



The Autonomy of the Family as an Obstacle in Preventing and Identifying Assault of Children in Sweden

ABSTRACT

RESEARCH OBJECTIVE: The purpose of this article is to investigate whether the protection of the child has been considered sufficiently compared with the interests of the autonomy of the family within Swedish legislation.

THE RESEARCH PROBLEM AND METHODS: The autonomy of the family is well protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms in Article 8, where the right to family life is stipulated. But the article also authorises the right of a public authority to interfere in family life in accordance with the law for the prevention of crime. One reason for such interference could be the suspicion of domestic violence, which for centuries was considered to be a private concern. Article 3 of the Convention also forbids exposing a person to torture, inhuman or degrading treatment or punishment. The rights of the family are also expressed in the Convention on the Rights of the Child (Article 16), but more specifically in its view of the child. In the case of domestic violence, the Convention in Article 19 clarifies the responsibility of signatory states to protect the child from all kinds of assault by measures such as prevention and identification.

THE PROCESS OF ARGUMENTATION: Due to the fact that domestic violence exists to such an extent that it severely affects society in different ways, Swedish legislation has been modified on several occasions.

RESEARCH RESULTS: Even if the aim of those changes has been to uphold the autonomy of the family while preventing and identifying assaults within the family – particularly where children are involved – the question remains whether the protection of the child has been considered sufficiently compared with the interests of the autonomy of the family.

CONCLUSIONS, INNOVATIONS AND RECOMMENDATIONS: In order to guarantee children a childhood and adolescence consisting of care, security and a good upbringing, further improvements – particularly within the Penal Code (1962:700) – are necessary to prevent and identify domestic violence against children.

→ **KEY WORDS: DOMESTIC VIOLENCE, PREVENTING, IDENTIFYING, CHILDREN**

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1. Introduction

The family is of essential importance for the structure and the maintenance of society through its role of generating new members as well as bringing them up. In the view of the child, the family – the basic unit of society – is the natural environment for his or her development and welfare. The autonomy of the family is well articulated in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in Article 8, which expresses the right to family life. But at the same time, the article authorises interference in family life by a public authority in accordance with the law for the prevention of crime. Furthermore, Article 3 of the ECHR states that torture, inhuman or degrading treatment or punishment are forbidden. Also, in the Convention of the Rights of the Child (CRC), Article 16 states that the rights of the family are well protected and may only be interfered with on legal grounds. An example of such interference could be, as stated in Article 19, to protect children against assault while in parental care.

It is very well known that one crime that is closely related to the autonomy of the family is domestic violence, meaning assaults by and against members of the family involving adults as well as children. For centuries, it was considered to be a private matter and governmental interference by law was denied. Improved knowledge of the crime, and its multifaceted reasons and effects on society, have resulted in several changes to Swedish legislation. The purpose of these changes has been to better balance the autonomy of the family with the individual integrity of its members.

In this article, the autonomy of the family will be problematised in connection to preventing and identifying domestic violence against children. The focus of this article is children assaulted by their parent(s) by all forms of physical and/or mental violence. Child abuse also includes the exploitation of children and children who are victims of sexual abuse, but these issues are not dealt with in this article. The focus will be on the ECHR, the CRC, Swedish legislation, the practice of courts in Sweden, and the work of the European Court of Human Rights.

2. The Autonomy of the Family in View of Domestic Violence

The family, comprising parents and children – including heterosexual and homosexual cohabitation with or without marriage – is as an institution well supported and protected by the ECHR. See e.g., Marckx against

Belgium, 13.06.1979, and Schalk and Kopf against Austria, 24.06.2010. More specifically, Article 8 states the right to private and family life, which are often integrated with each other. The respect of family life can only be infringed by public authority when it is in accordance with the law, and it is necessary for reasons such as the prevention of crime; this has been the subject of several cases at the European Court of Human Rights. See e.g., *X and Y against the Netherlands*, 26.03.1985, *M. and C. against Rumania*, 27.09.2011, *E.S at al. against Slovakia*, 15.09.2009, *A. against Croatia*, 14.10.2010, and *Hajduová against Slovakia*, 30.11.2010. The ECHR, in Article 3, also contains a ban on torture, inhuman or degrading treatment and punishment, which cannot under any circumstances be ignored. In a case – *A. against the United Kingdom* – the European Court of Human Rights concluded that English law was not in accordance with Article 3 in that it did not protect a child who, due to the treatment of his stepfather, was caused relatively serious physical injuries. Both respect and protection of the family and the interests of the child are also expressed in Article 16 of the CRC. This means that, in the context of domestic violence, the authorities have to have legal grounds in accordance with the rule of law for interfering in the life of a family in order to prevent and identify domestic violence involving children. In those cases, the principle of family integrity has to give way to intervention with the purpose of ensuring the child the best possible environment for harmonious development (SOU 1997:116, 14.2.1).

The construction of the family in Sweden is mainly legalised by the Marriage Code (1987:230) and the Cohabitees Act (2003:376). Legal questions relating to the entering into and dissolution of marriage, as well as questions of financial matters in relation to marriage, are addressed in the Marriage Code. Similar questions for two persons who live together without being married are addressed in the Cohabitees Act.

Legal matters concerning the relationship between parents and their children are stipulated in the Parental Code (1949:381). Of particular interest when studying domestic violence involving children is Chapter 6, Section 1, which stipulates that children are entitled to care, security and a good upbringing. Children should be treated with respect for their person and individuality, and may not be subjected to corporal punishment or other degrading treatment (SFS 1983:47). Historically, the situation for children in relation to parents and the use of corporal punishment was quite different; in Sweden, parents were, until 1902, and in accordance with the Penal Code of 1864, under an obligation to beat their children who in a trial were found guilty of less serious offences. The right of parents to use physical violence when punishing their children was even legalised in

the Act of 1920:407 on children born within marriage. But, with the ambition of reducing the number of cases where children were victims of severe bodily harm by parents, the word *punish* was in 1949 replaced by the word *reprimand* in the Parental Code. Hereby, it was indicated that more violent forms of physical beating should be avoided. Injury to children of a minor nature could still, in accordance with the Penal Code of 1864, and until 1957, result in no punishment being enforced on parents, because they had only used their legal right to beat their child. This was the situation for children, even if the changes in 1952 indicated that injury caused to a child by a parent should be treated in the same way as if a grown-up had been physical assaulted. But finally, in 1966, the right parents to give their children a reprimand was removed (Prop. 1966:96, p. 19-21). This meant that the use of violence against a child should be treated in accordance with the Penal Code of 1965, in the same way as if an adult had been the victim of the assault. Whether such assaults, physically or psychologically, affected the adult or the child differently, and the question of whether they should be treated differently under the Penal Code, were not issues at this time.

A commission appointed by the government suggested that the regulation in the Parental Code should have an explicit ban on exposing children to blows, beatings, boxing the ears, and other similar treatment, including mild physical reprimands for any reason or cause. The commission concluded that physical punishment was a form of degrading treatment and different from mentally humiliating and dismissive treatment, even if its effects could be identical. The effects of such treatment are lack of self-esteem and personality change, and affect the child throughout its childhood and adolescence and even as an adult. Among child psychologists and child psychiatrists, it has been very well known for a long time that it is inappropriate to punish children physically. A child subject to physical violence may experience not only physical injury but also psychological injury. There is also a risk that a child exposed to violence by parents will use violence as a grown-up (SOU 1978:10, p. 23-24). The prohibition of corporal punishment or other degrading treatment of children by parents was in accordance with the suggestion by the commission included in the Parental Code and came into force on 1 January 1979. The purpose of the ban on exposing children to corporal punishment or other degrading treatment was to make clear that such behaviour was not permitted, which was at this time still unknown to many. Furthermore, the ban would be the basis for information and educating of parents in the importance of giving children good care. In the long-term, it would also reduce the number of children being exposed to physical violence by their parents

(Prop. 1978/79:67). Similar ban of exposing children to physical or other degrading treatment had earlier been enforced in the Education Act in 1952. The ban on corporal punishment or other degrading treatment on children by their parents was questioned by a group of parents; they claimed in an application to the European Commission that the ban interfered in the right of family and the right of parents to decide how to bring up their child, referring to the ECHR's Article 8. The application was rejected by the Commission, which stated that the Swedish legislation was meant to protect potentially weak and vulnerable members of society (Application no 8811/79, Decision and Reports of the European Commission of Human Rights – DR No 29, p. 104).

3. Assault of Children in the Context of the Family

The number of children being victims of domestic violence is due to different reasons that are difficult to estimate. Earlier research estimates that, on the one hand, we do know that since the beginning of the 1980s, the number of children reported to police for being victims of maltreatment has increased more than fourfold. The number of children being victim of maltreatment in the age between 0-6 years of age increased from 196 in 1981 to 820 in 1997 and for those in the 7-14 from 758 in 1981 to 4 443 in 1997 (Dir 1998:105). On the other hand, the use of corporal punishment as a method of upbringing has declined sharply. The number of children being victims of corporal punishment are now fewer compared with earlier, and those children experience corporal punishment less often than before. Even the attitudes regarding corporal punishment as a method of upbringing have changed greatly since 1979, with many fewer feeling positive about such methods (Sandén, 1996). Still, four per cent of children between the ages of 10 and 11, and seven per cent of 20-year-olds have during their childhood been the victim of corporal punishment by using an object (SOU 2001:18, p. 7).

Between the years 1993 and 1999, the non-governmental organisation (NGO), Children's Rights in Society, revealed a more than 100 per cent increase in the number of children calling for help due to child abuse. Even though there are still too many children calling for help, supportive contacts by Children's Rights in Society to victims of child abuse went down from 3 523 in 2014 to 3 217 in 2015. Most of these contacts were related to bullying, but the second most common cause was child abuse. Physical violence was also the most common reason why children called for help to Children's Rights in Society in 2014 and 2015. The total number

of phone calls were 507 in 2014 and 442 in 2015 (Statistics of supporting services by the Children's Rights in Society 2014/2015).

When it comes to small children, the real number of child abuse victims is difficult to estimate due to such incidents not always being reported to the police. The total number of reported child abuse cases in the age 0-6 years in 2015 was 4 070 – an increase of seven per cent compared with the previous year. Concerning children between the ages of 7-14, the number of reported cases of abuse was 10 400 – an increase of five per cent. How many of these cases related to parents abusing a child is difficult to know, as most of them were reported by the schools (<https://www.bra.se/bra/brott-och-statistik/statistik/anmalda-brott.html>). An investigation by the Ombudsman for Children in collaboration with the Epidemiological Centre at the National Board of Social Health and Welfare shows the difficulty of estimating the number of children between the ages of 0-4 who are the victim of child abuse, but also that the number and increase of such cases between 1991 and 1995 are alarming (SOU 1997:116, 14.2).

It is well known that children being the victim of domestic violence by parents affects children not only physically but also psychologically, and can affect their personality and their ability to play and learn. It can also hamper the child in her or his relationships with other people as both a child and as a grown up, and is a cause of behavioural disorders (SOU 2001:72, p. 285).

A child's experience of parental assault can be described as a *psychological trauma*, which has been described by the Norwegian child psychologist Atle Dyregrov as an experience of overwhelming and uncontrollable incidents that expose the child to extraordinary distress. This makes the child feel helpless and vulnerable. What is traumatic for a child depends on the role of the parents, the child's level of development, the earlier history of development and temperament, and also how the child perceives and reads the situation. According to the American child psychiatrist Leonore Terr, there are two kinds of traumatic situations: type 1 trauma includes one sudden incident, and type 2 trauma includes a series of traumatic incidents. Dyregrov is of the opinion that type 2 trauma is more difficult for the child to handle compared with type 1 trauma. In such situations, the child has to suppress and displace strong feelings, which results in a barrier between feelings, thoughts and behaviour. This dissociation can cause the child to be screened from her or his feelings, with serious consequences for the child's development. The child may show fear, anxiety, insomnia, feelings of guilt, concentration problems, learning difficulties, sadness and depression, psychosomatic reactions,

eating disorders, behavioural disorders and relationship problems. Traumatic incidents can also cause *posttraumatic stress disorder* (PTSD) (cited in SOU 2001:72, p. 287-288). A child will receive this diagnosis if she or he, during more than one month after a trauma, shows reactions as intrusive memories in the form of, for example, nightmares and repeated play, avoidance behaviour, apathy and fear, hyper attention, difficulties in concentration and overreaction to unexpected stimuli. These reactions can affect the child's social ability and/or capacity at school (Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition. Washington, DC, American Psychiatric Association, 1994). In the opinion of Dyregrov, both type 1 trauma and type 2 trauma affect the development of the child's personality with problems in forming relationships with other people, disturbances in biological development, weakened self-reliance and self-esteem, and learning difficulties (cited in SOU 2001:72, p. 288).

4. Preventing and Identifying Assault of Children in Families

The need to protect children due to their vulnerability and immaturity against any form of exploitation was expressed for the first time in 1924 in the Geneva Declaration of the Rights of the Child, which was adopted by the League of Nations. The protection of the child was further developed in the 1959 Declaration of Rights of the Child, which was adopted by the UN General Assembly and which defines children's rights as: "The right to protection against all forms of neglect, cruelty and exploitation" (Resolution 1386). The right of children to protection against any form of exploitation, including assault, is more specialised in the Convention on the Rights of the Child of 1989. Article 19 states that, while the child is in the care of a parent, the state is under an obligation to

take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.

Concerning protective measures, the article states further that the measures taken by the state should:

...include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification,

reporting, referral, investigation, treatment and follow-up of instances of child maltreatment... and... for judicial involvement.

The purpose of Article 19 is consequently both to prevent and identify the assault of children, as well as intervene if necessary. According to the Committee on the Rights of the Child, the article encourages states to take measures to change the mentality of violence in their societies, which often is defended by traditions or customs. Through public information, the child's rights to physical integrity should be emphasised and social attitudes can change to a non-acceptance of physical punishment in families and a legal ban on physical punishment of children (Parkes & Santos, 1997). Even if the family is of fundamental importance in society and is the natural environment for the child to grow up in and develop, considering the best interest of the child still makes it necessary for public authorities to intervene when the child is in danger from the parents. Hereby are the principles of Article 3, the best interests of the child, and Article 6, the child's right to life and development noted. A child has a right to her or his parents, but the parents do not own the child (SOU 1997:116, p. 14.2).

The enumerated rights of protection and intervention in Article 19 are absolute and may not be ignored by signatory states, which is something also emphasised in Article 4 of the Convention. It states that: "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention."

By the time the CRC came into force – Sweden has signed and ratified it, but not yet implemented it as legislation, though it has transformed it into several other pieces of legislation – researchers and social workers agreed that cooperation between different authorities was one of the main issues to be resolved in order to reach children in danger. Other important issues were the provision of more information about this problem to those who come into contact with children and the obligation to notify social services of suspected child abuse. In order to be able to prevent and detect parental assault against children, society – authorities, NGOs etc. – has to be organised to cooperate and thereby to deal with the whole situation, such as living conditions and not just problems with certain members of the family (SoS 1998, stencil).

Over the last few decades, several amendments relating to child abuse and social services, the police, schools and the judiciary have been made due to both research and initiatives by the government (e.g. SoS-rapport 1994:4; SoS-rapport 1998:4; SOU 1997:116; SOU 1998:31; SOU 2000:42; Ds 2004:56). One example is the Children's House, the first one established in 2005 after a model project started in 1998 in Iceland. The first model of

Children's House was the Children's Advocacy Center, established 1985 in Huntsville Alabama, USA. Within the Children's House, different authorities are based, such as social services, the police, the prosecutor, medical and psychiatric staff, who all cooperate when a child is suspected of being a victim of parental assault. The purpose of the Children's House – which today in Sweden total 28 – is to improve the situation of the child in a child-friendly environment to overcome her or his trauma and provide the judiciary with better documentation to improve the number of cases being tried by the courts (see e.g. Landberg & Svedin, 2013). Furthermore, and with reference to CRC Article 19, the government established, due to previous results of governmental investigations, at the University of Linköping in 2015 a national centre for knowledge about violence and other child abuse (S2012/275/FST; SOU 2014:49; <http://www.barnafrid.se/om-oss>).

Another measure intended to prevent and identify parental assault of children came in 2002 with the establishment of a special representative for children. This person is appointed by the court at the request of the prosecutor when there is reason to believe that the child is a victim of parental violence. The special representative for the child has the authority to take decisions for the child during the preliminary investigation and during trial. In such cases, it used to be very difficult to uphold the rights of the child, as the parent(s) could exploit their rights in accordance with the Parental Code to prevent the child from, for example, being heard by social services and/or the police. This was also the case when the child had to be taken in by the police for interviewing and medical examination. One of the parents can also be appointed by the court to represent the child if there is no reason to believe that this would in any way harm the interests of the child. In this way, the quality of investigation and prevention of such crimes has been improved (Prop. 1998/99:133; Act 1999:997) on special representative for children; NJA, 2004, p. 417).

In 2012, the Social Service Act (2001:453) was improved in several ways to better uphold the rights of the child when there is a suspicion of parental assault. When a child case comes to social services' attention, and which requires intervention, social services should immediately make an assessment of whether the child is in need of immediate protection (The Social Service Act, Chapter 11, sections 1 and 1a). Such cases must be handled urgently and completed within four months. If a parent of the child is involved, he or she should immediately be notified about the investigation by social services. Still, if there are extenuating circumstances, which can be the case where a parent is suspected of assaulting their child, such notification can be delayed until after social services and police have spoken to the child (The Social Service Act, Chapter 11, Section 2). In such

cases, social services are allowed to talk to the child without the consent of the parent(s) and without the parent being present (The Social Service Act, Chapter 11, Section 10; Prop. 2012/13:10, p. 54-62).

The regulations on the responsibility of those working with children to report possible parental assault to social services have been modified several times. The authorities, both public and private, have a responsibility to immediately report possible abuse to social services. Under previous legislation, the person had to report to social service if she or he had evidence to suggest an intervention by social services was necessary. According to the present regulations, it is enough that a person suspects that a child is being assaulted to be under an obligation to report it to social services (The Social Service Act, Chapter 14, Section 1; Prop. 2002/03:53; Prop. 2012/13:10). Private persons ought to report to social services if they get knowledge of or suspect that a child is being assaulted (The Social Service Act, Chapter 14, Section 1c.).

In order to prevent and identify children being assaulted, the statute of preliminary investigation has also been modified several times. Of special importance for those cases is the responsibility to rapidly carry out a preliminary investigation when the potential victim at the time of the crime is under 18 and the crime is an offence against the offender's life, health, freedom or peace and the potential punishment is more than six months' imprisonment. It also means that the preliminary investigation should be finished within three months of the first report of a person being under reasonable suspicion (The Decree on Preliminary Investigations [1947:948] Section 2a).

Furthermore, a person under 18 years of age should always be considered as having a special need of protection (The Decree on Preliminary Investigations, Section 13f [2015:477]; RÅ Handbok, Utvecklingscentrum Göteborg, February 2012, 2016, p. 11; UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power A/RES/40/34; Directive 2012/29/EU of the European parliament and of the Council of 25 October 2012). At the interrogation of a child, special measures have to be taken; first of all, the interrogation should be organised and carried out in such a way that there is no risk that the child who is could be harmed. At the interrogation only necessary questions should be asked, and interrogations should not take place more than considered absolutely necessary with regard to this kind of investigation and the best interests of the child (The Decree on Preliminary Investigations Section 17 [2001:645]). A child should also be interrogated by a person with special competence for such task (The Decree on Preliminary Investigations Section 18 [2001:645]). A person with special knowledge in child- or interrogation psychology should also

assist in the questioning and/or comment on the value of the child's statement in cases where the statement of the child is decisive for the investigation, taking into account the child's age and development, as well as the nature of the crime (The Decree on Preliminary Investigations Section 19).

5. Child Assault in the Context of the Penal Code

The regulation of assault is to be found in the Penal Code, Chapter 3, Sections 5 and 6. The offence includes bodily injury, illness or pain and rendering another person powerless or in a similar state. If those acts constitute mortal danger, or the victim is subject to grievous bodily harm, severe illness or the offender had displayed particular ruthlessness or brutality, the accused, if proved guilty, should be sentenced for gross assault. If the offence is considered exceptionally gross, attention should be paid to whether the physical injury is permanent, if the act has caused exceptionally grave suffering, or if the offender has demonstrated extreme recklessness.

The regulations on assault in the Penal Code do not include any specific reference to assault of a child. The lack of such regulations has been discussed by a committee appointed by the government to investigate whether the CRC should be incorporated into Swedish legislation (SOU 2016:19). The committee pointed out that the protection for assault under the Penal Code was not in accordance with the child's right of protection under the CRC. In a number of cases where a parent was accused of assault, due to the use of less severe physical violence against her or his child, the court often dismissed the charges. In the observed cases, there was a conflict between the interests to protect the child and the parental interest to decide over the child and the upbringing of the child. In the cases where the charges were dismissed by the court, more emphasis had been put on the interests of the parent compared with that of the child. This was often due to the offence of assault requiring the victim's allegation of pain to be proved and be of some substance. Furthermore, the court could find mitigating circumstances that could explain and excuse the parent using violence against the child – another situation where the parent was treated with priority instead of the child. The commission also concluded that the court had looked on those cases from a grown-up perspective and not from the perspective of the child. Consequently, the Penal Code did not protect children from being assaulted according to the CRC Article 19. The commission therefore suggested that the Penal Code and the regulations on assault should be completed with regulations specifically on child assault committed by a parent or a person under whose upbringing, care or

supervision a child suffers injury, illness, pain or violence or puts the child into a deep sleep or similar condition. Differently from the regulations on assault, the new regulation does not require that the violence has caused physical pain. The regulation should also include gross assault as well as a possibility to sentence the guilty to a more severe penalty if the assault has been exceptionally gross. The commission also referred to statistics where, for example, only 12% of reported assaults against children in the age of 0-6 were prosecuted (SOU 2016:19, p. 238-269).

6. Discussion

The interest of the autonomy of the family is well protected both in the ECHR, Article 8, and in the CRC, Article 16. But both conventions also make clear that the protection against assault is a legal ground for interference into the life of family with reference to the ECHR, Article 3 and the CRC, Article 19. The above examples of Swedish legislation reveal the tension between the rights of parent(s) to decide over the child's upbringing and the right of the child to be protected against any kind of assault. The insertion of the rights of children to be protected against parental assault in the Parental Code, the Social Service Act and the statute of preliminary investigation are improvements in terms of treating children as rights-holders with no discretion in the context of the family. Still, more has to be done, which is exemplified by the investigation of some cases by the courts dealing with parental assault. The CRC has still not, unlike the ECHR, achieved the status of legislation in Sweden. Even so, to fulfil the fundamental requirements of the CRC, Article 19, the Penal Code has to be complemented with an offence concerning child assault by parent(s) or a person under whose upbringing, care or supervision a child suffers injury, illness, pain, exposure to violence or being put into a deep sleep or similar condition, even where the violence has not caused pain to the child.

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