Government – the central constitutional document – sets out the overall organisation of the Swedish state and furnishes the fundamental protections for democracy, human rights, and the rule of law. The previous Instrument of Government was enacted in 1809, and was replaced in 1974 by the current Instrument of Government. Since then, several amendments have been made, among other things, owing to the Swedish membership in the European Union. I review the content of this constitutional document further – especially in relation to children's rights – in the next section of this chapter.

The Freedom of the Press Act concerns freedom of the press for all. Its aim is to secure the free exchange of opinion and the availability of comprehensive information. According to this Act, Swedish citizens – including children – are generally free to publish official documents, express their thoughts and opinions in print and communicate information to others in other ways (Chapter 1, Article 1). This includes the right to disseminate whatever information a person likes in printed form, as long as the text does not contravene an express provision of law. The Act also protects against defamation and insulting

7 Maria Green and Titti Mattsson, 'Health, Rights and the State' (2017) 62 *Scandinavian Studies in Law* 178, 180.

8 Joakim Nergelius, 'Constitutional Law' in Michael Bogdan (ed), *Swedish Legal System* (Norstedts Juridik 2010) 39.

language and behaviour. For example, incitement against a population group (such as racist comments) may be regarded as a violation of the Act. The first incarnation of the Act dates back to 1766.

The early enactment of the Freedom of the Press Act was an interesting exception in the Swedish context. In most areas, constitutional protections came much later to Sweden than to other countries. Some scholars argue, however, that the very late passage of constitutional protections in Sweden did not mean that certain rights were not protected in practice or in other regulations.⁹ There has also been a continuous discussion of individual rights in Sweden over a long period, showing the importance the country places on legal protection for fundamental rights.¹⁰

The Fundamental Law on Freedom of Expression, from 1991, is the most recent of Sweden's constitutional laws. Enacted in response to the development of new media, it protects against violations of free expression in connection with radio, TV, films, videos, websites, blogs, sound and picture recordings, and so on. It thus complements the Freedom of the Press Act.¹¹

The focus of this chapter is first and foremost on the Instrument of Government.

2.3 *International Law*

Turning now to international law, both the ECHR and the EU's basic legal provisions (including the Social Charter) are central ingredients in the international panoply for the protection of constitutional rights, including human rights. In this sense, constitutional provisions for the protection of human rights encompass more nowadays than just the four constitutional laws mentioned above – a development that some scholars deem the most significant in Swedish constitutional law in modern times.¹² One consequence of this regulatory broadening is that some rights are protected in more than a single legal source.

The ECHR was incorporated into Swedish law in 1995. To underline the special role of this Convention, a provision was added to the Instrument of Government in 2010 (see the new wording in chapter 2, article 19), to the effect that no legal provision may contravene Sweden's commitments under

9 Derlén, Lindholm and Naarttijärvi (n 3) 45.

10 Derlén, Lindholm and Naarttijärvi (n 3) 47.

11 The fourth Constitution, the Act of Succession lays down the rules governing succession to the Swedish throne. This document has little bearing on protection for children's rights in Sweden.

12 Derlén, Lindholm and Naarttijärvi (n 3).

the Convention. EU legislation – including regulations, directives, and decisions – has force within Sweden as well, and thus qualifies as a source of law. In this regard, the Swedish Constitution underwent basic change when the country became an EU member. This means that many constitutional changes are not reflected in national documents.¹³ A recent example is the General Data Protection Regulation (GDPR). This regulation concerns children's right to information, and protects them from processing of their personal data. Likewise, the incorporation of the ECHR into Swedish national law has had a major impact on constitutional issues relating to human rights. The protection of children's rights is also a basic objective of the EU. This is clear from article 3(3), second subparagraph of the Treaty on European Union, and from article 24 of the EU Charter of Fundamental Rights. The latter reads as follows:

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

All Member States are bound by the Charter when implementing EU laws and measures. The potential of the Charter to promote children's rights and best interests has been discussed over the years,¹⁴ and the Charter has gradually become more and more widely cited in European case law.¹⁵

2.4 *The Child Convention and Its Incorporation into National Law*

Sweden has ratified the CRC without any reservations, save for the last of three optional protocols, which Sweden has yet to sign. (This protocol protects the right of children to complain.) When Sweden ratified the CRC, it

13 Thomas Bull and Fredrik Sterzel, *Regeringsformen: en kommentar* (Studentlitteratur 2015).

14 See, for example, Clare McGlynn, 'Rights for Children?: The potential impact of the European Union Charter of Fundamental Rights' (2002) 8 *European Public Law* 387–400.

15 See further Johanna Schiratzki, 'The Elusive Best Interest of the Child and the Swedish Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

committed itself – in accordance with international law – to comply with its provisions. Some of the Convention's articles have been incorporated into national legislation, so that Swedish law will better reflect the CRC. The government has focused on articles 3 and 12, in particular. The principle of the best interests of the child figures in many laws regulating government work nowadays.¹⁶ The right to participation as well has been secured in several regulations.¹⁷

Over the years since the ratification of the Convention, various research reports and government studies have called attention to deficiencies in how the CRC is interpreted and followed by Swedish authorities – for example, with regard to children's participation. However, there may also be interpretation problems in relation to national law.¹⁸

In 2016, the government proposed that the CRC be incorporated into national legislation.¹⁹ Two years later, in June 2018, the parliament decided that the law will enter into force in January 2020. The new parliamentary act incorporates articles 1 through 42 of the Convention into Swedish law, using the wording of the original text.²⁰ This enables Swedish agencies to cite the CRC directly as a basis for their decisions.

Following this general mapping of Swedish constitutional provisions, as well as of certain international documents that are relevant in this context, let us now take a look at the Instrument of Government, and specifically at those parts of it which address children's rights. As we shall see, Sweden has a rather ambivalent attitude towards furnishing children with a specific constitutional standing. An entire chapter in the Instrument of Government, for example, is devoted to human-rights issues, however, without any age-related distinctions. The basic idea is rather that children and adults enjoy the same fundamental rights and freedoms (at any rate in theory), and that they should therefore be treated together.

16 See further Schiratzki, 'The Elusive Best Interest'(n 15) in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

17 See Pernilla Leviner, 'Voice but no Choice – Children's Right to Participation in Sweden' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

18 For a description, as well as an analysis of this development, see Leviner (n 5).

19 Swedish Government Official Report SOU 2016:19 Proposal for an act on incorporating the UN Convention on the Rights of the Child (SOU 2016:19 Barnkonventionen blir svensk lag).

20 Act (2018:1197) on the Convention on the Rights of the Child [Lag (2018:1197) om Förenta nationernas konvention om barnets rättigheter].

3 Constitutional Protection of Children's Rights in the Instrument of Government

3.1 *A Soft Law Clause on Children's Rights That Affords Limited Protection*

The Swedish constitutional tradition is old, dating back to 1634. At the same time, it has been claimed that the country's constitutional framework long had much less impact than did ordinary acts of parliament on the everyday life of the Swedish population, or on the general development of Swedish law.²¹ It is mostly in modern times that the Swedish Constitution has truly become part of the legal system in practice, and been recognised and cited by the government and the courts. This background is also relevant for a discussion of the legal basis for children's rights in Sweden.

In 2011, the Instrument of Government was amended to include a specific provision for children.²² With this reform, the constitutional standing of children was finally addressed in chapter 1 of the Instrument (the introductory chapter, which sets out the basic elements for the country's governance).²³ According to the final paragraph of chapter 1 (section 2, subsection 4) the specific rights of children shall be secured by public institutions:

The public institutions shall promote the ideals of democracy as guidelines in all sectors of society and protect the private and family lives of the individual. The public institutions shall promote the opportunity for all to attain participation and equality in society *and for the rights of the child to be safeguarded*. The public institutions shall combat discrimination of persons on grounds of gender, colour, national or ethnic origin, linguistic or religious affiliation, functional disability, sexual orientation, age or other circumstances affecting the individual. [Emphasis added.]

This section in the Instrument of Government has some clear limitations when it comes to protecting the rights of Swedish children in general. More precisely, the first section of the chapter is not a 'hard-core' regulation. Instead, it sets out certain goals. In other words, the section is general and non-enforceable. As a consequence, it cannot by itself furnish grounds for any complaint that the rights of a child have been violated. The preparatory works state that the regulation is instead goal-oriented – that it articulates certain general aims

21 Joakim Nergelius, *Constitutional Law in Sweden* (Wolters Kluwer 2010) 39.

22 Legislative Bill 2009/10:80 (En reformerad grundlag).

23 It may be noted that the Instrument of Government is organized in 15 chapters.

and ambitions in connection with the human rights of children (and others).²⁴ However, this goal-oriented paragraph constitute an interpretation aid for more other legal Swedish provisions and may, as such, have a certain indirect implication for children's rights in the future.

When the section cited above was introduced in 2011, the weak position of children's rights in this goal-oriented provision in chapter 1 was met with criticism. Some argued that the section on rights in chapter 2 should be supplemented by a specific provision on children's rights.²⁵ However, the government did not share this view. It averred that Sweden had already acknowledged its special obligation to ensure the protection of children's rights. After all, the individual rights of children were already protected – in the same way as those of adults – under the current constitutional wording. Against this background, the argument went, there was no need to extend the protection of rights afforded in chapter 2 to children specifically; the proposed goal-oriented provision in chapter 1 was enough.²⁶

Goal-oriented regulation of this type has some clear drawbacks in a Constitution. First, it runs the risk of signalling a rather sly attitude towards constitutional protection in general, which may, in turn, undermine the enforceability of the regulatory framework over the long run. Second, as already mentioned, the Instrument of Government has generally played a quite limited role in the practice of law in Sweden historically. In most other countries, by contrast, the constitutional framework has usually had a significant impact on the course of legal development. Until the 1970s, for example, Sweden lacked any extensive constitutional provisions on human rights. It was only in the Instrument of Government adopted in 1974 (the current version) that a specific chapter, chapter 2, was devoted solely to questions of human rights. This chapter concerns the relationship between the individual and the state, and it guarantees each and every person freedom of speech, freedom of information, freedom of assembly, freedom of religion, and other human rights. Scholars have explained the limited role played by the Constitution in Swedish history by reference to several factors: the far-reaching welfare provisions; the strong trust in the state displayed by the population; the ethnic homogeneity that long characterised Swedish society; and the history of harmonious social and political development.²⁷ The slow and gradual development of the Swedish

24 Legislative Bill 1975/76:209 om ändring i regeringsformen 32.

25 Legislative Bill 2009/10:80 (n 21) 187–188.

26 Legislative Bill 2009/10:80 (n 21) 187.

27 Thomas Bull, 'Constitutional identity: A view from Sweden' (2014) 37(4) *Retfaerd* 22–23; Kaarlo Tuori, 'Introduction to the Theme: Constitutional Identity' (2014) 37(4) *Retfaerd* 3.

constitutional framework over a long period seems to have reduced the need for strong constitutional rules.²⁸ Moreover, other kinds of national regulation have compensated, in part, for the weakness of such rules. Finally, the increasing importance of European law in recent decades has also had a major impact in this area, among other things, through the option it has afforded of taking cases to the European Court of Human Rights and the Court of Justice of the European Union.

3.2 *The Right to Non-Discrimination*

Chapter 1 of the Instrument, then, provides only soft regulation. By contrast chapter 2, entitled *Fundamental Rights and Freedoms*, features enforceable rights. This chapter guarantees fundamental rights such as freedom of expression, freedom of information, freedom of assembly, and freedom of worship. The provisions in this chapter apply regardless of age.²⁹

The Constitution also has a provision banning discrimination. Section 12 of chapter 2 states as follows: 'No act of law or other provision may imply the unfavourable treatment of anyone because they belong to a minority group by reason of ethnic origin, colour, or other similar circumstances or on account of their sexual orientation'.

Age is not mentioned in this provision. Instead, age figures in the soft clause in chapter 1, section 2 discussed above. As noted, that clause bans discrimination on grounds of age. The preamble to the clause underlines the equal worth of all and the liberty and dignity of the individual. And with its specific mention of 'age', the clause makes clear that these pertain to children as well. It furthermore states the obligation of all public institutions to 'promote the opportunity for all to attain participation and equality in society'.³⁰

Turning now to ordinary national legislation, we find that the Discrimination Act (2008:567) does contain a ban on age discrimination that is enforceable and mentions children. This Act aims 'to combat discrimination and in other ways promote equal rights and opportunities regardless of sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age' (chapter 1, section 1). Several types of discrimination are proscribed. Section 4 of chapter 1 defines 'direct discrimination' as being treated less favourably than another person due to 'sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age'. Indirect discrimination is also addressed. This occurs when 'someone is

28 Derlén, Lindholm and Naarttijärvi (n 3) 60.

29 Legislative Bill 2009/10:80 (n 21) 187.

30 Legislative Bill 2001/02:72 50.

disadvantaged by the application of a provision, a criterion or a procedure that appears neutral' but which may be particularly disadvantageous to 'people of a certain sex, a certain ..., or a certain *age* ...', unless the provision, criterion or procedure has a legitimate purpose and the means used are appropriate and necessary to achieve that purpose' [emphasis added].

3.3 *The Right to Education*

In the area of education, the Instrument of Government affords special protection to children. According to chapter 2, article 18: 'All children covered by compulsory schooling shall be entitled to a free basic education in the public education system'. The article also enjoins the state to provide higher education. The stipulations of the Instrument in this area represent an exception to its main approach, according to which children are not to be distinguished from adults.

This right is further realised in the Education Act (2010:800), which lays down the goals and guidelines for schools and preschools. The principal organisers in the school system are the municipalities and the independent charter schools. Their charge is to allocate resources and to organise activities so that the nation's goals are realised and pupils are assured their constitutional right to education. The Swedish National Agency for Education supervises, supports, and evaluates the schools with an eye to enhancing quality, improving outcomes, and safeguarding pupils' right to an equivalent education. The Act also empowers children to lodge legal complaints on certain issues concerning their education (Education Act, chapter 29, section 12). Children who have reached the age of 16 are entitled – without the involvement of their guardian – to appeal all decisions in areas specified by the Act. Younger children too may appeal certain decisions, such as those concerning their application to attend upper secondary school (*gymnasieskolan*).

3.4 *The Right to Citizenship*

Due to the reform of 2010, moreover, the section on rights in the Instrument of Government now has a wider application. Citizens from countries other than Sweden are now protected as well for the most part. The new expression used in several sections of Chapter 2 for who is covered by this protection – 'each and every one' – goes further than the language that had earlier applied. Now all children and adults residing in Sweden – irrespective of citizenship or residence permit – are included.³¹ In view of the large-scale immigration into

31 Rebecca Thorburn-Stern, 'Vem får del av kakan? Om migranter, rättigheter och solidaritet' in Thomas Erhag, Pernilla Leviner and Anna-Sara Lind (eds), *Socialrätt under*

Sweden since 2015, this is relevant for large numbers of immigrant and refugee children.

The right of children to freedom of movement and to protection from expulsion is slightly more limited than that accorded to adults. According to chapter 2, article 7, no Swedish citizen may be deported from the country or refused entry into it. This includes children as well as adults. Furthermore, a Swedish citizen who is or has been a resident of Sweden may not be deprived of his or her citizenship. This too includes children. But there is a limitation on this right, in that '[i]t may ... be prescribed that children under the age of eighteen shall have the same nationality as their parents or as one parent'. Thus, children's right to citizenship may depend on their parents.³²

4 Children's Rights Discourse in Constitutional Law: a Concluding Discussion

The issue of constitutional rights for children is an overlooked field in Swedish children's law. As we have seen, the Constitution enumerates few rights specifically for children. Instead, the constitutional framework depicts most human rights as belonging to everybody, irrespective of age. Thus, in Sweden, the basic constitutional method for handling children is to integrate them with everyone else. Otherwise put, children and adults are seen as enjoying the same fundamental rights and freedoms (at any rate in theory), and therefore as best treated together. Thus, even if children are not mentioned in most parts of the chapter in the Instrument of Government dealing with human rights, they are understood to be included anyway. One of the very few places in the Constitution where children are given special treatment, and thus are mentioned as a specific group, is in the goal-oriented clause in chapter 1. This placement within the Instrument raises the overarching question of how enforceable the rights of children (and of others) really are.

The Swedish model in this area highlights some fundamental issues in children's law. In general, defenders of children's rights either cite the general discourse on human rights, and so demand the equal treatment thereby entailed; or they stress the particular vulnerability of children, and the need

omvandling: om solidaritet och välfärdsstatens gränser (Liber 2018) 169. See also Johanna Schiratzki, 'Children's Right to Family Life and the Swedish Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

32 See further Schiratzki, 'The Elusive Best Interest' (n 15).

for special treatment that follows from this.³³ The first argument is based on the assumption that the persons in question have the legal (and practical) capacity to claim their rights. The Instrument's approach to the matter – whereby the rights of children are included within the rights of all – reflects this assumption.

However, this equal-treatment argument is problematic. One concern that needs to be addressed is the legal capacity of people under 18 years of age. Children are seldom assigned legal capacity themselves, the assumption being rather that their rights are defended by adults over the course of their upbringing. Furthermore, the dependence of children on the support of their guardian on almost all issues regarding their rights and living conditions creates highly variable conditions for children. In the case of children without adult support at home (e.g., children without guardians, children in households riven by family conflict, or children in foster care or institutional care), the responsibility may even devolve upon a public authority. The mandate to act on a child's behalf may be assigned for a time to a court, social-service agency, or other such institution. This means ensuring the child's right to care, security, education, equality of living conditions, equal treatment and non-discrimination, and decisions in his or her best interests.

Children must accordingly rely in various ways on adults to defend their rights. The idea of equal treatment – which underlies large parts of the Swedish Constitution – is difficult to realise for persons who lack the legal tools to claim their rights. In order, therefore, to compensate for children's vulnerability and dependence on others, specific provisions to protect their rights are often thought to be necessary.

To some extent, the lack of specifically enumerated rights for children in the Swedish Constitution may be justified by the fact that children are accorded several rights on a quasi-constitutional level – through the CRC, ECHR, and EU Charter. Moreover, many of the children's rights that the Constitution fails to mention are implemented through ordinary national law and through case law. Thus, some children's rights are enforceable – in statutory law, in case law, and in practice – even though the Constitution does not enumerate them. On the other hand, their enforceability often depends on what legal capacity is assigned to children to lodge legal complaints or to what extent an adult is willing to claim the right of a child in a court.

33 Robyn Fitzgerald and others, 'Children's participation as a struggle over recognition: exploring the promise of dialogue', in Barry Percy-Smith and Nigel Thomas (eds), *A Handbook of Children and Young People's Participation* (London Routledge 2010) 298ff.

Criticism of the equal-treatment argument needs to be balanced, however, and the argument for special treatment owing to children's vulnerability ought not necessarily to be embraced. A critique of 'childism' forms the basis for this type of argument. This term refers to stereotypes about children, potential discrimination against them, and prejudiced attitudes towards them and towards childhood. The term first used in 2012, in the book *Childism: Confronting Prejudice Against Children*.³⁴ The author called attention to the legal disabilities suffered by children, and the many unfavourable social policies directed at them. Overall, it seems fair to say, legal age limits can have both positive and negative consequences. They have the virtue of simplicity. It is easy on such a basis to determine who shall have access to legal standing, social service or to a constitutional right. But they have the vice of simplicity as well: assessing people's social and other needs on the basis of the biological clock is plainly inadequate sometimes. Other solutions – which have other problems – include testing the maturity of would-be recipients (of a given benefit or service), attempting to ascertain their need for it on objective grounds, or simply allocating it to them in accordance with their own assessment of their need for it.³⁵

The question of what specific protections for children's rights may be needed in different areas of law is an often-debated issue in Sweden. The need to strengthen children's rights has been a recurrent theme in debates over reform in recent years. It is seldom, however, that further constitutional protections for children's rights are discussed. The matter was last highlighted in the revision ten years ago of the Instrument of Government. Some referral bodies, including the Swedish Law Society (*Advokatsamfundet*) and the Legal Commission, argued that the protections in chapter 2 of the Instrument ought to be supplemented by a specific provision on children's rights. Up to this point, however, the government has taken a different view. It contends that such a provision is not needed, because the Constitution as currently worded protects the individual rights of children already in essentially the same way as it protects those of adults.³⁶ Thus, the equal-treatment argument discussed above is deployed in defence of the status quo.

One change that will rearrange the legal map of children's rights in Sweden is the upcoming incorporation, in January 2020, of the CRC into Swedish law.

34 Elisabeth Young-Bruehl, *Childism: Confronting Prejudice against Children* (Yale University Press 2012).

35 Titti Mattsson, 'Ålderns betydelse i socialrätten' in Thomas Erhag, Anna-Sara Lind and Pernilla Leviner (eds), *Socialrätt under omvandling: om solidaritetens och välfärdsstatens gränser* (Gleerups 2017).

36 Legislative Bill 2009/10:80 (n 21), 187–188.

Views clearly vary among experts and politicians about the pros and cons of this reform, and about its prospects in practice for strengthening children's rights in Sweden. The Council on Legislation (*Lagrådet*), which scrutinised the original draft of the planned legislation, was very critical of the proposal. Its main critique was that incorporating the CRC is particularly ill-suited to remedying current shortcomings in the promotion of children's rights in Sweden. Among other things, most of its articles are formulated in a general fashion, and so are not fit for direct application to individual cases. Another argument was that difficult questions will arise as to how the provisions of the CRC relate to those of national legislation.³⁷ From a constitutional perspective, it is worth noting that the CRC – unlike the ECHR – will not be granted a more quasi-constitutional status than the status of the ratified international legal document. Instead, it will be incorporated into ordinary Swedish national legislation. Thus, while children's rights will attain a stronger legal standing than they previously had, they will not be written into the Constitution. However, the standing ratification of CRC and the special situation of CRC as an international document incorporated into Swedish law ought to maintain its quasi-constitutional status in the sense that other Swedish legislation is still to be interpreted according to CRC.

Over the last few decades, the role of young people as subjects and active participants in their own life has been increasingly emphasised in Swedish regulation and law enforcement at a general level. Specific legislative requirements for children to be treated as adults in certain respects, and to be protected from being treated as adults in certain other respects, derive mainly from the international documents discussed above, namely, the CRC, ECHR, and EU Social Charter. The object is to render the fundamental rights of children and young people visible and to ensure that the relevant authorities defend these rights and meet these needs. Sweden's efforts to fulfil its international commitments are still ongoing, not least as the CRC becomes national law. During coming years, moreover, the development of children's rights in national legislation will likely benefit if a broadly encompassing approach is taken and relevant legislation at all levels is reviewed. Therefore, the process of harmonising national legislation with the CRC ought to include a review both of the constitutional framework and other national law.

37 The Council of Legislation, <<https://www.lagradet.se/yttranden/Inkorporering%20av%20FNs%20konvention%20om%20barnets%20rattigheter.pdf>> accessed 30 January 2019.

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