

The Elusive Best Interest of the Child and the Swedish Constitution

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1 Introduction: the Best Interests of the Child vs. the Well-Being of the Individual¹

The relation between the principle of the best interests of the child and principles of constitutional law is intricate. This is, in part, explained by child law being a comparatively modern field of law, as well as the elusive nature of the principle of the best interests of the child as a legal principle, which has only recently begun to be explored. Constitutional law, on the contrary, has a longer history. The Swedish constitutional tradition dates back to 1634. The first constitution in the form of an Instrument of Government (*Regeringsformen*) was issued 1809 and replaced by the current Instrument of Government in 1974. Several amendments have been made, i.e. in 1994 and 2002, to meet requests related to the Swedish membership in the European Union (EU).² In 2011, the Instrument of Government was amended to include a dedicated provision for children. This provision is not enforceable but part of the general aims and ambitions for the governance of children (as well as adults) in the Swedish society.³ Chapter 1, section 2.5 of the Instrument of Government now reads as follows:⁴

The public institutions shall promote the opportunity for all to attain participation and equality in society and for the rights of the child to be safeguarded.

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- 1 Approved by the ethical board of Stockholm 17-05-2018. Registration number 2018/704-31-5.
 - 2 Sveriges riksdag, *Sveriges grundlagar och riksordning*, Riksdagsförvaltningen, enheten riksdagstryck, Stockholm 2015.
 - 3 Legislative Bill 2009/10:80 (*Prop. 2009/10:80 En reformerad grundlag*). See Titti Mattsson, 'Constitutional Rights for Children in Sweden' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).
 - 4 Translated in Magnus Isberg, *The Constitution of Sweden: The Fundamental Laws and the Riksdag Act* (Riksdagen 2016).

In addition, children have a constitutional right to education. The principle of the best interests of the child, as opposed of those declared, but alas undefined, rights of the child, is not included in the Swedish constitution.

All the same, the Swedish Government, as early as in 1997, held that the chapter 1, section 2.2 of the Instrument of Government, which states that the aim of public affairs should be the well-being of the individual, age not defined, could be understood as to reflect the spirit and ambition of article 3.1 of the United Nations Convention on the Rights of the Child (CRC).⁵ The statement should be read in its context. It was made in the 1990s, during the first discussion of the implementation of the CRC. At the time, the CRC was treated as any other international convention on human rights in that the intention of the Swedish government was that the CRC should be implemented by transformation in accordance with the general Swedish position on the implementation of international undertakings. The government was, therefore, looking for similarities between the CRC and Swedish law. The statement, that the best interests of the child could be understood as being included in the Instrument of Government, was not repeated in later preparatory works, such as the amendments of the constitution leading to the expressive inclusion of children's rights in the Swedish Constitution, 2011.⁶ It is a matter of speculation if the lack of mentioning of the best interests of the child is due to the fact that it was seen as obvious that the best interests of the child was included in the well-being of individuals or if it was seen as a too far-reaching interpretation of a general constitutional provision. My own position has been that the impact of the principle of the best interests of the child is broader than the concept of the well-being of any other, that is, adult individual.⁷

Notwithstanding the context, the view expressed by the 1997 Swedish government, that the principle of the best interests of the child could be read into a general article on the respect for the well-being of the individual, reflects the fluidity of the principle of the best interests of the child, as well as the difficulties of pin-pointing the meaning of the principle. Since the late 1990s, some progress has been made in the challenging task of interpreting and understanding the best interests of the child.⁸ The United Nations Committee on the Rights of the Child has thus suggested that the best interest of the child should

5 Legislative Bill 1996/97:25 (*Prop. 1996/97:25 Svensk migrationspolitik i globalt perspektiv del I*) 244; Johanna Schiratzki, *Barnets bästa i ett mångkulturellt Sverige* (2 edn, Iustus förlag 2005).

6 Legislative Bill 2009/10:80.

7 Johanna Schiratzki, *Barnrättens grunder* (7 edn, Studentlitteratur 2019).

8 Eg Julia Fionda (ed), *Legal Concepts of childhood* (Hart Publishing 2001); Michael Freeman, 'Article 3: The Best Interests of the Child' in Alen Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff 2007); Jonathan Herring, 'Farwell Welfare?' (2005) 27(2) *Journal of Social Welfare and Family*

be seen as a substantive right, a fundamental interpretative legal principle, as well as a rule of procedure.⁹ In relation to *constitutional* law, the position that the principle of the best interests of the child should be regarded as a substantive right is arguably the most relevant.¹⁰ As we will see, this is a position upheld in the Charter of the European Union (article 24).

2 To Believe or Not Believe in an Abundance of Rights

Alongside the advancement towards a more elaborated understanding of the best interests of the child, the last decades have seen an interest in children's rights and the principle of the best interests of the child in many jurisdictions, including Sweden and the other Nordic countries, in all fields of domestic law such as legislation, court praxis and other sources of law.¹¹ This development has led to a somewhat polarised discussion between 'uncritical proponents', at the one hand, and 'uncritical opponents', at the other hand. The former has a strong belief in the obvious positive effects of expressing children's rights in the law. The latter radically deny the value that children's rights – be it on a global or local level in constitutional or other forms of law – could have in the aim to realise a greater respect for children.¹²

The CRC is to be incorporated in Swedish law in 2020.¹³ The process towards an incorporation of the CRC into national law has proven to be a watershed between 'believers' and 'opponents'. The Swedish legislator is to be found among the believers in the usefulness of children's rights. So are the children's rights movements of the Swedish civil society. The opponents are found among the Swedish judiciary and other legal institutions – as represented by the respondents to the referral procedure for formal consultation of the findings in the Swedish Government

Law 159–171; Kirsten Sandberg, 'Barnets beste som rettighet' in Ingun Ikdahl and Vibeke Strand (eds), *Rettigheter i velferdsstaten* (Gyldendal 2016); Jean Zermatten, 'The Best Interests of the Child Principle: Literal Analysis and Function' (2010) 18 *The International Journal of Children's Rights* 483–499.

9 UN Committee on the Rights of the Child, *General comment no. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1)* (29 May 2013) CRC/RC/C/GC/1.

10 Sandberg (n 8).

11 Schiratzki (n 7).

12 Dieder Reynaert, Maria Bouverne-De Bie and Stijn Vandeveldel, 'Between 'believers' and 'opponents': Critical discussions on children's rights' (2012) 20 *The International Journal of Children's Rights* 155.

13 Legislative Bill 2017/18:186 (*Prop. 2017/18:186 Inkorporering av FN:s konvention om barnets rättigheter*).

Official Report on the incorporation of the CRC.¹⁴ Their criticism, however, is not directed against children's rights *per se* but rather against the perception that the incorporation of the CRC in to Swedish law will be a tool to achieve a better situation for children. It is held that the lack of precision in the CRC is hard to amend with general demands of the rule of law such as clarity, transparency as well as predictability in the application of the law.¹⁵ These points are argued in relation to the Swedish legal system as whole to give the CRC a constitutional stand has not been suggested in the Swedish Government Official Report. Although these are concerns in regard to the CRC all together, it seems specifically weighty with regards to the principle of the best interests of the child (article 3), which is as Philip Alston has pointed out, a principle with a multiple of feasible interpretations.¹⁶ This position is shared by the Committee on the Rights of the Child, in its General comment no. 14. The Committee suggests the following:

Accordingly, the concept of the child's best interests is flexible and adaptable. It should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs.¹⁷

The usefulness of the General comments of the committee on the rights of the child, have been debated in the process of the incorporation of the CRC in to the Swedish legislation. The debate take as its starting point is the fact that comments and other observations from UN Committees are not binding legal sources according to international law.¹⁸ All the same, the General comments and other comments from Committee on the Rights of the Child could, in my opinion, be used as advisory sources of law, with the same standing as, for example legal literature, for the determination of rules of law.¹⁹ Legal literature is accepted as an advisory source for the interpretation of law in article 38(d) of the Charter of the *International Court of Justice*. Article 38(d) considers

14 Swedish Government Official Reports 2016:19 (*SOU 2016:19 Barnkonventionen blir svensk lag*). Legislative Bill 2017/18:186.

15 The administrative court of appeal in Stockholm (*Kammarrätten i Stockholm*), 2016-09-23, dnr KST 2016/189. The Parliamentary Ombudsmen (*Justitieombudsmannen*) 2016-10-04, R 29-2016.

16 Philip Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' in Philip Alston (ed), *The Best Interests of the Child* (Clarendon Press 1994).

17 UN Committee on the Rights of the Child (n 9) para 32.

18 Legislative Bill 2017/18:186 91.

19 Helen Keller and Leena Grover, 'General Comments of the Human Rights Committee and their legitimacy' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 116-198.

judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'. This recalls the criteria for choosing the Committee on the Rights of the Child, which should consist of experts with 'high moral standing and recognized competence' in the field covered by the CRC (article 43 CRC).²⁰

The opposition of significant parts of the Swedish judiciary against the incorporation of the CRC should be seen in light of the fact that children's rights in Sweden are protected by several national and international legal instruments apart from the CRC, i.e. other legal instruments of the United Nations as well as European law. Several sources of European law are binding on Swedish courts; i.e. the Charter of the European Union, the Regulations of the European Union and the case law of European Court of Justice as well as the European Council's Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the case law of European Court of Human Rights (ECtHR). The principle of the best interests of the child is not to be found in the ECHR. The ECtHR, however, are including the fundamental principles and provisions of the CRC in the court's judgement.²¹ The principle of the best interest of the child is quoted by the ECtHR in case law related to article 8 on the right to a family life.²² Considering the impact of the ECHR in Swedish law this presumably strengthens the general position of the principle in this field of law, which is dominated by case on compulsory care of children. It is worth noticing that in other areas of child law such as education, the principle of the best interest of the child appears not to be quoted. These are cases in which parental rights are quoted more frequently in relation to the right to education according to article 2, the First Additional Protocol.²³

20 The Swedish Ministry of Social Affairs, however, does not seem to share this position, as the Ministry states in one of its directives that General comments are no sources of law. Dir. 2018:20 (*Kartläggning av hur svensk lagstiftning och praxis överensstämmer med barnkonventionen*) 4. Professor Karin Åhman is assisting the Ministry of Social Affairs in preparing guidelines on the interpretation and application of the CRC, its legal history and the documents of the UN Committee on the Rights of the Child (CRC), see n 36.

21 Ursula Kilkelly, 'The CRC in Litigation under the ECHR' in Ton Liefwaard and Jaap E Doek (eds), *Litigating the Rights of the Child* (Springer 2014); Elisabeth Gording Stang, 'The Child's Right to Protection of Private Life and Family Life' in Said Mahmoudi and others (eds), *Child-friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child* (Brill Nijhoff 2015).

22 Eg Case of *K. and T. v Finland* [GC] App no 25702/94 (ECtHR, 12 July 2001); Case of *Gnahoré v France* App no 40031/98 (ECtHR, 19 September 2000); Case of *S.J.P. and E.S. v Sweden* App no 8610/11 (ECtHR, 28 August 2018).

23 Eg Case of *Lautsi and others v Italy* App no 30814/06 (ECtHR, 18 Mars 2011). Case *Relating to certain aspects of the laws on the use of languages in the education in Belgium v*

3 Constitutional Pluralism

Contrary to the Swedish constitution and the ECHR, the principle of the best interests of the child is included in the Charter of the European Union. According to its preamble, the Charter of the European Union stems from the constitutional traditions and international obligations common to the Member States, the ECHR as well as the Social Charters adopted by the Union and by the Council of Europe, the case law of the Court of Justice of the European Union. Article 24 of the EU Charter states the following:

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Article 24.2 of the Charter of the European Union corresponds to article 3 of the CRC on the best interests of the child. Article 24.1 of the Charter corresponds with article 12 of the CRC on the right of children to express their views. Article 24 of the EU Charter on the rights of the child, which includes the principle on the best interests of the child, has been interpreted by the European Court of Justice in a growing number of judgments regarding European Union citizenship,²⁴ parental responsibility,²⁵ victimised children²⁶ and asylum-seeking children from third countries.²⁷ In the asylum law case of MA, BT, DA against the United Kingdom, the European Court of Justice, granted

Belgium App no 1474/62 (ECtHR, 9 February 1968); 1677/62; 1691/62; 1769/63; 1994/63; 2126/64; Case of *El Ghatet v Switzerland* App no 56971/10 (ECtHR, 8 November 2016); Case of *Nunez v Norway* App no 55597/09 (ECtHR, 28 June 2011).

24 Eg Case C-200/02 *Zhu and Chen* [2004] ECR I-9925; Case C-413/99 *Baumbast and R* [2002] ECR I-7091. See also Case C-255/99 *Humer* [2002] ECR I-1205; Case C-286/03 *Silvia Hosse v Land Salzburg* [2006] ECR I-1771.

25 Eg Case C-435/06 *C* [2007] ECR I-11531; Case C-523/07 *A* [2009] ECR I-02805, Case C-195/08 *Rinau* [2008] I-5271; Case C-403/09 *PPU Deticek* [2009] ECR I-12193; Case C-256/10, *Purrucker* [2010] ECR I-07353.

26 Case C-105/03 *Pupino* [2005] ECR I-5285; Case C-400/10 *PPU MCB* [2010] ECR I-8965.

27 Case C-648/11 MA, BT, DA [2013].

unaccompanied asylum-seeking children the right to choose in which Member State of the EU to apply for asylum. The European Court of Justice based its position on the principle of the best interests of the child. The Court stated the following:²⁸

Those fundamental rights include, in particular, that set out in article 24(2) of the Charter, whereby in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests are to be a primary consideration.

Thus, the second paragraph of article 6 of Regulation No 343/2003 cannot be interpreted in such a way that it disregards that fundamental right (see, by analogy, *Detiček*, paragraphs 54 and 55, and Case C-400/10 PPU *McB*. [2010] ECR I-8965, paragraph 60).

It is a subject for further research to discuss if the position of the best interests of the child in the European Charter constitutes a constitutional or semi-constitutional protection or, more likely, could be seen as a part of a growing constitutional pluralism.²⁹ Constitutional pluralism has been considered a result of constitutional competence could being shared by several authorities, national as well as supra-national. Or as Neil Walker has pointed out:

States are no longer the sole locus of constitutional authority, but are now joined by other sites, or putative sites of constitutional authority, most prominently [...] those situated at the supra-state level ...³⁰

It seems reasonable for this shared responsibility for fundamental rights and freedoms to be particularly interesting to discuss in relation children's rights, as it is an area that has been very much influenced by international development and agreements. In any case, Swedish authorities should give priority to the ECHR over national statutes and interpret its legal regulation including the constitution in solidarity with its obligation under EU law.³¹

28 Case C-648/11 MA, BT, DA [2013] paras 57–58.

29 See Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963], 1, on the effect of EU-law in relation to the constitution of a Member State.

30 Neil Walker, 'Late Sovereignty in the European Union' in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003).

31 Chapter 2, section 19 Instrument of Government. Legislative Bill 2017/18:186 (*Prop. 2017/18:186 Inkorporering av FN:s konventionen om barnets rättigheter*) 63.

4 How Is the Principle of the Best Interests of the Child Expressed and Implemented in Swedish Law?

Article 3 of the CRC on the principle of the best interests of the child is one of the two articles of the CRC that are most frequently implemented into Swedish legislation. The other one is article 12 on the right of the child to be heard.

The Swedish process towards the implementation of the CRC, as we have seen, started in 1997 with the statement that the chapter 1, section 2.2 of the Instrument of Government could be understood to reflect the spirit and ambition of article 3.1 of the CRC.³² The amendments to the Aliens Act and the Social Services Act to include the articles 3 and 12 followed the next year, 1998, by the Parental Code on custody. A section on the principle of the best interests of the child in relation to compulsory care was introduced 2003 in the Care of Young Persons Act (*Lag med särskilda bestämmelser om vård av unga*). In 2009 and 2010, the principle of the best interests of the child was implemented into the health and care area e.g. the Health and Medical Services Act (*hälso- och sjukvårdslag*) as well as into the Support and Service for Person with Certain Functional Impairments Act (*Lag om stöd och service till vissa funktionshindrade*). In 2011, the principle of the best interests was implemented in the Educational Act (*skollag*). The principle is further implemented in the Detention Act (*häkteslagen*), the Prisons Act (*fängelselagen*), the Act on a Representative for the Child, (*lag om särskild företrädare för barn*), the Act on International Child Adoption (*lag om internationell adoptionsförmedling*), and the Act on Dental Care (*tandvårdslagen*). The principle of best interests of the child was implemented in the Patients Act (*patientlagen*) 2015 and 2018 in chapter 5 of the Parental Code on adoption.³³ The principle of the best

32 Legislative Bill 1996/97:25 (*Prop. 1996/97:25 Svensk migrationspolitik i globalt perspektiv del I*) 244; Schiratzki (n 5).

33 Utlänningslag (1980:376), (2005:716) Legislative Bill 1996/97:25 (*Prop. 1996/97:25 Svensk migrationspolitik i globalt perspektiv*); Föräldrabalken (1949:381), Legislative Bill 1997/98:7 (*Prop. 1997/98:7 Vårdnad, boende och umgänge*); socialtjänstlagen (2001:453), Legislative Bill 2000/01:80 (*Prop. 2000/01:80 Ny socialtjänstlag m.m.*); lag (1990:52) med särskilda bestämmelser om vård av unga, Legislative Bill 2002/03:53 (*Stärkt skydd för barn i utsatta situationer m.m.*); häkteslag (2010:614), Legislative Bill 2009/10:135 (*En ny fängelse- och häktningstjänst*); lag om särskild företrädare (1999:997) Legislative Bill 1998/99:133; lag (2018:1289) om internationell adoptionsförmedling, Legislative Bill 2017/18:121 Modernare adoptionsregler; tandvårdslag (1985:125); skollag (2010:800) Legislative Bill 2009/10:165 (*Den nya skollagen – för kunskap, valfrihet och trygghet*); lag (1993:387) om stöd och service till viss funktionshindrade, Legislative Bill 2009/10:176 (*Personlig assistans och andra insatser – åtgärder för ökad kvalitet och trygghet*); patientlag (2014:821), Legislative Bill 2013/14:106 (*Patientlag*).

interests of the child may presumably be given divergent interpretations in the various field of law.

The principle of the best interests of the child is invoked in both branches of the Swedish two-branched court system: the general courts that hear cases within private and criminal law and the administrative courts that hear cases on welfare law, migration, etc. In some of the judgments, an individual child is considered as a member of an aged-defined group in need of particular protection. In other judgments, the child is considered as a right-holder with particular rights. Both these interpretations could be accommodated within the principles of the best interests of the child.

The source of law used by the courts tend to be foremost Swedish legislation implementing article 3 of the CRC. Other sources of laws used are, Swedish Legislative Bills, case law and legal literature as well as the ECHR and the rulings of the European Court of Human Rights.³⁴ References to other international obligations, such as the rulings of the European Court of Justice, are slightly less frequent.³⁵ References to the General comments from Committee on the Rights of the Child are made now and then. An example from the Migration Court of Appeal relates to the right to family re-unification.³⁶

The judgments of the two Swedish Supreme Courts relating to the best interests of the child could be divided into cases with a bearing on children's autonomy to express views, right to family life, and miscellaneous. Two miscellaneous cases concern enforcement (*utmätning*) and tort liability.

The judgment on enforcement, Supreme Court case NJA 2013 p. 1241, regards the equity of enforcement of a family home when the surplus is relatively modest in relation to the inconvenience for the debtor and his family. The Supreme Court recalled that a subject has a right to respect for his or her home, according to article 8 of the European Convention. The court added that the consideration of the best interests of the child according to the CRC was relevant.

34 Louise Dane, 'Europadomstolen och barnets bästa' (2015) *Förvaltningsrättslig tidskrift* 193–224; Maria Grahn Farley, 'Högsta domstolens rättighetspraxis från 2003 till 2015: utmaningar och möjligheter med en inkorporering av Barnkonventionen' (2017) *Europarättslig tidskrift* 651–669.

35 Marlene Wind, 'The Scandinavians: Foot-dragging supporters of European Law?' in Mattias Derlén and Johan Lindholm (eds), *The Court of Justice of the European Union* (Hart Publishing 2018).

36 UM 5407–18, MiG 2018-20 13 November 2018.

In addition, the Swedish Supreme Court has invoked the principle of the best interests of the child in Supreme Court case NJA 2001 p. 234 on tort liability.

In Supreme Court case NJA 2001 p. 234, regarding a 13-year old with an intellectual disability who had burnt down his caretaker's home, the Supreme Court held that the culpability of the child should be assessed in accordance with the 'objective' liability law principle, i.e. without any 'subjective' considerations relating to the child's age, ability and maturity. The culpability of the child was assessed as if the child was an adult.

It has been suggested that the Supreme Court's application of the 'objective' liability law principle regarding the child has no bearing on the principle of the best interests of the child, or at least not in the negative.³⁷ This position – that it generally is in the best interests of the child to be treated as an adult – may be construed as supporting the idea that rights for children, including the paramount position of the best interests of the child, aim at the promotion of the capable adult-like child's ability, not to protect the vulnerable child.

5 Lost in Translation

The principle of the best interests of the child is established in Swedish legislation and case law as well as in supra-national sources of law applicable in Sweden, such as the EU charter and the CRC, albeit not in the Swedish constitution. It is worth noting that the wording of the principle of the best interests in Swedish legislation generally is more far reaching than in the article 3 of the CRC or article 24(2) of the Charter of the European Union. The wording used in Swedish legislation is that 'the best interests of the child should be *the* primary consideration' (*barnets bästa ska komma i främsta rummet*), not *a* primary consideration. This wording reflects a previous official Swedish translation of the CRC.

As part of the process towards the incorporation of the CRC year 2020, a new official Swedish translation of the CRC has been issued.³⁸ In the 2018 official

37 Håkan Andersson, 'Den symbolladdade agstiftningen om det sällsamt strikta föräldransvaret: Ett och annat om problemen med bråkiga barn, barnrättsliga moralister och brutal lagstiftning med beskäftig preventionsövertro' in Margareta Brattström and Maarit Jänterä-Jareborg (eds), *Vänbok till Anna Singer: för barns bästa* (Iustus förlag 2017) 24; Schiratzki (n 7).

38 Prop. 2017/18:186 7–57.

Swedish translation, the last sentence of article 3.1 reads: '*i första hand beaktas vad som bedöms vara barnets bästa*'. This could be translated back in English as 'what could be considered to be the best interests of the child'.

As a consequence of the 2018 translation, the scope for the principle of the child's best interests, according to the CRC, may appear to be more limited than according to many of the Swedish Acts and other sources of law in which the principle of the best interests has been transformed during the last 20 years. This impression is emphasised by the fact that some articles in the 2018 translation seem to give less scope for the child's best interests than the authentic language versions. An example is article 18.1 CRC (last sentence). The authentic English version reads:

States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the up-bringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

In the authentic French version the last sentence reads: '*Ceux-ci doivent être guidés avant tout par l'intérêt supérieur de l'enfant*'. The last sentence is translated into Swedish as follows: '*Dessa ska låta sig vägledas av vad som bedöms vara barnets bästa*'. The Swedish translation suggests that the best interests should be a guideline or concern for the parents, but not a basic concern, as an equivalent to the word 'basic' (or 'avant tout') is lacking. It is too early to assess what impact these changes will have.

6 In Conclusion

To summarise, the intersection between the vehicles of what could be labeled constitutional pluralism, the Instrument of Governance and sources of European law, such as the Charter of the European Union, applicable in Sweden and the principle of the best interests appears somewhat crammed and foggy. The principle of the best interests of the child is not included in the Swedish Instrument of Government. It could, however, be argued that close connection between the rights of the child and the principle of the best interests of the child as recognised in the fundamental legal instruments of European law, such as the Charter of the European Union, suggests that at least the right-oriented aspects of the principle of the best interests of the child are covered by chapter 1, section 2 of the Swedish Instrument of Government. What this implies remains

to be clarified. It is matter of observation, however, that the CRC, including the principles of the best interests of the child, tend to be invoked by children with a weak position according to other Swedish legal sources. An example is the 8-year-old Syrian refugee whose right to family reunification to a large extent was decided on the basis of the the General comments no. 6 on treatment on un-accompanied and separated children and General comments no. 14 of article 3 on the principle of the best interests from the UN Committee on the Rights of the Child alongside case law from the ECHR.³⁹

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39 UM 5407–18, MiG2018-20 13 Nov 2018.

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