

# Some Reflections on Children's Rights in a European Perspective

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## 1 Introduction

The century labelled "the century of the child" is nearing its end.<sup>1</sup> It must be admitted that children's rights, especially so called "parenting and children's rights", have greatly increased during this century in Sweden as well as in most other European nations. But, as is well known even the sun has its spots. Almost daily we are informed, through the media, of very serious violations of children's rights in Sweden and in other areas of Europe.

In this essay I shall first describe international cooperation of importance for children's rights in Europe (2). - After that, I examine some different areas of children's rights in Sweden which serve to exemplify the situation within the same areas in other European countries (3). - It is not a question of an all encompassing or systematically complete study.<sup>2</sup>

## 2 International Cooperation

### *Global Cooperation*

Concerning the question of global cooperation of importance to children's rights in Europe, one may first recall the *declaration* on children's rights (the so called Geneva declaration) that the League of Nations adopted in 1924, whereby "children's rights" became an internationally accepted concept. One may also recall the declaration on children's rights- stated in ten separate points -and

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<sup>1</sup> Key, E., *Barnets århundrade*, 1900.

<sup>2</sup> I have not found it necessary to include a jurisprudentially theoretical analysis of the term "children's rights". For this see Freeman, M & Veerman, Ph., ed., *The Ideologies of Children's Rights*, 1992 and Sund, L.G., *Rättigheters funktioner och generella skyddsobjekt, särskilt barn* in TfR 1994, pp. 166 ff.

adopted by the UN in 1959.<sup>3</sup> The importance of these morally binding declarations should not be minimized as principal declarations, but their value, cannot be compared to the, UN resolution on children's rights, adopted in 1989, for which Poland took the initiative in the UN during the international year of the child ten years earlier, 1979. As one of the nations that actively contributed to the creation of a children's convention, Sweden ratified it in June 1990 and it went into effect for this country on 2 September that same year. Focused on the individual child, the Children's Convention can be said to be dominated by four different fundamental principles, namely prohibition against discrimination (art. 2), the principle of the child's welfare (art. 3), the right to life (art. 6) and the right to freedom of expression in all questions related to the child itself (art. 12). The Convention, embraces, in one and the same document, all types of human rights - and is, with its 54 different articles, legally binding for the (now approx. 190) states that have adopted it.<sup>4</sup>

Only certain types of rights are seen as absolute in the sense that every convention state - regardless of that state's material situation - is obligated to respect them. Such rights are citizens rights and political rights, for example the right to registration at birth and the right to knowledge of one's parents and to be cared for by them (art. 7), the right to be heard on issues related to the child (art. 12) as well as the right to protection of private and family life (art. 6). The recognition of other rights, that are more "target" related - namely economic, social and cultural ones, such as the right to health and medical care (art. 24), social security and social insurance (art. 26), child care (art. 18.3) and education (art. 28) - have been made dependent on the states resources, which however are required (art. 4) to be utilized to a maximum.<sup>5</sup>

Currently a parliamentary committee ("the Children's Committee") is working on a broad overview of how Swedish legal codes and case law relate to the rules of the Children's Convention. In June of 1996 this committee presented a partial report "Barnkonventionen och utlänningslagen" (SOU 1996:115), (Children's Convention and the Immigration Act, Official State Reports 1996:115) where the committee's views are expressed on the question highlighted in the title of this paper. The committee had been assigned to examine this question with priority.<sup>6</sup> - Finally, as in the case of the European convention on human rights and fundamental freedom (cf. below), the question of whether the Children's

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<sup>3</sup> Earlier international agreements concerning children's rights were for example directed at prohibiting the trade of young girls and protecting children in the work environment. See Eriksson, M., *Barnets folkrättsliga skydd* in SvJT 1988, pp. 438 ff.

<sup>4</sup> Cf. note 19 below.

<sup>5</sup> Cf. *Barnkonventionen och utlänningslagen*. Subreport by the Children's committee, SOU 1996:115, pp. 30 f.

<sup>6</sup> See section 3 below. - A committee consisting of "ten experts with high moral integrity and acknowledged expertise" is responsible for an examination of the progress of the convention states regarding the realization of children's rights according to the convention. After this essay was published in *Festskrift till Stig Strömholm, II*, 1997, pp. 731 ff. the Parliamentary Children's committee in August 1997 turned in its main report, *Barnets bästa i främsta rummet. FN:s konvention om barnets rättigheter förverkligas i Sverige* (SOU 1997:116).

Convention, ought to be incorporated with the Swedish legal system has been discussed several times by the Parliament.<sup>7</sup>

Some conventions within the area of international private law are also of interest in the question of children's rights. One such area of current interest in Swedish legislative efforts is the convention adopted in May 1993 at the Hague conference on International Private Rights regarding children's protection and cooperation during international adoptions.<sup>8</sup> In a bill presented to the Parliament in February 1997, it is suggested that Sweden shall ratify this convention, based on the principle of the child's best interests, and that it should be incorporated with Swedish legislation as a specific law.<sup>9</sup> It should also be mentioned that due in part to an existing need to revise the 1961 convention "concerning the powers of authorities and the law applicable in respect of the protection of minors" the Hague conference on International Private Law in October 1996 approved a convention on children's legal protection across international borders (Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children).<sup>10</sup>

According to art. 1 the purpose of the Convention is to determine which state authorities shall have the right to take actions for the protection of a child's person and property, thereby determining which country's law shall be applicable concerning "parental responsibility" (cf. below); to make provisions for the recognition and execution of such protections in all convention states; to establish such cooperation between authorities in the convention states that may be necessary in order to accomplish the Convention's goals. The term "parental responsibility" encompasses, according to the same Convention article, "parental authority, or any analogous relationship of authority determining the rights,

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<sup>7</sup> See for example *Barnkonventionen och utlänningslagen*. Subreport by Barnkommittén, SOU 1996:115, p. 22. - The convention does not constitute Swedish law but shall, through ratification, be accorded great importance in connection with the creation of new laws and other statutes, and in the interpretation and application of such valid laws and rules. In the case of NJA 1993 p. 666 regarding the transfer of guardianship from biological parents to the habitation family in accordance to the rule in the Parent Act's (FB) chapter 6 paragraph 8, the Swedish Supreme Court (HD) specifically referred to the convention rules that the best interest of the child shall be the first rule in all questions regarding the same and, furthermore, that great importance shall be attached to this opinion in relation to the child's age and maturity (art. 12). Cf. SOU 1996:115, p. 22.

<sup>8</sup> See for example Jänterä-Jareborg, M., *Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, Nordic Journal of International Law 63, 1994, pp. 185 ff.

<sup>9</sup> Prop. 1996/97:91 - See also *Interationella adoptionsfrågor. 1993 Haag konvention m.m.*, SOU 1994:137, pp. 107 ff. After the publication of this article in *Festskrift till Stig Strömholm*, II, 1997, pp. 731 ff., the Parliament has adopted the mentioned bill, whereby the current Hague Convention now is regarded as Swedish law (see SFS 1997:191).

<sup>10</sup> See Hague Conf. on Private Int. Law, Prel. Doc. No 7, March 1996. Rev. of the Hague Convention of 1961 on the protection of Minors. Preliminary draft Convention on the Protection of Children adopted by the Special Commission and Report by Paul Lagarde. In its main report mentioned in note 6 above the Swedish Parliamentary Children's Committee recommends that Sweden shall ratify the 1996 Hague Convention in question (se SOU 1997:116, p. 250).

powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child." The Convention, which applies to children from birth to age 18 (art. 2), is especially focused on questions regarding custody, guardianship, foster home placement and social care. It specifically does not encompass questions related, among other things, to establishing and rescinding parentage, names, support, inheritance, or health. According to the Convention (art. 5) the right to take measures for the protection of a child's person and property rests with the legal and administrative authorities in the state where the child formally resides.<sup>11</sup>

## ***European Cooperation***

### **The European Council**

Of great importance for children's rights in Europe is also of course the work that has been and is being performed within the European Council, often resulting in different international instruments in the form of conventions between member states or recommendations aimed at the governments and developed by some of the committees that work under the European Council's Committee of Ministers, for example the Committee of Experts on Family Law or the Social, Health and Family Affairs Committee. The great importance of the European Conferences on Family Law should also be mentioned in terms of their identification of different family rights issues and questions regarding children's rights in family law and proposals for work aimed at solving such and other issues, which have been discussed by the European ministers of justice on several occasions at their conferences.<sup>12</sup>

A large amount of the work by the European Council concerns the European convention regarding the protection of human rights and the basic freedoms from 1950 ("European Convention"), a convention which is incorporated into Swedish law since 1 January 1996 through the statute (1996:1219).<sup>13</sup> This convention concerns not only the rights of adults but also children's rights; a

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<sup>11</sup> Examples of other international private law conventions of interest here are the 1973 Hague convention on the recognition and execution of decisions regarding child support and the 1980 Hague convention on the civil aspects of international abductions of children. Both of these conventions have been incorporated into Swedish law, the first through the statute (1976:108) on the recognition and execution of foreign decisions regarding child support, and the latter through the statute (1989:14) on the recognition and execution of custody decisions and on transference of children.

<sup>12</sup> As example can be named the question regarding the lowering of the age of adulthood (fifth conference in London, 1968), children's custody (seventh conference in Basel, 1972) and the importance of the principle of the "child's best interests" (sixteenth conference Lisabon, 1988). See Killerby, M., *The Council of Europe's Contribution to Family Law*. Report presented at the 8th world conference ("Families across Frontiers") arranged by the International Society of Family Law 1994, pp. 5 f.

<sup>13</sup> Prop. 1993/94:117, pp. 32 ff. - According to the bill it is clear (p. 33) that the European Convention is applicable law in almost all of the convention states. Since the convention was incorporated into Swedish law only Great Britain, Norway and Iceland do not have it as a part of their national legislation. However the latter two nations preparations are under way for the propositions to be incorporated into national legislation.

minor may himself bring action to the European Court. Several cases regarding the question of children's rights have also been dealt with by the European Commission and the European Court, where several complaints have been directed against Sweden.<sup>14</sup> Furthermore, the European Social Charter from 1961, must be mentioned. It took effect in 1965 and touches, to a great extent, on the question of children's rights. In this charter it is stated, among other things, that children and youths shall be guaranteed special protection from "those risks of a physical and moral nature that they are exposed to."<sup>15</sup>

In January 1996 the Committee of Ministers accepted a proposal by the Committee of Experts on Family Law for a European Convention regarding the exercise of children's rights (European Convention on the Exercise of Children's rights), at the same time as the Convention was opened for undersigning by the member states.<sup>16</sup> This Convention with its 26 different articles, constitutes a compliment to the Children's Convention by regulating above all, different actions of a procedural nature, which may promote the possibilities for children to actually exercise their rights according to the UN Children's convention. This European convention is presumed to be also of assistance to the member states in fulfilling those demands that article 4 in the UN Children's Convention establishes, namely that the convention states shall take all suitable measures through legislation and in other ways, for the realization of those rights acknowledged in the Convention.<sup>17</sup>

Let me finally mention that the European Council's Advisory Assembly during its ordinary session in January 1996 adopted a recommendation regarding a "European Strategy for Children".<sup>18</sup> This recommendation expresses (art. 5), among other things, that children "are citizens of the society of today and tomorrow. Society has a long-term responsibility to support children and has to acknowledge the rights of the family in the interest of the child. Responding to children's rights, interests and needs must be a political priority. The Assembly is convinced that respect for children's rights and greater equality between children and adults will help preserve the pact between generations and will contribute towards democracy." The Committee of Ministers is recommended to

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<sup>14</sup> See Danelius, H., *Mänskliga rättigheter*, 5 uppl., 1993 and Eriksson op.cit. pp. 437 ff.

<sup>15</sup> See Eriksson op.cit. p. 459. - It should be mentioned as it concerns the European Social Charter that the signature parties can decide for themselves which (yet no fewer than 10) of the Charters articles they shall be bound by.

<sup>16</sup> See Council of Europe, ed., *European Convention on the Exercise of Children's Rights and explanatory Report*, DIR/JUR (95) 12 Rev, Strasbourg, 8 September 1995. See also Killerby, M., *The draft European Convention on the Exercise of Children's Rights*, *The International Journal of Children's Rights* 3., 1995, pp. 127 ff.

<sup>17</sup> Examples of other conventions created by the European Council concerning Children's rights are the 1967 convention regarding the adoption of children (The European Convention on the Adoption of Children), 1975's convention regarding children born out of wedlock and their legal status (The European Convention on the Legal Status of Children born out of Wedlock) and the 1980 convention regarding the recognition and execution of the custody of children, as well as the restoration of child custody. The latter convention has been incorporated into Swedish law through the statute (1989:14) regarding the recognition and execution of foreign custody decisions m.m. and regarding the transference of children.

<sup>18</sup> Recommendation 1286 (1996).

act for the ratification of the UN Children's Convention by those member states that have not yet done so. It has also been recommended that the member states ratify all of the European Council conventions related to children's rights, especially the just mentioned European Convention on the Exercise of Children's Rights.<sup>19</sup> It is suggested that the Committee of Ministers, through a series of concrete measure proposals within the recommendation, dedicates itself to a political prioritization of the question of children's rights among the member states and the European Council.

### **The European Union (EU)**

The purpose of the EU (previously the EEC) is, as is well known, to create a domestic market with free movement of goods, people, services and capital. The Unification Act, the addendum to the Rome Treaty which was adopted in 1987, and the Maastricht Treaty from 1991 have increased however the possibilities for the EU-authorities to take an interest in questions related to human and citizen's rights, health, education and social issues, which can all be of importance for children's rights. Through the European Council's agreement in Maastricht in 1991, the other EU nations agreed to begin legal cooperation even concerning civil law issues, something that obviously can be thought of as being of importance, for example, in terms of harmonizing laws concerning the "family law children's rights."<sup>20</sup> Within this context one can also mention that it is assumed, that the harmonization work regarding EU:s social law can come to actualize certain harmonization needs also within family law.<sup>21</sup>

In reality, the EU - and especially the European Parliament has - possibly somewhat unexpectedly and in different ways - shown a great interest in questions of importance to children's rights.<sup>22</sup> The Parliament adopted a resolution in 1991 concerning children's rights, based on the report titled "Problems of the Children in the European Community"<sup>23</sup>. In this resolution the Parliament demanded that all of the member states should ratify and put into practice (without any reservations) the UN convention regarding children's

<sup>19</sup> All the EU-states have now ratified the UN Children's Convention. See Ruxton, S., *Children in Europe*, published by NCH Action For Children, 1996, p. 1.

<sup>20</sup> Since the legal committee rejected approval of motion L411 during the 1991/92 national meeting with a demand for recognition from the parliament regarding the issue of promoting efforts for children's rights from a EEC-perspective, the committee stated, among other things, that they assumed that the government would follow the developments of cooperation according to the previously mentioned Maastricht agreement and that the government, to the degree that rule changes within family law area were required, would take those measures that the situation required. See the legal committee's report 1991/92:LU 30, p. 9.

<sup>21</sup> See *Europagemenskap och rättsvetenskap*. Report done by the legal faculties by appointment from the government, June 1992, p. 32.

<sup>22</sup> Concerning the EU:s activities regarding children's rights, see Ruxton op.cit. and Svensson, G.M., *EU och barnen*, Rädda Barnens report series, rev. ed., 1994. - Among the European Parliaments, different committees of special importance are the committee for legal questions and citizens rights, social questions and youth, culture, education and sport which have concerned themselves with children and youth issues. See Svensson op.cit. p. 32.

<sup>23</sup> The author of the report was parliamentary member Lissy Gröner, see Svensson op.cit. p. 11.

rights, including its "child's best interest" principle.<sup>24</sup> In addition the EEC (now the EU) ought to according to the Parliament, align itself to the UN:s Children's Convention.<sup>25</sup> The Parliament also requested the appointment of a European Children's ombudsman with the task of looking after all areas related to children's rights. The Parliament has also brought attention to the problem of conflicts between different countries national laws regarding parents custody responsibilities after divorce, a problem that, of course, increases in importance in a Europe with free movement for people. In addition, work is in progress within the EU for a proposal to a convention, among other things, court jurisdiction concerning decisions in marital issues.<sup>26</sup> Within the European Commission important questions for children and youth are dealt with foremost within the Director General V (DGV), which is responsible for employment and social politics. In a memorandum, regarding family issues of 1989, the Commission noted that the developments that had occurred during the last decades regarding family formation and family fragmentation necessitates family and social legislation in the member states to be adapted accordingly, in order to protect children's rights and welfare. The Commission also proposed a number of joint activities for the member states and stressed that the activity within the concerned area ought to be coordinated with other organizations, especially the European Council and the UN.<sup>27</sup> The Council of Ministers, which also pointed out the importance, in this context, of contacts between different individual organizations representing family interests (cf. below about these), placed themselves behind the Commission's proposal. In 1989, the Commission also established a European Observatory for Family Politics consisting of a network of one expert from every member state whose task would be to follow the development in the different member states within the area of family politics. According to the Observatory's first report (1990), covering the period 1988-89, several measures for children's benefit were taken by the member states during this period.

Several different private organizations attempt through, for example, so called lobbying to affect the EU:s policies.<sup>28</sup> As concerns the current area, examples of such activities, that ought to be mentioned are The International Save the Children Alliance, that encompasses some twenty organizations with activities in a great number of countries and European Citizen Action Service (ECAS), formed in 1990, and which together with the organization International Forum for Child Welfare (IFCW) in Geneva took the initiative in February 1991 for a European network for children's welfare, European Welfare Network, but which has now changed its name to European Forum for Child Welfare (EFCW). In January

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<sup>24</sup> See Svensson *ibid.* See also note 19 above.

<sup>25</sup> In this context one can mention that several independent and varied organizations that have demanded that the EU as such also shall connect itself to the European Council convention regarding protection of human rights and the underlying freedoms. This question is undoubtedly being investigated, See Svensson *op.cit.* p. 18.

<sup>26</sup> Information to the author from the Ministry of Justice.

<sup>27</sup> COM (89) 363 final.

<sup>28</sup> Regarding this see the following from Svensson *op.cit.* pp. 23 ff.

1992 the EFCW opened an office in Brussels in order to oversee child aspects within EEC-politics and to coordinate "lobbying" activity of the member organizations. Finally I want to mention the Confederation of Family Organizations in the EC (COFACE). As regards this organization, which resides in Brussels, and which, among other things, carries out opinion polls and lobbying activities; it ought to be pointed out, in particular that it, has completed an extensive study of family law in all of the EEC member states at that time, with a special focus on the question of children's position within different types of "de facto-families".

### 3 Children's Rights Today

As was mentioned by way of introduction, children's rights have been successively strengthened during the 20th century, as far as concerns "family law children's rights", to which can be counted such questions as the confirmation of paternity, custody, visitation rights, adoption and alimony. I shall take notice here of only the first two areas, that is to say, those concerning the appointment of parentage, custody and visitation rights. However, let me first remind you of the very important improvement that has taken place regarding the legal standing of children who were previously, in Swedish law, termed "children out of wedlock".<sup>29</sup>

In 1976 the terms "children born within marriage" and "children out of wedlock" were completely eliminated from Swedish legislation. Instead Swedish law today makes a distinction between children born from a wed or an unwed mother.<sup>30</sup> The situation is nowadays the same in Norwegian law. On Island, where all differences, from a legal perspective, between "children born within marriage" and "children born out of wedlock" were abolished in 1981, these terms were first eliminated through a 1992 statute. Also within Swiss law these terms have been eliminated from the statutory legislation. In certain other countries in Europe, as for example Greece, the terminological renewal within this area has only signified that one has abolished the terms "legitimate" and "illegitimate children" and instead incorporated the terms "born within marriage" and "born out of wedlock".

Through legislation from 1969 Sweden acknowledged for "children born out of wedlock" the same right to inheritance after the father and father's parents as

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<sup>29</sup> If nothing else is mentioned, the following sources regarding foreign law that is mentioned in this context are: Hamilton, C & Standley, K., *Family Law in Europe*, 1995, Confederation of Family Organizations in the European Community (COFACE), ed., *Family Policies in the Member States of the European Community. III. Family Models and civil Law: Affiliation and its Effects*, 1990; and the yearly summary on developments within the area of family law (Annual Survey of Family Law) provided by the International Society on Family Law in different states, which up until the 1994 survey was published at the University of Louisville, ed., *Journal of Family Law*, but thereafter in Bainham, A., ed., *The International Survey of Family Law*. The last year of the latter publication was 1997 and dealt with the 1995 conditions.

<sup>30</sup> The purpose of the reform was to eliminate, in society, lasting prejudicial attitudes towards children of unwed mother.



for "children born within marriage". A precedential nation in Europe regarding equality of children's inheritance rights was, however, another northern country, namely Norway, which enacted such legislation as early as 1915. Only much later have other countries in Europe followed suit regarding this issue, besides the other northern countries, also France, Belgium, Switzerland and Germany.<sup>31</sup> However, as will be shown in the following presentation there still remain, in Swedish law, certain distinctions within other areas of family law between children born from a married and children born from unwed mothers, namely regarding questions dealing with the confirmation of fatherhood and child custody.

### ***Confirmation of Parentage***

According to art. 7 of the UN:s convention on children's rights, children shall be immediately registered after birth and shall as far as possible, have a right to knowledge about their parents. Furthermore a convention state shall guarantee the carrying out of these rights in accordance with its national legislation and its undertakings with regard to applicable international instruments within the area in question. Swedish law, going back a long time (and currently according to "peoples registration law" (1991:481)), has stated that a child's birth shall be reported to the national registration authority. Such a report shall, among other things, clarify the identity of the child's mother. In Sweden, as in most other countries, other rules regarding the confirmation of motherhood have been considered unnecessary according to the clause "mater semper certa est", since the delivery usually shows who the mother of the child is ("mater est quam gestatio demonstrat"). However, in another European country, namely Belgium, an earlier rule did not acknowledge the mater semper certa-rule in cases of children of unmarried mothers. Instead motherhood for such children had to be determined through the mother's admission or through a court of law. In 1979, in the case of *Marckx v. Belgium* the European Court declared this to be in conflict with art. 8 of the European Convention regarding the right to protection family life.<sup>32</sup> No real right for the mother to remain anonymous exists in the Swedish, and normally not in other European, legal systems; however such is the case in the French and Italian legal systems.<sup>33</sup> More recent registration

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<sup>31</sup> However, in German law it has long been held valid that illegitimate children have not been regarded as co-owners in the estate of a deceased, with the right to administer together with the other estate owners the estate's holdings; the inheritance right has only signified a right to an monetary amount, however with the same value as a legitimate child's inheritance. See Frank, R. In Bainham, A., ed., *The International Survey of Family Law*, 1994, pp. 265 ff.

<sup>32</sup> Cf. for example Danelius, pp. 195 f. - Belgian statute has thereafter changed on this point. - However, in Italy it is still held that motherhood of children born from an unmarried mother is determined through the mother's acknowledgment.

<sup>33</sup> If the mother, due to some special circumstance, should refuse to allow herself to be registered as the mother of the child at the national registry the Social Welfare Board ought to, according to a statement by the Parliamentary Ombudsman (JO) and by the press in an extensively reported "baby Doe" case (lost child case) (the so called "Enköping case"), complete the birth application report in lieu of the mother or after an eventual refusal from the national registry's side in accepting such an application, seek a court judgment regarding

information regarding motherhood may, in individual cases, be theoretically incorrect as a result of the child having been conceived through so called egg donation.<sup>34</sup> Egg donation is not allowed in Sweden because of problems related to the motherhood issue but also out of concern for other types of problems, for example, psychic problems that may develop for the child. However, it is still likely that there have been cases where Swedish women have given birth to children after having undergone egg donation in some other country where it is allowed.<sup>35</sup>

In a report commissioned by the Government, the government's medicinal-ethical Council presented, in April 1995, a report regarding egg donation and so called surrogate motherhood. The Council's majority suggested that egg donation ought to be allowed for medical reasons to women of a fertile age and that children procreated in this manner ought to have the same rights as children begotten through so called donor- or giver insemination in order for the child to be able to gain information of its genetic origin.<sup>36</sup> The research report has been submitted for consideration, but at this writing it has yet to lead to any suggestions for legislation from the Government.

As has previously been implied, the rules regarding the confirmation of paternity, are not the same for all children.<sup>37</sup> For the child of a married mother it is presumed that the husband is the father, according to the so called "pater est rule" ("pater est quem nuptiae demonstrant") valid in all of Europe. In the Swedish legal system this paternity presumption signifies that if the mother is married at the child's birth or if the child is born at such time after the husband's death that it can have been conceived before the date of death, then the now

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the determination of motherhood according to the general rules of the Civil Procedure Act's so called appointment's procedure. JO stressed, that this should be regarded to lie within the general responsibilities of the Social Welfare Board to intervene for the protection of children. It is generally perceived in our country that a child in principle has the right to know its origin; see Justitieombudsmännens ämbetsberättelse 1989/90, pp. 223 ff. See further about the case in question Saldeen, Å., *Barnets rätt till sitt ursprung*, in *Rättsvetenskapliga studier tillägnade Carl Hemström, De Lege* 1996, pp. 254 f.

<sup>34</sup> See Saldeen above in note 33 op.cit. pp. 251 ff.

<sup>35</sup> Egg donation is even disallowed in Norway and Germany but is allowed in several other European countries. Egg donation when it concerns Swedish women has occurred foremost in England and Italy. See *Assisterad befruktning. Synpunkter på vissa frågor i samband med befruktning utanför kroppen*. Investigative report presented by the States medicine-ethical council, 1995, pp. 25 f. - Previously it was possible, in certain cases, for incorrect national registration information regarding motherhood to occur as a result of mistaken child exchange in the maternity departments within hospitals. For a closer analysis of this see Saldeen above in note 33 op.cit. op.cit. 255 f.

<sup>36</sup> See the States Medical-Ethical Council above in note 35 op.cit. pp. 33 ff. - Concerning the question of the legal maternity as a result of egg donation the Council argues, that one ought to be able to keep the mater semper certa rule, in other words, the woman that gives birth to the child (the "biological" mother according to the Council's terminology) and not the woman that has donated the egg (the "genetic" mother), shall be regarded as the child's mother. See op.cit. p. 37.

<sup>37</sup> For a more in depth analysis regarding the determination of paternity, see Saldeen Å., *Fastställande av faderskap*, 1980, *Faderskapsfrågan i svensk rättsutveckling efter 1734 års lag*, Lakimies 1984, pp. 1250 ff. and *Barn och föräldrar*, 1997, pp. 32 ff.

deceased husband is presumed to be the child's father (FB 1:1). Before 1977, the paternity presumption also applied in cases where the woman gave birth at such a time after a divorce that it could have been conceived prior to the divorce.<sup>38</sup>

The paternity presumption can of course be incorrect in an individual case and that is why it is also possible to invalidate the rule by - bringing a - so called, negative fertility claim (FB 1:2). According to Swedish law, cause of action exists, besides the child itself, only for the husband or if he is deceased, for his heirs (FB 3:1 and 2).<sup>39</sup> The child's claim is also acknowledged in most European countries.<sup>40</sup> Earlier Swedish legislation in this area was designed in the great interest of a child to be considered as legitimate, even if the legitimate husband was not really the child's father. This was often expressed in the statute limiting in different ways the legitimate husband's (but not the child's) possibilities to raise a negative fertility claim through specific time limits on the raising of claims.<sup>41</sup> As a result of a 1976 statute, all restrictions of the legitimate husband's right to raise a negative fertility claim were abolished. Because of the balancing act that had occurred regarding the child's legal standing within, respectively outside of marriage, it was thought that these restrictions no longer be could be based on the fact that the child had an essential interest in being allowed to keep its position as a child of married parents. On the contrary, it could now be considered in the best interest of not only the father, but also of the child to rescind the legal paternity if this did not coincide with the genetic proof.<sup>42</sup> This

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<sup>38</sup> The same reform has been carried out in, for example, the Norwegian legal system. - In foreign legal systems but not in the other Nordic countries - the statute often indicates a certain time period within which the child must be born after the husband's death (or after divorce) (so called legal conception period) - for example, according to Belgian, French, Greek, Italian and Spanish law (300 days), German law (302 days) or Dutch law (307 days) - for the paternity presumption to be applicable. However, in Swedish law one has found that in order to avoid material injustice in the individual case, it is best if the question of the conception period is determined from case to case, with consideration to the child's development level at birth. For more on the subject, see Saldeen, Å., *Fastställande av faderskap*, 1980, pp. 79 ff. See also, the same author, *Rätt släkt. Om förhållandet mellan rättslig och genetisk släkttillhörighet* (in *Arv och anor, Årsbok för Riksarkivet och Landsarkiven* 1996, pp. 109 f.

<sup>39</sup> The mother does not - as is the case in, for example, Denmark, Norway and several other countries - have an independent cause of action but may have a claim through her capacity as heir to the husbands.

<sup>40</sup> According, to Bulgarian law, for example, the child does not have a claim. In Greek law, prior to legislation in 1983, only the husband and his heirs had a cause of action, but now this right is extended to both the child and the mother. According to Swiss law in order for the child's right to a cause of action to exist it is presumed that the presumed father and mother no longer share a common household and that the cause of action is raised prior to the child's turning twenty one. Cf regarding foreign law below at note 43.

<sup>41</sup> Among other things it was regulated that the legitimate husband must start his cause of action no later than three years after knowledge of the child's birth (according to the 1917 statute about marital lineage, which was in force until the Parent Act (FB) took effect, the preclusion time period could be as short as six months).

<sup>42</sup> Prop. 1975/76:170, p. 134. - Slightly less in agreement with this point of view is the possibility, also created in by the statute from 1976, of rejecting the paternity presumption not only through legal judgment but also through the very less complicated procedure whereby the legitimate husband and mother in writing accept another mans formal paternity

point of view is, however, not common in other European countries. In these countries the legitimate husband must often submit his cause within a certain time period, which normally is counted from the point in time of the child's birth or when knowledge of that birth was attained<sup>43</sup>

Concerning the confirmation of paternity of children born from unmarried mothers, the rule in Sweden has been, since the creation of the 1917 statute regarding children born out of wedlock, that it is a matter for the public authorities (currently the Social Welfare Board) to act in the child's best interests in order to determine paternity. In principle this should be done regardless of the mother's view on its necessity. In Norway, similar rules have been in effect since the creation of a statute in 1915,<sup>44</sup> while in Finland an applicable law states that the mother has the right to oppose the carrying out of an investigation into the paternity question.<sup>45</sup> The adopted point of view in Swedish law regarding the public authority's task in this area was at first motivated by the child's, but also the mother's and society's economic interest in making a man, through determined paternity, become obliged to contribute child support, a position that was reflected in older rules about determining paternity through acknowledgment or judgment, rules which were designed in such a way that they gave small guarantees that the confirmation of paternity in reality coincided with the true genetic relationship. In 1969, as has previously been mentioned, Sweden carried out an inheritance reform that implied the incorporation of full inheritance rights for illegitimate children even in relation to the father and the father's relatives. This reform was the result of a number of factors: the successively improved economic and social status of illegitimate children in society; through various social reforms; the changed perception on non-marital relations and the fruits thereof; the successively strengthened and improved ability to determine paternity issues through medical evaluation; a man's legal rights if alleged to be the father; and also children's interest in a correct agreement between legal and genetic paternity. All of these factors resulted, through legislation in 1969, in the implementation of new rules regarding the confirmation of paternity through admission and judgment. This legislation aims at creating more precise decisions in paternity questions than was previously possible. After this reform, the task of the state, was delegated to the social services authority, to act in public interest to determine the paternity of

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acknowledgment (FB 1:2 last paragraph). Regarding this, cf. Saldeen, Å., *Barnets rätt till sitt ursprung* (in *Rättsvetenskapliga studier tillägnade Carl Hemström, De Lege 1996*, pp. 264 f.).

<sup>43</sup> This period of respite from the cause of action is, for example, six months in the French and Dutch legal systems, one year in the Icelandic, Italian, Swiss and Hungarian legal systems, two years in the German legal system two years (counted from the point in time when the man gains knowledge regarding the circumstances pointing against his paternity); and three years in the Danish and Norwegian legal systems.

<sup>44</sup> Re. Norwegian law, se Lødrup, P., *Barn og foreldre*, 4 utg. 1993, p. 41. In Danish law, the rule is that a mother who fails to provide information related to the question of the identity of the child's father can be penalized with fines. At the same time, however, there exists a rule that the mother can be exempted from the duty to inform, a rule liberally applied in practice. For more detail, see Lund-Andersen, I., m.fl., *Familieret*, 1990, p. 12.

<sup>45</sup> See Aarnio, A. & Kangas, U., *Äktenskap, arv och testamente*, 1995, p. 103.

children born of unmarried mothers. This can now be motivated by the child's right to knowledge about its origins.

As is usual in other European countries, paternity can be determined in Sweden, either through voluntary admission (now called "paternity admission") by the identified father or through a trial and judgment.<sup>46</sup> With regard to the question of determining paternity, through judgment confirmed sexual intercourse during the conception period between the mother and the identified man constituted, prior to the 1969 reform, a presumption of paternity, a presumption, however, that the identified man had the right to disprove by showing that it was "unlikely" that the child had been conceived during the sexual intercourse in question.<sup>47</sup> The rule implemented by the 1969 statute regarding the confirmation of paternity through judgment (currently FB 1:5) does not mean that confirmed intercourse during the conception period between the mother and the identified man constitutes enough of a presumption for his paternity; rather, for an identified man to be confirmed to be the child's father, it is also required that, in consideration of the all of the factual information, the child has in all probability been conceived by this individual (so called "positive determination of probability", instead of the previous "negative determination of probability"). While Finnish law also implemented similar rules, in other countries confirmation of sexual intercourse during the time of conception between the mother and a identified man creates a presumption of his paternity, a presumption, however, that can be overcome by evidence to the contrary.<sup>48</sup>

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<sup>46</sup> Regarding paternity admissions, the 1969 reform meant, among other things, that the possibility of admitting to paternity orally (in front of a priest responsible for church records, for example), a possibility that hardly left any guarantees for the material rights connected to such an admission, was abolished and a rule was instead adopted, whereby an admission (currently acknowledgment) always shall be in the form of a written and witnessed document, that shall be approved by the mother as well as by the Social Welfare Board. This admission may be approved only if it can be assumed that the man in question is the father of the child. If the child is of age (or if it is not under anyone's custody according to FB 6:2) the child's own consent is instead required (FB 1:4).

<sup>47</sup> According to the 1917 statute regarding children outside of marriage which was valid up until the adoption of FB 1950, the identified man had to show in order to disprove the presumption of paternity that sexual intercourse created that it was "evident" that the child had not been conceived during the sexual intercourse.

<sup>48</sup> As is the case in, for example, German and Greek law. In Swedish judicial practice it has been considered possible to establish paternity in relation to a child born by an unmarried mother not just with the help of the presumption rule which assumes, partly, that a sexual intercourse during the conception period between the child's mother and the defendant has been corroborated, and, partly, that in view of all the circumstances of the case it is probable that the defendant is the child's father. It has been thus also considered to be possible to establish paternity with the help of the general principles of evidence in cases when there was no sufficient evidence for sexual intercourse taking place, but where paternity as such has been corroborated by the DNA evidence presented in the case. This is what happened in NJA 1998 case, p. 814, in which the result of DNA testing was applied. Concerning this and other cases decided earlier, see, Saldeen, *DNA-teknik och fastställande av faderskap*, Juridisk Tidskrift 1998-99, pp. 174-185. In Norway, DNA technology has already led to changes in the legislation in this area. And so, if a man can be regarded as the father of a child as a result of DNA testing, he shall be declared by the court to be the child's father without any reservation. If, for some reason, DNA-testing has not been performed, one must then still

In the Swedish legal system it has been possible, ever since the 1930s, for a court to enforce the carrying out of blood tests or other genetic examination during the paternity investigation. This is not always possible in other European legal systems, for instance, not in the British system, but a party's refusal to go along with such examinations can become important to the confirmation of paternity.<sup>49</sup>

It has often been discussed in the Swedish Parliament whether or not a paternity presumption like the one that exists for a married man's paternity ought to be implemented for a man living with an unmarried mother during the child's birth. When the statutory committee, during the 1992/93 annual meeting, rejected such a motion, the committee made the following statement that stressed the practical problems that arise when deciding which cases within which such a presumption should be valid and emphasized the importance that the rules for the confirmation of paternity be designed so as to satisfy the child's best interests, namely that the "present order for the confirmation of paternity offered secure guarantees that it really is the biological father and not someone else who is confirmed to be the father".<sup>50</sup> In Icelandic law, however, through legislation from 1992, a paternity presumption has been adopted which also applies to an unmarried man cohabiting with the mother.<sup>51</sup>

### ***Custody and Visitation Rights***

As regards child custody I will only deal briefly with the question of joint custody, i.e. the custody type that is currently considered to be generally the best for the child, regardless of how the parental relationship functions; that is to say, for example, regardless of whether the parties are married to each other or divorced. According to art. 18 p. 1 in the UN:s Children's Convention, member states "shall do their best to ensure the acknowledgment of the principle that both parents have joint responsibility for the raising and development of the child". The importance of joint custody for the promotion of good relations between the child and the parents has resulted in, in Sweden and in many of the European nations, the adoption of rules that make it possible for divorced and

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examine whether or not the mother and the defendant had a sexual intercourse during the conception period. If the sexual intercourse has been corroborated, and only one man is in the picture, in Norwegian law this man shall be declared the father, as long as it is not improbable that he is the child's father. If two or more men had a sexual intercourse with the mother during the conception period, one of the men shall be declared as the father if it is clearly more probable that he and none of the other men is the child's father.

<sup>49</sup> The same applies to Scottish law. In Greek law a statutory rule from 1983 applies whereby the counter party's statement regarding paternity is accepted if a party without special health reasons refuses to go through with a blood test or other genetic examination. Examples of countries where such examinations can be forced (as in Sweden) are Switzerland and Germany.

<sup>50</sup> See the Judicial Committee's report 1992/93:LU 22, p. 39.

<sup>51</sup> The implication of the rule as such is that if it becomes evident through information in the national "faellesregistret" or in some other way is undoubtedly clear that the mother and he who is pointed out as the father cohabited during the child's birth, then he will be presumed to be the child's father.

unmarried parents to have joint custody.<sup>52</sup> In Sweden the first step in this direction was taken through legislation in 1976, when the possibility was created for such parents to get joint custody after a court ruling.<sup>53</sup> Nowadays the situation in Swedish law is such that joint custody continues, as a principle rule, after divorce (FB 6:3, 2 paragraph). In English law, as a result of The Children Act from 1989, the rule states that joint parenting responsibility continues after a divorce and can only be dissolved under special circumstances, for instance if one parent uses violence towards the child.<sup>54</sup> If the parents cannot cooperate about which of the parents the child shall continuously reside with or about contact with the other parent, then a court may decide these issues.<sup>55</sup>

Regarding the issue of children born from an unmarried mother, Swedish law holds - as is the case in most other European states - that only the mother is automatically granted custody at the child's birth (FB 6:3, paragraph 1).<sup>56</sup> However, Icelandic law holds that if the parents according to registration in the "faelleregistret" or according to some other irrefutable evidentiary material live together at the time of the child's birth, then custody is automatically joint.<sup>57</sup> Also according to Spanish law the parents have joint custody from the child's birth date. However according to Swedish law unmarried parents today can get joint custody through a relatively simple procedure, namely through registration at the Tax Authorities after registration by both at the Social Welfare Board in conjunction with the Board's acceptance of the confirmation of parentage (FB 6:4).

It is also believed today that it is very important for a child's positive development to have good working relations or other contact with a parent that is separated from custody. In art. 9 p. 3 of the UN:s Convention on Children's Rights, a child separated from one parent is guaranteed the right to, "regularly maintain a personal relationship to and direct contact with both parents, except when this is contrary to the child's best interests". However, Swedish law has held, since the realization of the statute from 1983, that the child's need of contact with the parent separated from custody must come first - and not, as was

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<sup>52</sup> Some examples of other European nations where joint custody after divorce is possible are, besides the other four Nordic states, England, France, the Netherlands, Spain and Germany.

<sup>53</sup> Regarding the reformation work in this area, see for example, Saldeen, Å., *Barn och föräldrar*, 1997, pp. 54 ff.

<sup>54</sup> The information regarding foreign law in this chapter is mainly taken from "Vårdnadstvistutredningens" report *Vårdnad boende umgänge*, SOU 1995:79, pp. 167 ff. Regarding the source material concerning foreign law in this essay, cf. above at note 29.

<sup>55</sup> Cf. Spanish law where parental responsibility cannot be denied and therefore remains an issue for both parents after a divorce. Cf. also the fact that the question of with whom the child shall reside is determined by a court.

<sup>56</sup> Even in, for example, the Danish, Finnish, Norwegian, English, Dutch and German legal systems it is held that only the mother automatically becomes guardian at the child's birth.

<sup>57</sup> If this it not the case the mother alone is granted custody of the child even on Iceland. - According to French law, only when one of the child's parents have acknowledged the child then this parent alone becomes the guardian. If, however, both parents prior to the child's one year birthday acknowledge the child and they on that occasion lived together then they are granted joint custody.

the case earlier, that the parent's visitation rights with the child had to be fulfilled.<sup>58</sup> However, according to current Swedish law it is not possible for a court to decide about visitation rights when custody is or shall be joint; a functional joint custody is presently conditioned upon both parents coming to agreement over important questions, for example, with which parent the child shall continuously live and when and how visitation with the other parent shall be exercised. In several European nations it is, however, possible for a court to make decisions regarding visitation even with joint custody.<sup>59</sup>

The rules regarding custody and visitation rights have recently been the object of an overhaul by the Custody Dispute Inquiry ("Vårdnadstvistutredningen"), created in October in 1993, which presented its report *Vårdnad boende umgänge* (SOU 1995:79) in 1995.<sup>59a</sup> The Inquiry did not consider itself able to suggest the adoption of a rule regarding automatic joint custody with regard to parents who are unmarried at the time of the child's birth; that is, not even with regard to parents living together at the time of the child's birth. The reason for this is primarily the practical problem that exists in Sweden in determining when a "sambo" (cohabitation) relationship exists. Also, in certain cases, an automatically applicable rule regarding joint custody for unmarried parents at the time of the child's birth would not, according to the Inquiry, be compatible with the child's best interests, as when one of the parents, for some reason, is directly unsuited as guardian. Furthermore, such a rule, which would also apply to children conceived during temporary relationships, could conceivably entail that the mother refuse to cooperate with the inquiry into the paternity question. Such a rule could also lead to joint custody even when the child was conceived through rape or other sexual crime.

On the other hand the Inquiry has suggested that a court, if it can be considered in the child's best interest, shall be able refuse to dissolve joint custody, even against the wishes of one of the parents, or to enforce such

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<sup>58</sup> Thus FB 6:15 states that the child's guardian is responsible to see that the "child's need for companionship with one parent that is not the guardian or with someone else that is especially close to the child is met as far as possible". This is further clarified by the rule that the court in determining custody questions must "take into account the risk for the child in connection with the exercise of custody will be exposed to acts of cruelty, unlawful abduction or is detained or in any other way is harmed". The importance for the child of a working companionship with one parent that is separated from custody is also expressed in the rule in FB 6:6, whereby it is clear that the court in determining of what is best for the child during the choice of guardian shall attach special importance "to the child's need of a near and good contact with both parents". If other circumstances do not speak against it, the court ought to, in cases where joint custody is not in question, acknowledge custody to that parent who can be assumed to best be able to promote a well functioning relationship between the child and the other parent.

<sup>59</sup> Such is the case in the other Nordic nations, with the exception of Iceland, as well as in England, France, the Netherlands and Spain. ) But see note 62 with regard to new Swedish legislation in the area.

<sup>59a</sup> After this essay was printed for publication in *Festskrift till Stig Strömholm, II, 1997*, pp. 731 ff. the Government has presented a bill based on the recommendations of the Custody Dispute Inquiry, namely prop. 1997/98:7, *Vårdnad, boende, umgänge*. See also note 62 infra regarding the new legislation.



custody, something that is allowed in some other European countries.<sup>60</sup> Furthermore, in order to promote the use of joint custody and to further highlight such form of custody as the most accepted, a court shall be able to decide, according to the Inquiry, which parent the child shall reside with, in cases when the parents with joint custody do not reside together. However, it shall be a prerequisite for such a decision that the parents themselves are unable to agree or that they, for some other reason wish such a decision. The Inquiry has also suggested that a court shall be able to rule regarding some other form of contact than visitation in such cases, for example, where a physical visitation would be harmful to the child. Such alternative forms of contact might be telephone or letter contact with the parent that the child does not reside with. Such a possibility already exists in certain other areas in Europe.<sup>61</sup> Finally, it should be mentioned that according to the proposal, the responsibility of both parents to ensure that the child's need for visitation or other forms of contact with this parent be met shall be expressed in the statute. This stance must be considered to be well motivated, as it is unfortunately common, that after a certain period of time after a divorce, that the child loses all or almost all contact with the parent that it no longer resides with, as the result of one parent not doing what ought to be done to ensure that the, normally so important for the child, visitation functions well.<sup>62</sup> Unfortunately, as is well known, it is not only the present conditions that can be said to signify a violation of children's rights. In the remainder of this presentation I will touch on certain conditions in Sweden that it must be said constitute very serious violations of children's rights. In this context I begin with child abuse.

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<sup>60</sup> Such is the case in Finland, Norway and France but not in the, for example, Danish, Icelandic, Dutch or German legal systems.

<sup>61</sup> Such is the case according to Danish, Finnish, French, Spanish and German law, but not according to, for example, Icelandic or Norwegian law. In the Governmental bill (prop. 1997/98:7) mentioned above in note 59a the implementation of rules regarding contact other than physical visitation rights is not recommended. See further note 62.

<sup>62</sup> For a closer examination of this issue, see for example, Saldeen, Å., *Något om faderns ställning i svensk rätt* (in *Festskrift till Anders Agell*, 1994, pp. 577 ff.). New legislation concerning custody, visitation rights and the place of residence has now been introduced, which came into force on 1 October 1998. Note, however, that not all the proposals submitted by the Commission of Enquiry concerning Custodial Disputes, which have been discussed here, have been introduced. This concerns the proposal that a court should be able to provide for another type of contact than physical contact. It can be further mentioned that an introductory section has been added to the first chapter of the Parents' Code concerning custody, etc, where it is stated that the principle of promoting the child's best interests shall be the most important consideration when deciding issues concerning custody, place of residence and visitation rights regarding children. It can also be mentioned that parents can now conclude agreements about custody, place of residence and visitation. When such an agreement has been done in writing and when it has also been approved by the Social Welfare Board, it has the same effect as a court decision and can form the basis of an enforcement order. Among other news is the fact that the court may now decide about visitation rights and the child's place of residence even if the parents have joint custody. Also when the child lives with one of the parents the court may decide that the parent shall participate in the costs of trips caused by the child's need to visit the other parent. This shall be decided according to what can be regarded as reasonable with regard to the parents' financial situation and other circumstances.

### **Child Abuse**

The number of cases of child abuse has increased dramatically during the last several years.<sup>63</sup> This tragic development when parents exercise child abuse, can in part be explained by the helplessness that many parents feel, for instance, as a result of unemployment and the economically strained situation that this creates.<sup>64</sup> Children of immigrant families are said to constitute an especially vulnerable group when it comes to assaults by parents. There can be several reasons for this, among others, the view of corporal punishment in bringing up children in the immigrant parent's homeland. The view on corporal punishment can to a certain extent explain the situation of child abuse in Great Britain. It is said that - aside from sexual abuse - physical and psychological child abuse occurs very frequently. At least four children per week, or grossly 200 children per year, are supposedly abused to death in Great Britain, compared to five to six children per year in Sweden.<sup>65</sup> In Great Britain corporal punishment is thought to be a traditional parental right, a right that parents in Sweden lost through legislation already some thirty years ago.<sup>66</sup> In Sweden, which in 1979 became the first nation in the world to incorporate in legislation an explicit prohibition against corporal punishment (FB 6:1), the attitude towards corporal punishment has become increasingly negative since the mentioned legislation was adopted.<sup>67</sup> An express statutory prohibition against corporal punishment now exists also in some other European countries, at any rate Norway, Denmark, Finland and Austria.<sup>68</sup> However, since conditions supporting this were non-existent, the UN Children's Convention did not include any article with an express prohibition

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<sup>63</sup> In 1995, apx. 5 100 cases of child abuse among the age group 0 -14 were reported to the police, which signifies an increase of apx. 50 % compared with the 1993 situation. This increase can, to a certain extent be explained, by an increased inclination in society to report such incidents. It is important to note that the majority of all child abuse is not committed by parents but by children of the same age. See the Social Services Department's report *Barn idag*, Ds 1996:57, pp. 239 ff. About child punishment from an earlier date see, among others, Rembe, A., red. (by Save the children, publ.) *Barnets rättigheter*, 1991 p. 35.

<sup>64</sup> At the Academic hospital in Uppsala one intends to begin to regard all fractures of children under the age of 2 as being caused by abuse, if no other obvious explanation for the injury can be found. See Svenska Dagbladet (SvD) 26 October 1996. Re. criticism from a legal rights perspective see article. *Akademiska sjukhuset har vänt på bevisbördan*, SvD 6 November 1996.

<sup>65</sup> See for example, Dagens Nyheter (DN) och SvD from October 26 1996. - One other reason for very troubling statistics, in Great Britain, may of course be the problems that all too many families with children face as a result of social welfare cutbacks which have been even greater there than in Sweden.

<sup>66</sup> For a report in the autumn of 1996 by the European Court for Human Rights concerning the fact that English courts do not hold corporal punishment by parents as being against the law, see SvD 10 September 1996.

<sup>67</sup> See SCB, publ., *Barn och aga. A study regarding adults and young adults attitudes, experiences and knowledge*, Demografiska rapporter 1996:1.1.

<sup>68</sup> As regards, for example, Spain, Great Britain and Germany the UN Children's Committee has expressed the view that a prohibition against corporal punishment ought to be adopted in these countries also. See Ruxton op.cit. p. 12.

against corporal punishment.<sup>69</sup> According to Art. 19, which is directed towards all forms of physical and mental abuse of children, the member states shall however "take all appropriate legislative, administrative and social measures as well as measures in an educational purpose to protect the child against all forms of physical and mental violence, injury or assault, ... abuse or exploitation, including sexual assaults, while the child is in the parent's or a parent's, guardian's or other person's care".<sup>70</sup>

### ***Sexual Assault, Child Prostitution and Child Pornography***

During the last several years we have often had occasion to get upset over what has become known through the mass media as sexual assaults of children in my own country and in certain other European nations.<sup>71</sup> One very current and extremely tragic example of this is the Belgian pedophile scandal that has caused mass demonstrations against the whole Belgian legal system. Another very recent example is the disclosed pedophile scandal in Poland in which, according to information in the mass media, over a thousand adult persons, among them some Swedes, were involved.

Another very serious violation of children's rights is child prostitution, including so called sex tourism, and child pornography. As regards to child prostitution and sex tourism one can note that this has come to be a growing problem, not just in Western Europe, but also in several countries in Eastern Europe, such as Poland, Rumania and Russia. Concerning child pornography, it can be established that despite the fact that the production and distribution of such material was outlawed in Sweden in 1980, two noticeable cases in the beginning of the 1990s - one of them in Norrköping have shown that such pornography is still supplied to buyers both within and outside the country.<sup>72</sup> The distribution of child pornography which in recent years mostly has taken place through video films, now has begun to occur via Internet and e-mail. In this context one should mention the possibility that digital photo technique now offers to manipulate, not just still photos but also moving pictures, so that a more

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<sup>69</sup> See prop. 1989/90:107, p. 54.

<sup>70</sup> The penalty for assault is prescribed in the Criminal Act (BrB) 3:5 and for gross assault in BrB 3:6. Assault of children is often judged to be gross assault, as assault against a defenseless child can be considered to be especially raw and ruthless. See Beckman, N., et. al., *Kommentar till brottsbalken I. Brotten mot person och förmögenhetsbrott*, 1987, p. 172. - Re. the question of whether a guardian's supervision, according to the rule in FB 6:2, allows the guardian to exercise a certain amount of non punishable violence, see Jareborg, N., *Brotten. Första häftet. Grundbegrepp. Brotten mot person*, 2 uppl., 1984, p. 194.

<sup>71</sup> Provisions regarding the penalties for sexual exploitation is found in BrB chapter 6. These have been changed in recent years, among others in 1994 when, for example, the possibility to judge someone for gross crimes was introduced and the statute of limitation for sexual crimes against children was extended.

<sup>72</sup> It can be mentioned that in April 1995, the Parliament as a result of a motion in this issue decided to demand from the government that it attempt to press for the development of more stringent actions within the EU against child pornography. See the Justice Committee's report 1994/95:JuU14.

or less "innocent" pictorial can be transformed into advanced pornography.<sup>73</sup> Since a while back the question has been discussed in Sweden - and not the least as a result of the previously mentioned "Norrköping case"- of a possible criminalization of possession of child pornography - something that most likely would require a constitutional change ("freedom of the press and the freedom of expression regulations"). This question is being analyzed by the so called Child Pornography Committee, which is expected to present its report in March 1997.<sup>74</sup>

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<sup>73</sup> See SvD 26 February 1994.

<sup>74</sup> According to what has been communicated to the press (see for example, DN 23 February 1997, p. A 6), the Parliamentary Child Pornography Committee, which actually was supposed to have presented its report as early as the summer of 1996 but has been granted an extension, is supposedly, unanimous in its view, that the possession of child pornography shall be criminalized, but divided concerning the technical legal solution. - What applies today according to BrB 16:10a is that a person "who portrays children in a pornographic picture with the intent to distribute the picture or distributes such pictures to children be sentenced for the crime of *child pornography* to fines or jail up to two years, unless the act under the circumstances is deemed defensible". Since the production of child pornography presupposes sexual assault against children BrB:s other criminal classifications related to sexual assault may be applicable, for example, sexual exploitation of a minor (BrB 6:4). In the freedom of the press regulation (TF) it is ruled that violations of the "press freedom" regulation are "child pornography crimes, whereby someone portraying children in a pornographic picture with the intent of distributing that picture is guilty, unless the act under the circumstances is deemed defensible" (TF 7:4, p. 12). In the freedom of expression regulation (YGL) 5:1 it is clear that a deed considered to be a freedom of the press violation according to TF 7:4 shall also be considered a "freedom of expression" violation, if it occurs in a radio program, a film or a sound recording that is punishable by law. Furthermore it is clear from the last statements (2nd paragraph) that under "the same conditions, someone who depicts graphic violence against humans through indiscreet and lengthy pictures with the intent to distribute this material, shall be considered to be in violation of the freedom of expression, unless the act under the circumstances is deemed defensible." - Furthermore, the statute that was adopted in autumn 1994, statute (1994:1478) on the forfeiture of child pornography, states that depiction's of children in pornographic pictures that are found in connection with preliminary inquiries be forfeited, "if the depiction is of a realistic nature and there are no special circumstances against its being forfeited". After this essay was printed for publication in *Festskrift till Stig Strömholm, II, 1997*, pp. 731 ff. New legislation has been passed (prop 1997/98:43) which entails, among other things, that the Freedom of the Press Act and the Fundamental Law on Freedom of Expression do no longer apply to the depiction of children in pornographic pictures. Child pornography is now punished only under the new provisions of the Code of Criminal Procedure (Ch. 6, s. 10a), which means, in principle, that all activities that have to do with child pornography are criminal. It is also forbidden to produce, disseminate, purchase, sell or act as intermediary in business transactions concerning materials which constitute child pornography. It is, for example, also forbidden to exhibit child pornography. The new legislation means that in the majority of cases it is also forbidden for other instances than public authorities, and then especially the police, prosecutors and courts, to possess child pornography. The prohibition against depiction and possession does not apply to those who draw, paint or represent in some other way in the form of a handicraft a child-pornographic picture if it is not intended to be disseminated, transferred, granted the use of, exhibited or made available in some other way to others. Possession of child pornography does not either constitute a crime if it is defensible in view of the circumstances. In the view of the Parliament (Riksdag) this exception makes it easier for people involved, for example, in shaping public opinion against child pornography to handle the material without it being considered a crime.

With regard to the question of international cooperation aimed at coming to terms with the problem of child pornography, child prostitution and the other forms of sexual exploitation of children, one might mention the first world congress against child prostitution, child pornography and other commercial exploitation of children which took place in August 1996 in Sweden. At this congress, which generated a great deal of interest due to the newly revealed Belgian pedophile scandal, governmental representatives from 122 nations, together with some voluntary organizations and other bodies within the UN family, adopted a common declaration, as well as a plan of action," to assist in protecting child rights, particularly the implementation of the Convention on the Rights of the Child and other relevant instruments, to put an end to the commercial sexual exploitation of children worldwide".<sup>75</sup> All states are asked to, in cooperation with national and international organizations, give a high priority to measures against the commercial sexual exploitation of children; to promote stronger bonds between states and all sectors in society to prevent children from falling into the sex trade; to criminalize commercial and other sexual exploitation of children; to condemn and penalize all involved criminals (domestic or foreign) while at the same time guaranteeing that children who are victims of the crime are not punished.<sup>76</sup> Furthermore, the states underlined the demand for effective application of existing laws aimed at the protection of children from sexual exploitation, as well as new legislation of laws as needed. Through education, social mobilization and development, a climate is to be created, guaranteeing that parents and others with a legal responsibility towards children can realize their rights and obligations, as well as their responsibilities to protect children from sexual exploitation. National plans of action within this current area shall be determined no later than the year 2000. Finally, it should be mentioned that, during a meeting at the end of November 1996, the EU:s Council for Justice and Home Affairs, also agreed upon cooperation between the member states in order to attempt to come to terms with this problem.<sup>77</sup>

#### 4 Concluding Remarks

This essay has given an account of international cooperation, globally and in Europe, of the importance of children's rights in Europe. In this work, Sweden has played a leading role, not the least in the creation of the UN Convention on

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<sup>75</sup> See *Report of the World Congress against commercial exploitation of Children*. Stockholm, Sweden, 27-31 August 1996, Part I and II.

<sup>76</sup> It is specifically presumed that a considerably more intensified cooperation between, for example, Interpol, the UN:s Children's Committee as well as different voluntary organizations take place than is the case today. - The importance of giving sexually exploited children all of the necessary social, psychological and medicinal help is stressed.

<sup>77</sup> See the Council of the European Union. Secretary General. Press Release 12/04/96 (Presse 346). 1971st Council meeting - Justice and Home Affairs - Brussels, 28/29 November 1996. - There was also an agreement to create a program for the period 1996-2000 "to develop coordinated initiatives on the combating of trafficking in human beings and the sexual exploitation of children, on disappearances of minors and on the use of telecommunications facilities for those purposes".

Children's Rights. Through its membership in the EU, Sweden can come to play a positive role in the development of issues concerning children's rights in the different member states, for Sweden is regarded as exemplary when it comes to children's interests in different questions that affect them, for example the questions that have been discussed here about the confirmation of paternity and about custody and visitation rights. Within this last area, carrying through the Custody Dispute Inquiry, which was discussed here, should lead to an additional strengthening of children's rights. The UN:s Child Committee's examination of Sweden's (i.e., the Ministry of Health and Social Affairs) first report (1992) about the Swedish legislation's concordance with the Children's Convention's regulations (Initial Report by Sweden on the Convention on the Rights of the Child) was to a large degree favorable.<sup>78</sup> Certain remarks, directed against Sweden were deemed necessary among them, one of the areas that this essay has treated, namely child pornography.<sup>79</sup> Hopefully the current legislative work in Sweden in this area, as well as the work accomplished during the recent 1996 world congress in Sweden against child pornography, child prostitution and the sexual exploitation of children, both globally and even within the EU, will lead to cooperation between different states and to a greatly improved protection for children against different forms of sexual exploitation both in Sweden and in other areas in Europe. Finally I would like to mention that attempts have been made to solve a troubling problem in Sweden, namely the question of children's rights in immigration matters. In December 1996 the Parliament decided on several changes in the Immigration Act (1989:529), aimed at strengthening children's rights in such cases. The new legislation, which was adopted on January 1, 1997, among other things, included an introductory provision (1 Chapt. 1 sec. 2 subsec) stating that the children's health, development, and its best interests shall be observed in all immigration cases concerning children.<sup>80</sup>

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<sup>78</sup> Regarding this the UN.-Committee, see above at note 6.

<sup>79</sup> Among other things, it was held that the Government ought to look after the best interests of the child at the execution of communal cutbacks. See, for example, the Department of Social Services investigation report *Barn idag*, Ds 1996:57, pp. 24 f.

<sup>80</sup> The bill, prop. 1996/97:25 (*Svensk migrationspolitik i globalt perspektiv*), is founded on a point, of interest here, from the Children's Committee's partial report *Barnkonventionen och utlänningslagen*, SOU 1996:115. - The new legislation has - among other things as a result of the so called "Åsele case" (the expulsion of the Sincari family) and the case of the little Peruvian girl Evelyn Barrantes - been preceded by a lengthy debate in the country about the immigration statute's agreement with the UN children's convention. The latter case especially, involved the collision between the immigration statute (UtL) and the statute (1990:52) of special directives having to do with the young (LVU). The girl was in custody as a result of the latter regulation but the immigration authorities felt that the interest of Swedish society in regulating immigration had to go before the principle of the child's best interest. Now the UtL has included a regulation (2 chapter 4 c §) that allows for the granting of temporary residence permits to children and guardians as long as care according to LVU continues.