

Children's Rights in Sweden: *Where to Draw the Line?*

Wendy Bainsby



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- * Every child has the right to divorce his parents
- * When parents are divorced, no arrangement may be made for their child's custody without his consent
- * Parents or guardians may not take decisions concerning a child of seven or older without discussing it with him first.

These three extracts come from Eight Theses of a Child's Rights (appended), compiled by a Swedish Professor of Law. A government committee considering children's rights is expected to recommend some of them for enactment into Swedish law.

The Theses, written by Ulla Jacobsson, Professor of Law of Procedure at the University of Stockholm, are extremely controversial — even in Sweden. The committee has already caused a stir this year by proposing a ban on corporal punishment for children. This ban has in fact been enacted into law, and came into effect on 1 July. In spite of some Swedes' doubts about the new law, this country is probably more at ease with it than most other western, industrialised societies would be. But the idea that children should have the right to divorce their parents raises most parents' eyebrows. It did mine, when I talked to Professor Jacobsson in her downtown Stockholm flat. She smiled at my confusion with her pleasant, motherly face (she has grown-up children of her own), and asked why I should be taken aback. It is, she says, a logical consequence of putting the child first.

Professor Jacobsson maintains that the Swedish Code Relating to Parenthood and Guardianship has been written in the interests of parents. It is, she says, based on four, unstated assumptions: parents are best, parents know best, a mother is better than a father, and a child is best off where he already

is. The child is expected to be dealt with for the parents' convenience. But in the real world, with parents' suitability and judgement varying and with sex roles being redefined, we must face the fact that these assumptions are not self-evident in every case. There is only a greater or lesser degree of probability that they will apply to any specific case. Under the present law, each case should be investigated to find out just how far they apply. But this would not only be enormously time-consuming: it would be impossible. Present rules of procedure do not allow for it.

The law as it stands makes the parents parties to the proceedings of a custody case. The Child Welfare Committee can also be a party, but hardly ever is. The child is not a party. In practice, therefore, the child's interests are seldom represented, so there can be no investigation into his interests. Professor Jacobsson claims that, since the matter of custody is vital to him, the law should be re-written. Its present formulation — "Custody belongs to the parents . . ." — should become "The child has the right to be in the custody of . . ." This would make the child a party to the case. He would have the opportunity to agree to the arrangements his parents want to make for him, to oppose them, to ask for an investigation and to appeal.

Professor Jacobsson also takes up the question of who is most suited to look after a child. Are parents best? Swedish law assumes so. But what do we mean by parents? She is impressed with the work of Goldstein, Freud and Solnit ("Beyond the Best Interests of the Child", London, 1973), who identify various factors that children need in their relationship with their parents: psychological and physical care and intimacy, stimulation, security and continuity. These are important from the child's point of view, and the authors call the person who can provide them the child's

psychological parent. While the child's biological parents are also, in general, his psychological parents as well, they need not be; and Professor Jacobsson thinks the law on custody should be re-written to state that the child has the right to be in the custody of his psychological parent.

The idea that a child is best off where he is — the status quo principle — is misused, according to Professor Jacobsson. Sometimes, a parent counts on the court's application of this principle and is able to keep the child illegally or even kidnap him.

What about children divorcing their parents? Professor Jacobsson explains that we should start thinking about parents and children in the same way we think about husbands and wives. Whereas we once used to consider divorce a disgraceful affair, we now realise that some couples are simply ill-suited without either of them being to blame. But we still think that removing a child from the custody of its parents is morally degrading. "However", she says, "parents and children can be poorly suited to each other too without anybody being to blame. It should be possible to regard the child's right to divorce not as a chance for the child to accuse his parents but as an entirely reasonable expedient in a situation that is difficult for everyone. In order to be able to accept the idea, we must stop thinking in terms of parental prestige."

This suggestion differs from the present practice of removing a child from the custodianship of his parents in two ways. Firstly, it would be the child himself who would bring the action, instead, as now, of the social authorities. Secondly, "profound differences in personality or views between the child and his parents" would constitute sufficient grounds for bringing an action; whereas today the parents' unfitness has to rest on the

more traditional grounds of maltreatment, bringing up the child in a manner which endangers his physical or mental health, and so on. As the proposal stands, inheritance and maintenance rights would still be tied to biological parenthood, and the child would be allowed to bring an action for divorce only if an obligatory attempt at mediation failed.

The suggestion that children ought to be able to divorce their parents strikes me as a typically Swedish one. It shows a detached appraisal of the situation, a logical attempt to improve on it, and a lack of embarrassment in putting forward the conclusion, even if it sounds outrageous or strange. All this is very laudable. But it seems to miss the point, somehow. We know all too well that marriages only last as long as is convenient for each spouse. Can parent-children ties be equated with marital ones? It seems to me that they are different. Perhaps it is the protectiveness that a parent feels for his child; but whatever the reason, parents have a commitment to their children quite unlike the commitment they have for each other. Biologically, this is not surprising: it helps to ensure that our children survive to child-bearing age so that they can take over the reproduction of the species. It is, even in biological terms, a basic urge. Far more importantly in this connection, however, it is also a basic emotional response; and to deny this in legislation seems to me a failure to grapple with the reasons for the breakdown of the relationship in the first place. Given the emotional and even biological pressures working against such a breakdown, psychoanalysis would seem to me a better instrument for dealing with it than legislation. It is, however, typical of Sweden that every problem is believed to have a logical solution.

But this is a parent's view. What happens if we follow Professor Jacobsson's advice and put the child

first? All children disagree with their parents at times, whether their parents happen to be their psychological and/or their biological ones. Personalities and views may differ profoundly; but I doubt whether the child could distinguish his situation from, say, healthy and quite natural rebellion. Asking the child to resolve prolonged family disputes by divorcing himself from his parents on the grounds Professor Jacobsson suggests demands of him a breadth of knowledge and understanding he cannot possibly have, as his experience of the family situation is limited to the child's role. It is like asking monks to be marriage counsellors.

Professor Jacobsson's suggestion that every family should function as a mini-democracy seems more sensible. She adds that if the parents and children cannot agree, the parents must make the final decision.

Just how much of this will be recommended for legislation when the committee reports later this year is uncertain. It is not enormously important either, as far as the debate on children's rights goes. What is interesting is that these proposals are being taken seriously and will no doubt spread, even if some of them are judged to be too radical for this country at the moment. And this would seem to be the fate of the divorce proposal. On the other hand, the committee is reportedly including a statement of child's rights in the preface to its recommendations on custody, and one of its suggestions reformulates the present law to focus on the child as Professor Jacobsson proposes.

APPENDIX

EIGHT THESES ON THE RIGHTS OF THE CHILD

Thesis 1:

Legislation on the custody of a child should begin with a catalogue of the child's freedoms and rights. The child should be assured freedom of

expression, the right to information, freedom of association, the right to demonstrate, freedom of assembly and freedom of religion. The child has the right to exercise these rights and the parent may not force a child to demonstrate, join an organization or religious group.

A child may not be subjected to corporal punishment or other abusive treatment. A child shall be protected from body searches, invasion of private space, opening of mail and being secretly overheard. The prohibition of corporal punishment, abusive treatment, force and invasion should apply to all children under 18 years. The right to positively exploit these rights should be bestowed on the child according to his maturity and age.

Parents may waive the child's rights only if serious danger exists for his health and development.

Thesis 2:

A child has the right to psychological and physical care:

1. Psychological care: The child has the right to love, understanding and stimulation as well as to have advice and support when he makes important decisions, such as which course of study to take, work and leisure activities.

2. Physical care: The child has the right to board and lodging and the means for special needs.

The custodian has the duty to supervise smaller children and to direct and inform older children about the laws and regulations. Decisions should be taken in consultation. If the decision concerns the child's person, consultation should take place from the time the child turns seven. If no agreement is reached, the parents should make the decision. But decisions should be successively handed over to the child after he turns seven.

Thesis 3:

Choice of custodian: The current laws should be revised. The child's consent should be a condition for basing the custody decision on the agreement arrived at by the parents. If the child's consent is withheld, the court should ask for an investigation. In difficult cases, individual investigations should be made with the presumption that the mother is best suited to look after the child or that the child is best off where he is.

Thesis 4:

In difficult custody cases, the child's special nature must be taken into account, as well as his relationships with his custodians in those aspects concerning the meaning of custodianship.

Thesis 5:

A new rule should be introduced which would give the child the right to demand that his custodians be removed from custodial responsibilities on the ground of profound differences in personality and views between the child and the custodian.

Thesis 6:

The child should have the right of access to the parent who does not have custodial responsibilities.

Thesis 7:

The child should have the right to plead in cases concerning custody and access.

Thesis 8:

The child should, on his own demand, be able to have an adviser who would help him with advice and support and represent him in disputes with his custodians.

Ulla Jacobsson.

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(Jack Davis, Aboriginal Poet
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