The Rights of the Child as Legally Protected Interests

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1. Introduction

The subject of Children’s Rights is blessed with series of articles, books and, not least, conferences. It is also fortunate to have a UN Convention of 1989, with near universal ratification, as a sort of backbone. It seems, however, that progress has come to a turning point. Will we see the area become a subject in its own right, like Contract Law? Such a development would be enhanced by a theory that ties together the most important loose ends in this complex area of Law. This paper proffers such a theory, drawing on findings by Neil MacCormick and influences from Rudolph von Ihering as well as Jeremy Bentham.¹

A legal right can be seen and analyzed from many angles. In the footnotes in Section 3 I briefly outline a few examples.²

2. The Convention on the Rights of a Child

The Convention on the Rights of a Child is often labelled soft law, since no international court will deal with violations of the code. Sanctions will merely take the form of negative publicity and multilateral policy pressure to conform. It seems the Convention will only contribute to a moral code on how children should be treated or, perhaps more accurately, what children should not have to lack or endure. A UN Committee on the Rights of the Child is surveying the progress (art 43–44).

On the other hand, according to article 4, the states are obliged to use appropriate legislation to ensure the rights of a child in each country. This obligation and the fact that the Convention is ratified by most countries, makes it possible and desirable that the rights of the Convention are given a concrete form.

In the following I will draw on a few articles concerning social rights that seem appropriate for further domestic development. The articles will be interpreted and made suitable for application in certain social contexts. I will
argue that, in order to ensure the rights, legislation has to be passed in each country. These codes has to show who or which entity is obliged to ensure the rights and also provide sanctions if the obligations are not fulfilled. A theory on this chain of rights, obligations and sanctions are presented in the next Section.

The selection of articles is made with consideration to the interests of the family. According to the Introduction of the Convention, the family should be given necessary protection and children should be raised in a family, as is recognized in art 5, 7 and 9. A child should also be given appropriate protection, since s/he is immature in a physical and psychological sense.

According to articles 18–19, the parents have the responsibility to raise a child and they are in various ways to be supported by the state. One example of support is publicly financed daycare when parents are at work.

Raising a child includes fulfilling a series of obligations, which are not specified in the Convention. In general terms, perhaps these can be described as a duty to give the child physical and psychological care, as well as supervision. All is supposed to be performed with the best interest of the child in mind. Opinions on what is the best care may vary from one country or culture to another. I suppose, though, that the need for supervision is approximately the same in all countries. By supervising a child I refer to the duty to protect it from being harmed, as well as protecting a third party from being harmed by the child. Some ways in which a child is supposed to be protected are described in articles 19 and 32–38. All are directed to the state, which is supposed to contribute in various ways, e.g. through legislative efforts. In day-to-day life, the parents have the responsibility to protect the child (art 18). When the supervision is exercised they are, among other matters, obliged to prevent their child from being harmed by other persons or animals, etc. (compare arts 32–38). Approximately the same duty has, I suppose, to be performed by others who have the care of the child, such as employees in day-care centres and teachers in school.

When the same persons exercise supervision in order to protect others from the child, they are under an obligation to prevent it from causing damage and committing crimes. This duty to supervise a child will be further developed in relation to Swedish Law in Section 4. The state can make an important difference by subsidizing e.g. athletic and scout movements, which organize children in ways that encourage cooperation for joint efforts or to give a helping hand in social work.

A couple of other articles that seem to be suitable for further development, i.e. through legislative efforts, are arts 28–29 concerning the education of the child. Such efforts are performed by civil servants in day-care centres and in schools. Their teaching skills have to be trained. How and in which areas they exercise it has to be stipulated in legislation. Detailed obligations may require further development. (See also subsection 3.4.) One example is a written or
oral agreement between the employer and the parents deciding whether the employees in school may bring the children along in private cars on excursions.

3. A theory on the rights of a child

3.1. Introduction

As previously mentioned and in accordance with the Convention, children are immature in a physical and psychological sense. They have a plethora of legal rights, but cannot exercise them. Depending on age and maturity, a child can contribute, but normally someone else has to exercise the rights of the child.

Not all interests of a child are legally protected. For example, a child has an interest to live together with both parents until maturity. There seems to be no legal system that recognizes such a right for a child. Further, the legal rights of a child are not always enhanced through an obligation for someone else, or someone close, to safeguard them. As an example, a child has a right to education and teachers are obliged to provide this. Parents may, however, not be obliged to give their children education, just to provide them the opportunity to go to school. If a person is under an obligation to protect a legal right, failure is not always sanctioned. Parents are, for example, under a duty to raise their child with his or her best interest in mind. General failures in this sense, such as when parents care more for their career than for the upbringing of their offspring, which often may be handed over to others, cannot be sanctioned.

In the following, this step-by-step chain, from interests to a right for a child and from obligation for someone else – most importantly parents – to a sanction, when the obligation is not fulfilled, is called a version of the Interest theory. The function of legal rights are, according to MacCormick, to express various degrees – as in liberty-, claim- and power-right – of protection of the interests of an individual. Illustrated as a triangle, or pyramid, the chain can be depicted as follows:

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Sanctions
Obligations
Rights
Interests
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In this chain, the right is seen as a link between the obligations of parents (among others) and the interests of children.
Why are some interests of a child protected by this chain of rights, obligations and sanctions? The explanation can probably be found in the fact that children have only limited legal competence to act in their own interest, and they also lack full responsibility for their actions. Further, someone else, mostly the parents, are obliged to protect and enhance the financial and personal interests of a child, since s/he is immature.

3.2. Interests

Values determine what is in the interests of a child. They vary from one country and culture to another. Just to give a short example, in some countries it seems more important to give education to boys than to girls. In other countries, the sexes are, by and large, treated equally. Further, values change with the passing of time. Supervising a child requires a parent to prevent the child from committing crimes. It may be deemed important to prevent a child from watching violent films on TV, in order to prevent a potential development of a criminal attitude. Accordingly, the opinions on which interests of a child that deserve protection as legal rights, and which rights that should have a corresponding obligation and perhaps sanction, will vary from one country to another as well as by the passing of time. This will ultimately have to be decided by the legislator, i.e. the Parliament.

3.3. Rights

A legal right has to be, in one way or another, expressed in recognized legal sources, such as statutes, cases and legal doctrine. This pattern of accepted legal sources can be found in all countries. However, in detail, the importance, or weight, of each of these sources of the law can vary, in contrast to the interests of children, which have no legal backing, except if they are recognized as rights. A legal right for a person is either expressed explicitly in the legal system, or it can be derived from an obligation for someone else to promote or protect a certain interest.

Some rights are strengthened by obligations that have a corresponding sanction, i.e. these rights can be enforced by the courts. Accordingly, a person who is under an obligation to protect a right can be penalized if she fails to perform. The parent X, for example, has a duty to supervise his or her child, Y. If the child damages the property of Z and if it was caused by X’s negligence in supervising Y, the parent can be required to pay damages to Z. Rights that are strengthened by an obligation with a corresponding sanction are here called operative rights. Another type of legal right for a child lacks an obligation, with a corresponding sanction, which I here label inoperative (i.e. paper) rights. An example is when, according to the legal system of a
country, a child has a certain right but no obligation is stipulated to protect
the right, or when the obligation lacks a corresponding sanction.

In pluralistic societies, it is relatively easy to agree on a certain right. This
link, between interest and obligation, can be used as a tool (in the form of an
inoperative right) to settle disputes between individuals, organizations and
authorities, who disagree to what extent, and in which way, children should
be protected. For example, it may be very complicated to agree on exactly
what parents should do to give a child an excellent upbringing. Then, the leg-
islature can merely stipulate in the legislation that a child has a right to a
good upbringing. The details are left to be decided by the courts.

Further, legislators may introduce an inoperative right in order to test pub-
lic opinion. It gives the population of a country the possibility to demand that
an obligation with a corresponding sanction is added in the legal system.
Thus, the function of paper rights may be to test public opinion.

A legal right cannot as such be omitted and replaced merely by an interest
and an obligation. A right is personal for the child and cannot be handed over
to somebody else. On the other hand, the obligation, e.g. to supervise a child,
can be performed by a multitude of persons. A parent can, for example, hand
over this responsibility to the employees in a day-care centre. Further, the
right motivates the obligation, not vice versa.

3.4. Obligations

As mentioned, some legal rights for a child are enhanced by an obligation for
another person. The obligations cannot be stipulated in detail. Children dif-
fer in many ways, such as in attitude, liveliness and maturity. The same can
be said about parents, teachers, etc. Further, families live under very differ-
ent circumstances. Therefore, an obligation can only be stipulated in general
terms. Put in the words of Marmor and seen from another angle: “... no inter-
est is so important as to justify the imposition of unlimited duties on oth-
ers.” For example, parents have a general duty to supervise their child. It is
not possible to stipulate what they are supposed to do under all circum-
stances. Instead, an obligation is, or can be, specified through sanctions.
Parents will be required to pay damages only if they have negligently omit-
ted to perform the supervision. This way, the duty to supervise can change
when values are altered.

3.5. Sanctions

It is common for social duties to have a more or less corresponding sanction
in Tort or Criminal Law. Further, if a person under an obligation to educate
children, acts negligently, she may, as a sanction, according to Labour Law,
lose her job. Far from all obligations have a corresponding sanction. Perhaps in some countries, parents have, according to various legal sources, a duty to teach their child to show respect for other persons and their property. General failures to perform such a duty cannot be sanctioned. However, if the child commits a crime and if it was caused by failure of the parents, they may in some systems be penalized.

The function of these sanctions seems to be to exercise control of a minimum performance of the obligations. Without the sanctions, there will be no reminder of the duties and hence the rights, according to law, may become an illusion. And, as previously mentioned, the obligations are stipulated in general terms. The details have to be decided by the courts. Another function of a sanction may, as mentioned above, be to reflect current values on what is important for children under various circumstances.

At this point it should, as previously mentioned (Section 2), be stressed that no sanction (or chain of interest, right, obligation and sanction) can replace a stable and loving family environment. Children are, first and foremost, in need of a stable nest, from which they can explore the world under caring guidance. No law, or construction of the law, can replace the family.12

When a child is taken into care by social authorities, it cannot merely be regarded as a sanction against parental failure to perform social duties. Rather, a decision on transfer of care is based on the entire situation for a child and a prognosis of future progress. Risk of a criminal development or abuse of drugs, or persistent violence or abuse against a child, may motivate a removal of parental care. A general failure to supervise the child or give education is not enough reason to take a child into care. Similarly, in case of divorce, if one parent is given custody of a child, it cannot be seen as a sanction of failures to perform social obligations. Rather, in most cases, it seems like the court is determining who will in the future be most capable to act in the best interests of the child. In these cases, there are no clues provided to what is an acceptable minimum performance of the obligations.

4. The Swedish Law System as a short case study

4.1. Introduction

Sweden is a welfare state and has not been to war for 200 years. The population enjoys a surplus of food, clothing and housing. Everyone has access to medical care, education, transport and sanitation. Individual exceptions can be found; however, they are few. Is this a paradise for children?

It is well known that the suicide rate in Sweden is high, as is the rate of divorce. There are also other drawbacks to life in this country. The life of a child may be grim in Sweden, as in other countries. A welfare state has a backyard.
The version of the Interest theory described in Section 3 is, in the following, tested in relation to the Swedish legal system. The test consists of a short investigation whether we can in legal sources identify the chain from (interests and) rights for children to obligations for mainly parents, as well as, occasionally, caretakers and teachers, and corresponding sanctions, when the obligations are not fulfilled. The legal sources establishing rights, duties and sanctions are statutes, preparatory work and cases from the Supreme Court, as well as leading legal doctrine.

4.2. Interests of Swedish children

The interests of Swedish children have changed dramatically from the agricultural society of the mid nineteenth century up to now. Here I will mention only a couple of changes: education beyond a basic level was not important for the population in general. Now a long education is crucial for the future of most children. Supervision with the aim of protecting the child was, 150 years ago, mainly a question of preventing physical harm. Now it seems more important to safeguard a child from drugs and the negative influence from mass media, such as from videos featuring violence. Concerning supervision in the interest of a third party, it was enough, if possible, to prevent the child from causing physical harm through fist fights, theft, etc. Now children may, among other things, have access to shotguns and possibilities to commit crimes using computers.

4.3. Rights

According to the Parental Code, a child has a right to be raised in a loving and caring environment (Parental Code 6:1). Of course, this is not always the case. Parents do not always show a physical and psychological involvement. The right is inoperative, since there are no sanctions against general failures. A part of the custodial responsibilities is the obligation to supervise a child (Parental Code 6:2). From this duty we can derive, as noted in Section 3.3, a right for the child to protection through supervision. This right, when the obligation is not fulfilled, is met with corresponding sanctions (in Tort Law and Penal Law), and hence it is an operative right.

A child also has a right to education, in day-care centres, primary school and in ordinary school. Teachers are obliged to give education and they will face sanctions if they fail to comply.

4.4. Obligations for Swedish parents, teachers, etc.

As just mentioned, parents are under an obligation to supervise their child (Parental Code 6:2). Failures in this sense may be sanctioned in accordance with provisions in Tort Law and Criminal Law.
Employees in day care centres, teachers in primary school and in the ordinary school have an obligation to provide the children with an education (School Law, Section 2a, 2b och 4), as well as to supervise the pupils. Also in these cases, failure to comply can be sanctioned.

4.5. Sanctions

As previously mentioned, no sanctions are provided concerning failures to meet the general obligation to give a child physical and psychological care. On the other hand, the more specific duty to supervise a child does partly have corresponding sanctions. First, parental failure to protect the child from being injured by a third party is theoretically sanctioned, both in Tort and Criminal Law. However, in practice it rarely occurs. If the child has been bitten by a dog, owned by a third party, and this was caused by negligent supervision by a parent, the child will usually not claim damages from the parent, but may do so from the owner of the dog. Further, the police and the prosecutor may have the opinion that the parent, due to injuries suffered by the child, is punished anyway and hence there will be no prosecution. If the same has occurred in a day-care centre or in school, and if it was caused by negligence of the employees, the child may file a claim for damages and the police may be inclined to report the incident, as well as the prosecutor to open a criminal case.

Concerning the duty to supervise the child in order to prevent it from causing damages for a third party, it is sanctioned both in Tort (Skadeståndslagen 2:1) and Criminal Law (Brottsbalken 23:6). In Tort Law, insurance will, however, take care of the bulk of the cost of the damages. Further, it is rare that a criminal case is filed against a careless parent. It may be more common if the child has caused damages or committed a crime whilst in school. The outcome is, however, dependant on whether a teacher has negligently omitted to perform the supervision. This is difficult to prove.

The sanctions against teachers in school who have not fulfilled their duty to educate children, can be found in Administrative and Labour Law. They may be given a warning or, in severe cases, be suspended from their job for a short or a long period, with or without salary, or be dismissed.

4.6. The theory and the Swedish system

Swedish children do have both an interest in, and a legal right to protection via supervision and spiritual and practical development through education. The question is, whether these rights are operative. First, concerning the right to supervision for a child’s own protection, I believe the right is inoperative when it concern parental supervision. The sanctions are there, but they are rarely used by the courts, since police and prosecutors, in most cases, are
reluctant to take necessary initiatives. On the other hand, the rights are operative when it concerns other supervisors, e.g. teachers.

Supervision with the aim of protecting a third party, is a typical operative right for a child. Parents and other supervisors are obligated to protect a third party from harm and crimes committed by the child. Sanctions are provided in the legislation. However, in almost all cases, insurance will finance most of the cost of the damages.

The right to education seems, in general, to be met by a professional performance of obligations by teachers. However, sanctions are rarely exercised. This may be due to reluctance by principals to react when teachers (colleagues) fail.

In conclusion, the rights are there as well as obligations and sanctions in case of failures. However, unprofessional (sometimes understandable, though) considerations, by those who are supposed to react in case of negligence, hinders the effectiveness of the system. The same can be said about insurance, when it concerns damages against a negligent parent who has omitted to supervise the child, which, in turn, has caused injuries for a third party. Thus, due to various reasons, the rights to protection via supervision and development through education, although formally operative, are partly inoperative in practice.

5. Conclusions and some critical aspects

This version of the Interest theory provides us with an important structure which makes it possible for lawyers to organize and survey comprehensive systems of rules. It also gives us a tool to analyze various degrees of protection for the interests and rights of children, e.g. with or without a corresponding obligation, which in turn can have, or lack, a corresponding sanction. The theory makes it easier for us to enhance the rights of children, mainly in a domestic scenario. Whenever legislators are dealing with issues concerning the rights of children, by the theory they are encouraged to ask the crucial question: Who, or which entity, should be legally obliged to protect a right and should there be a corresponding sanction provided in the legal system?

The theory could also be useful as a part of a foundation needed to establish the area of the rights of the child as a subject of its own, like Contract and Company Law, including a genuine child perspective. Further, it makes it possible to compare the legal protection of children in different countries. At least the theory makes it easier to identify where the differences between countries can be found and also facilitates the possibilities to explore multilateral solutions.

The Convention on Children’s Rights can be improved with the addition of articles requiring states to implement obligations in their domestic legislation.
Who, or which entity, that should bear the obligation to act in order to promote the rights of a child, could be left to be decided by each country. It is, however, as noted in Section 3.3, politically more difficult to agree on obligations, than on rights. In article 27, it is stated that parents have the main responsibility for a child’s development in a broad sense.

Further, certain important rights in the Convention could also be enhanced if states were obliged to implement sanctions when the obligations are not fulfilled. Currently, there is only one article that obligates states to implement sanctions (article 32).

One drawback to the theory presented is that it does not provide an explanation for the rights of children on all occasions. As mentioned before, it is not of much use in case of divorce. Neither is it useful for social authorities taking a child into care (Section 3.5). Instead, the theory has an explanatory value when it concerns legal rules protecting children, or enhancing some of their personal and financial interests, during day-to-day life (at home or in school) or, in other words, concerning minors as protected social interests.

Further, the scope of a sanction is difficult to assess, which may result in considerable legal uncertainties, at least in some areas. As discussed above, this difficulty may partly be due to changing values. Other phenomena, like insurance, may frustrate the practical possibilities to use sanctions. Additionally, the theory does not assist us on the question of which interests are worthy of protecting by imposing duties, with or without a corresponding sanction, on individuals.\(^1\)

A domestic development of children’s rights may be enhanced by an Ombudsman for children. In Sweden, this civil servant is obliged to look after issues concerning the rights and interests of children (Lag om Barnombudsman). As discussed above, this approach is not adequate. The ombudsman should also be obliged to identify and analyze the obligations (for parents, teachers, etc.) to promote the rights of children, as well as various types of sanctions in case of failures.

The rights of a child in the Convention are inoperative. However, this version of the Interest theory provides us with a tool to use if we wish to improve the situation for children.

Notes

1 Concerning MacCormick, see in the following: Ilhering, Geist des Römischen Rechts III, §§ 60–61, and Bentham, see Hart, Essays on Bentham, Chapter VII.
2 For further reading, see, among others, Smith 1976.
3 Measuring progress in this area is difficult, see Beeckman 2004.
4 A competing theory is the Will Theory. According to Hart, a legal right is an expression of the individual’s possibility to control the obligations of other persons, also to
waive the possibility. Such a position can be relatively weak, as in a liberty-right, or strong as a power-right (Hart 1982 pp. 183–189). MacCormick, on the other hand, claims that the function of a legal right, at least when it concerns children, cannot be an expression of the individuals possibility to choose (or control the obligations of someone else or waive it). Children do not have the possibility to make such choices. They are instead dependant on their parents, as guardians or custodians.


6 An interesting and illuminating article on obstacles, to the enforcement of children’s rights, created by cultural differences is given by Himonga 2001.

7 See further MacCormick 1977.

8 Marmor seem to have the opinion that rights are an intermediary which reflect a society where “people do not share a common understanding of ultimate values.” Marmor 1997 p. 16.


12 On these critical aspects, see further Wardle 1996.

13 For general critical aspects on the Interest theory, see Cruft 2004 pp. 370–379.

References


