Coercive Legislation - Children's invisibility in the Legal Process.

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Abstract
Social welfare law is administered by elected local authorities in municipalities in Sweden, the social welfare board, but most of the decisions in client cases are made by the employed social workers. When children have to be taken care of by welfare service, and parents do not agree with such decisions are maid, and if the coercion have to be used, the case is then referred to the county administrative court. Within the legal process, the child regardless of age, has the right to have a Child’s Representative (CR) by their own, when using the Coercive Legislation, Care of Young People Act (LVU 1990:52). CR’s mission for children younger than 15 years is both to interpret and convey the child’s desire and furthermore make their own independent assessment of what is in the best interest of the child in each case.

This research particularly examines the knowledge, related to child welfare, of the ‘Child’s Representative’ appointed by the 23 county administrative courts in Sweden at Care of Young People Act (LVU) Cases. The sample was made up of all 23 county administrative courts in Sweden in 2007, and 22 of them responded the questionnaire. The findings of this study are (a.) the skills requirements of ‘Child’s Representatives’ is too general and therefore not focused enough on children and young people’s welfare (b) the county administrative courts do not demand any such special knowledge and experience related to children and young people’s welfare from the ‘Child's Representatives’ (c) in the case of very young children (below 3 years old) the ‘Child’s Representative’ is not expected to meet either child or their respective carers before LVU-hearing.

Introduction
Children's invisibility in the Legal Process has been discussed and confirmed in research both in Sweden and internationally. In Sweden, through the Social Services Act (SoL 2001:453) and Care of Young People Act (LVU,1990:52), some coercive legislations relating to children
and young people. Most of the aid and relief efforts for children and young people are maid in collaboration with children and parents through the Social Services Act. The Care of Young People Act is a law to protect children and young people in very difficult situations and when cooperation is not working. For society to protect children it is necessary that those who have been commissioned to investigate and help children in need become aware of the child's situation and experience. The information should be as truthfully as possible and reflect the child's actual conditions. Of course, the child itself is the one who can show and tell the best. (Schiratzki, 2006)

Despite many years of debate and research evidence that children's voice is weak and not clearly emerges in the legal process, the judicial system has not been significantly improved in this particular matter. Despite the implementation of ‘The Convention on the Rights of the Child’ (CRC), within the Swedish legislation for strengthening the child's perspective and visibility of children, it could be argued that no significant change has really occurred.

Children who are in need of community support and help, usually when it is time for an intervention under Care of Young People Act (LVU) has lived in a precarious situation for a long time. They are in a very fragile condition, and therefore it is reasonable and necessary that special competence and skills are designated from ‘Child’s Representative’. It is important that this person is capable to understand the situation of the child and has the training and skills to listen, observe and talk to the child, and moreover can explain in a comprehensible manner to the child what is happening and why it happens. In the legal text there is no specific requirement for the ‘Child’s Representative’(CR) to be a legal person or to have a legal education. The county administrative courts are still consistently giving the ‘Child’s Representative’ role and function to the lawyers, who seem to not have adequate knowledge, training and experience on children's expressions, needs and development.

This article is particular framed from the perspectives of CRC Art. 3 and 12, which are two of the pillars of the CRC, relevant. Art. 3 states that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. Art. 12 states that the child has right to be heard in matters concerning them.
Literature Review

This research refers to the work of Titti Mattson (2002) and Lina Ponnert (2007) from Sweden, Michael King and Judith Trowell (1992) from the UK, Turid Vogt Grinde (2004) and Kristian Andenaes (1989) from Norway. They describe from different aspects the children’s difficulties to be seen and heard in the legal process. A study from The National Board of Health and Welfare (2009) also reveals interesting facts in this area. The results are also seen in the light of the Swedish legislature’s attempt to strengthen the rights of children based on the CRC.

As early as 1992, writes King and Trowell in the UK about the paradox in determining children’s welfare in court. “The more the legal system takes on itself the burden of protecting children and promoting their interests, therefore, the less able it is to act swiftly to resolve conflicts and provide certainty. If courts were actually able to offer the environment for long-term problem-solving and resources to help children and families in difficulties, there would be less of a problem. Unfortunately, in Anglo-Saxon countries which operate upon an adversarial system of justice this is not possible. Courts are there to make decisions on specific, isolated issues. Furthermore, despite all the trappings of welfarism – the specialist lawyers, the social workers, the mental health experts and the guardians ad litem – when it comes to the crucial decision-making, the courts often revert to type and concentrate on issues of “proved” and “not proved”. As we shall see from some of the cases discussed, complex issues concerning disturbed and damaged children may, once they enter the legal arena, so easily be transformed into the simple question of whether the abuse did or did not take place. And the outcome for the child depends much more upon the answer to that question than upon a careful analysis of that child’s needs.” (King and Trowell 1992 p.6)

Lina Ponnert (2007) share a similar view that there is a clear risk that the child welfare investigations can be "infiltrated" by the legal thinking and requirements. She has seen in her research how social workers in work with children and their families as much as possible to avoid enforcement. This is because there is uncertainty about adequacy of evidence to begin such difficult process. They do not want to expose children and family to the legal process until they are sure that it comes to a final stage in which legal decisions appear to be the only way. There is a risk that in the process of waiting for evidence to get legally, the children are exposed to hard conditions and situations. (Ponnert, 2007).

Turid Vogt Grinde (2004) has many years of research in the child’s voice in the legal process when using coercive legislation in Norway. Child’s right to be heard and get their voices heard is still dominant in Norwegian law and its application. In a comparative Nordic study Vogt Grinde highlights similar experience as Ponnert, how social services hesitate and are
sometime waiting as long as possible with the application for compulsory until they feel confident that the application is granted. The reason is that the process takes a long time and is stressful for parents as she expresses, "fylkesnemndssak do something with parents". (Grinde 2004).

A question raised in Norway including various actors in the legal skills and who is the best "expert". Turid Vogt Grinde (1997) have been critical of how the legal competence is valued higher and that the hearings are carried out on the legal premise. She pronounces as follows:

“I am tired of social workers so easily put to the bottom of the hierarchy, while they have greatest responsibility, the worst paid and often are those who will be hanged if something goes wrong. I feel not only morally outraged but also concerned that barnevernets action goes from help, support and problem-solving, in a skewed rule of law with emphasis on respect for parents."

Vogt Grinde (1997)

Kristian Andenaes (1989) describes an early issue in this subject, questions that arise when no legal professionals and semi-professionals make decisions which are based on legal rules. He writes about how the social law is a part of public law and basic principles has been taken from court procedure and private law. The legal system is only to a limited extent applicable on problems in the welfare society. He stresses how the variations in practice between court procedure and the activities on street level are "formidable", and on the other hand, many problems and situations in the social practice which are regulated by the social welfare legislation hardly fit into traditional legal pattern. He highlights the importance of bridging the traditional gap between legal and professional thinking and practice. One of the conclusions in his article is:

"We are not talking about different worlds, but participants in the same world who need to be enabled to cooperate. As a starting point, there is no doubt that we find common values and interests in the legal and the social policy system".

He means that it is also a challenge to the professions in welfare services themselves to participate in the creation of a functional legislation. As he finally says:

"After all, to grasp and understand the complexities of a system makes it easier to do a decent job within it."(Andenaes, 1989)

Titti Mattsson (2002) has studied the child's legal status and how Care of Young People Act (LVU) meets the requirements of legal certainty, protection of privacy and a gradual increase in autonomy for children. She also compares the Swedish legislation with that of Norway and England. Part of the thesis is based on 390 judgments from four county courts where one of the conclusions is that the requirement of legal certainty may clash with the need for child
privacy and right to autonomy. She recalls in particular the built-in dilemma for the ‘Child’s Representative’ when the child is under 15 years (and not processbehörigt) to represent and interpret the child's needs and its own interests and desires. Mattsson fears that the child’s voice will not be presented and considered adequate in the legal process. From a legislator's view she describes the importance of that ‘Child’s Representative’ is a person with special aptitude related to child welfare and not just a legally qualified person with procedural experience. (Titti Mattsson, 2002)

In 2008 the National Board of Health and Welfare in Sweden (Socialstyrelsen) made a follow-up study on “the Child in Care of Young People Act (LVU)-process” from 1993. The results show a "weak" commitment from the ‘Child’s Representative’ with a very low level of the engagement from a child welfare view. It shows that no detectable change in the 15 years that have passed in terms of ‘Child’s Representative’ (CR's) behavior and skills. They found that the court’s nowadays very rarely use experts in LVU hearings as they are able to do. In addition, it was clear that the witnesses who appeared at the hearing were the parents witnesses. These conditions threaten to further strengthen the parents and reduce children's visibility

The investigator (2009) also notes that the cost of the bills from the ‘Child’s Representative’ (CR’s) is substantially lower than the parents' representative. This is a commonly known fact. Both children's and parents' representatives lawyers provide cost benefits at each hearing, which is reported in the final Judgement. The investigator (2009) also noted that in all 35 cases examined, all the ‘Child’s Representative’ (CR’s) were lawyers. Young people who are competent in process were well supported, but when it came to younger children, the picture was more mixed. The study as well show from the cost study that some children had not met their representative at all, especially not the youngest. Overall the study shows how the “childs voice” is still weak as it was in 1993. (National Board of Health and Welfare (Socialstyrelsen) 2009-126-182 s.40)

Attempts to strengthen children’s visibility in coercive legislation the Child in Care of Young People Act (LVU).

A strengthening of the position of children in the legal process was proposed by the investigator (2000) in Ministry of Health and Social Affairs in Sweden to be effected by the opportunity for county administrative courts to hear appropriate child experts at the LVU hearing. She also suggested that a fixed number of child experts were appointed to assist the
courts. The investigator raised several issues on strengthening of children's visibility, including the issue of demands for special children's skills of Child’s Representative (CR) in the legal process. These interesting suggestions for strengthening of children’s visibility in LVU hearings was never completed. Her comments about the cause of child’s invisibility:

"I have during the investigation failed to find that the conditions for intervention under the Act to be made is too narrow and would need to be extended. The fact that the child was not visible in investigations and judicial decisions are not cured mainly by the legal conditions for intervention changed. It is rather a question of changing the viewpoint of those applying the law. " (LVU investigation “Omhändertagen” SOU 2000:77,s. 94)

The investigators radical proposals were also greater demands on education and special skills for both social workers as well as Child’s Representative (CR). The final reinforcement of coercive law the Child in Care of Young People Act (LVU) in 2002, was an amendment in the wording of the law opening paragraph: "at the decision under this Act shall be what is best for the young to be decisive".

**Problem**

The “Childís Representative” (CR) has, to ensure the childís legal rights, the mission to interpret and convey the child's desire and make their own independent assessment for the young children of what is in the best interest of the child. Are there any possibility to interpret and understand a small child in a vulnerable position if you lack knowledge about children's needs and ways of expression, and moreover without meeting the child or their carers ? In the legal text there is rather a specific requirement for the CR to be a legal person, nor to the CR to have to have a legal education. That means not only lawyers but also social workers could be a CR if the latter have specific competence in children’s welfare. Despite this fact, all county administrative court’s in Sweden give those mandates to lawyers. They all demand the legal competence and the procedural skills as the most core competence in the LVU-hearing. The child’s right to be heard in this context should mean the necessity for the CR to understand the child and to convey to the court the child’s experience, situation and conduct. It should also involve skills and ability to converse with children. If the best interests of the child shall be a primary consideration in these difficult decisions, it should be necessary for CR to meet the child or their respective carers to provide a fair and just view.
Methodology
After establishing personal contact with two judges with long experience in those LVU Cases, a survey was constructed to be answered by the judges, highlighting the judiciary procedures in the appointment of CR's. Questions about the CR´s meetings with children were also formulated. Cooperation with the two judges was important to eliminate the risk that the questions could be misinterpreted. The sample was made up of all 23 county administrative courts in Sweden in 2007. 22 of them responded the questionnaire. Research participants were judges who are managers of the county administrative courts. The data from the answers of the questionnaires where thematically analyzed. The themes for the analysis were based on important aspects related to child’s voices within the judicial system as identified and discussed in the literary review.
This study has considered the ethical implications. For instance the summary of survey responses are anonymous and the material is handled confidentially.

Findings
This article will describe three key facts who emerges in this study. The first issue found the prevailing opinion among the judges showing howe they do not ask for any special competence in these cases. The questionnaire asked for social workers or other professionals as CR’s with reference to legal skills not required. 18 county administrative courts from 21 do not demand for any specific knowledge and competence and from one, no answer. There is a large consensus about the fact that the lawyers who accept those missions (in charge) are interested and therefore considered of being appropriate. There is also a consensus that the focus issue is about how to handle the legal procedure. The choice of ‘Child’s Representative’ (CR) was mainly based on legal competence, then the Court’s earlier experience as a lawyer. Third the CR:s experience in these cases, when using the Coercive Legislation, Care of Young People Act. Only two judges describe specific criteria that indicate a conscious choice that deals with children’s special needs. One judge considers that the proximity in terms of location of the child has been important because it is important for CR to meet the child. Just one judge consider the importance of the ‘Child’s Representative’ (CR) to bee appropriate for the mission because it is important for the child. Just one judge answered that a social worker had been commissioned. No judge from the other 21 county administrative courts commented anything about other professions, social workers or other professions.
Another issue was the question of how often the child's representative (CR) meet the very young child or there respective carers before LVU-hearing. (Table 1)These questions were answered by all the 22 judges, and five of them answered that they did not know if there had been meetings or not. When the issue was children between 0 - 2 years 10 judges answered that the CR’s seldom or never meet the child. For children between 3 – 5 years, 8 judges answered no meetings with the child. Conversely, seven judges said that the CR's often met with children in the group 0 - 2 years and 9 judges that the CR's often met with children in the group 3-5 years. Interestingly, when the children were in the age of 6 – 8 years meetings between CR's and children becomes more frequent. 15 judges respond that i this age meetings are often taking place. When children and young people aged between 9 and 14 arises in the LVU Cases, 20 judges answers that the CR's meet them. Still indicates two judges that they do not know if meetings take place. When meetings are not known by the judge, it could mean that no one asks during the hearing, if there have been meetings with the children or not.

Table 1. How often the ‘Child’s Representative’ meet the child

<table>
<thead>
<tr>
<th></th>
<th>child 0-2 y</th>
<th>child 3–5 y</th>
<th>child 6-8 y</th>
<th>child 9-11 y</th>
<th>child 12–14 y</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not known</td>
<td>5</td>
<td>5</td>
<td>4</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Never</td>
<td>2</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Rare</td>
<td>8</td>
<td>7</td>
<td>3</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Often</td>
<td>7</td>
<td>9</td>
<td>15</td>
<td>20</td>
<td>20</td>
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<tr>
<td>Total</td>
<td>22</td>
<td>22</td>
<td>22</td>
<td>22</td>
<td>22</td>
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</tbody>
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The third issue was how important the judges thought it was that the child's representative (CR) meet the children or there respective carers before LVU-hearings (Table 2). As in the previous issue a dividing line is shown at 6 years age of the child. 7 judges at county administrative court’s (cac’s) view that it is less important or not important at all for CR to meet children younger than 6 years, which conversely means that 14 cac’s believe it is important. At 6 – 8 years of age 19 judges at cac’s view it is important with meetings, and at 9 – 14 years of age of the children, almost all coherent view it is important to meet and listen to the child.
Table 2. The importance of the ‘Child’s Representative’ meeting the children

<table>
<thead>
<tr>
<th></th>
<th>child 0-2 y</th>
<th>child 3–5 y</th>
<th>child 6–8 y</th>
<th>child 9–11 y</th>
<th>child 12–14 y</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not import. at all</td>
<td>1</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Less important</td>
<td>8</td>
<td>6</td>
<td>3</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Important</td>
<td>12</td>
<td>14</td>
<td>19</td>
<td>22</td>
<td>22</td>
</tr>
<tr>
<td>No answer</td>
<td>1</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Total</td>
<td>22</td>
<td>22</td>
<td>22</td>
<td>22</td>
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</table>

Discussion and findings

The very youngest children living in difficult circumstances are most vulnerable and therefore most in need of representatives who engages in them. This research shows how CR's has been in the past and still are exclusively lawyers by profession. This in spite of the fact that in the legal text there is no specific requirement for the ‘Child’s Representative’(CR) to be a legal person and to have a legal education. The fact that judges from 21 county administrative courts did not comment anything about other professions such as social workers or other equivalent professions, can be understood in different ways. Either the question is surprising and not relevant based on what is normal or they do not know that this is an opportunity. It may also depend on the fact that it is no need of other than lawyers when a sufficient number of interested lawyers cover the need. Or perhaps, most likely, there is no person with another profession who have expressed an interest in the missions in the 21 county administrative courts.

Why do not the judges ask the CR’s for the experience and knowledge of children? The question is whether this is a consideration of lawyers to not question their experience and knowledge of children in these cases? Is it offensive to ask for experience and knowledge of children's needs from the one to interpret and assess the child’s situation. Social workers are not aware of the possibilities to be as a CR. The court do neither approach social workers for those missions. It should be particularly important for younger children who have no opportunity to influence the choice of their representatives. Children have no real impact opportunity for the selection of public counsel, even when they are over 15 years and has its own standing. (Mattsson,T, 2002).
This research also shows how the very youngest children in cases of coercive, actually lacks a representative who is prepared to engage in meetings with them. As a consequence that the very young child’s voice is not heard and the best interests of them is not the primary consideration. A fact that even Titti Mattsson (2002) highlights and the investigator of the coercive law in Ministry of Health and Social Affairs (2000). Interesting is the particularity, the judges in the county administrative court’s think it is more important to meet and talk to the very young children than what actually occurs. Which means that in the practice this does not happen so often as they think it should do. But the judges don’t ask for whether the child's representative (CR) have met the child or not. It seems that most judges ignore doing this. It is not asked for, and never especially noted in courts summaries or in final judgement. What is not required or requested may not have any significance.

An indication of this fact is the apparent difference in expense reports that are known and that CR is more difficult to get travel expenses for meetings with children approved and paid by the court. Something that could further deteriorate due to the organizational merger carried out in 2010 in Sweden, when 23 county administrative courts have been merged into 12 administrative tribunals into larger regions. This administrative change is likely to impair the ability of CR to meet the children unless the courts change their attitudes towards this problem. The judges should both ask for if meeting with the very young children has occurred, and of course replace the CR’s for those costs. It would even be able to apply cost reductions for the CR who fail to fulfil their mission seriously, a positive example I received from a judge in charge of a county administrative court where children's participation in the process was taken seriously.

The paradox in determining children’s welfare i court, which King & Trowell (1992) describes is an experience that social workers recognize in LVU hearings in Sweden, particularly in cases. The hearing may enter into the likeness of a trial in which the dialogue ends up in the issue of evidence of what occurred or not occurred. The central question of the child’s problematic behaviour, what it is caused by and what in the child’s needs are missing. As Ponnett (2003) describes the social worker sometimes wait until they feel confident about the application goes through the court, with an obvious risk that the child will live in continuing difficulties and vulnerability. Christiansen & Anderssen (2010) analyzes this problem in their current research about the Norwegian Child Welfare Service (CWS) workers,
how they explain why children need to be placed out-of-home at a given time, and how they justify a placement at a given time. How they often refers to a long-term back-and-forth process that finally end up in a trigger appears, which refers to factors that made the out-of-home placement take place when it did. The findings emphasize the difficulty for street-level bureaucrats in these missions and importance of acknowledging the contradictory position of the CWS workers. (Christiansen and Anderssen, 2010, Child & Family Social Work, 15: 31–40.)

Municipal social services in Sweden has in recent years worked for development of child investigations and develop skills in how to talk with children. Investigation tool BBIC as National Board of Health and Welfare encouraged to use, gives a better structure of the investigations on the child’s view and also hopefully contribute to a clearer picture of children in need in the social services and also in court. The expansion of the Children's Houses in Sweden has also contributed to an improvement in the protection of children suspected of being abused. Above all, the children are in focus. In addition, develop cooperation between social services, police and medical professionals. Talks and interrogation of children takes place in a calm environment for the children in vulnerability.

But how does it look in the legal arena, is it possible for the lawyers and judges in this process to be more welfare oriented? By tradition, lawyers are said to be norm-oriented, and therapeutic professionals are goal-oriented. Is it therefore an impossible challenge? How should courts and other actors in the legal arena reach a greater understanding of the importance of increasing knowledge about children, how to talk with children and understanding especially the youngest children's right to be heard? As the LVU investigator put it, “there is nothing wrong in law. It does not help to change the legal texts; it is rather a question of changing the viewpoint of those applying the law”. (LVU investigation “Omhändertagen” SOU 2000:77,s.94)

The change must come at an early stage during law school. The prospective lawyers need not only elective courses in child protection law as it exists today, but those who will work within the Family and Social Justice also need knowledge of child development and needs and also know how to converse with children.
There is no good rule of law for a small child with a child's representative (CR) who do not believe it is possible to "interrogate" the very young child who do not have a language and therefore believe it is not necessary to meet, see and hear them where they are.

A way to change is also the possibility which Andenaes (1989) pointed out, the challenge to the professions in the social welfare themselves to participate in the creation of a functional legislation. In this case I mean the importance of social workers taking responsibility for change and dare to enter the legal arena by offering their services as CR's for children. One can also see it as an opportunity or even an obligation for social workers involved in the mission within the legal sphere in which they are entitled to participate. As a CR you can work to ensure that children are made more visible in the judicial process and thereby promote a change in mindset of all those who will use coercive legislation concerning children.

The Ministry of Health and Social Affairs has prepared a proposal for a new comprehensive law on children and young people in Sweden. "Act on the support and protection for children and youth" (SOU 2009:68) Coercive Act LVU is proposed to unchanged being enrolled in the combined new law. The proposal includes increased skill requirements for social workers working with children and young people. However, there is no demand on change with regard to the Child's Representative knowledge about children’s needs.

In particular CRC Art. 12 which is one of the pillars of the CRC, states that the child has right to be heard in matters concerning them. From this perspective, the result of this research lead to further questions and debates related to Children and Young People’s welfare within the judicial systems and procedures. Would the possibility of change increase for the children’s voice to be heard, if “players on the judicial arena” opens up and offers other professions the assignment they ought to have access to as the law allows them. Other actors as CR’s with different skills could contribute to a change in the "dialogue" within the hearings and in a better and more obvious way of bringing up children's needs and make them more visible in the process. To make this to a reality required interested social workers and / or other appropriate professionals be made aware of that these missions are available to them. Judges and lawyers in the legal arena will also have to accept that the hearings will not be as "clean and legally due and proper, as you are used to”, as a judge put it.
Referencess:


Regeringens proposition 2002/03:53 Stärkt skydd för barn i utsatta situationer m.m.


SOU 2009:68, Lag om stöd och skydd för barn och unga (LBU) Betänkande av barnskyddsutredningen

SOU 1997:116, Barnets Bästa i främsta rummet, ”Barnkommittén”

SOU 2000:77, ”Omhändertagen” Betänkande av LVU-utredningen,


Vogt Grinde, T Artikel 01/97. Fylkesnemndene og barnevernets kompetanse