‘Rightificating’ Coercion – A Critical Perspective on the Transformation of State-Driven Coercive Care

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Abstract
During the last decade there has been a growing trend to give the child’s rights perspective a prominent role within the Swedish legal system. Simultaneously, one of the most central notions of the Swedish welfare state is the idea of the state having a certain responsibility to protect children. This article explores the tensions and contradictions between the child’s rights perspective and the collectivistic discourse on state protection in the transformation of state-driven coercive care in accordance with the United Nations Convention on the Rights of the Child (UNCRC). Based on a textual analysis on policy documents, it illustrates a complex process, which both endorses and resists the transformation process. Findings show how emphasis on the child’s right to protection is used, not to strengthen the role of the child towards the state, but to legitimise a strengthened position of the state towards the child, decorated in the terminology of a child’s rights perspective. Further, it suggests that an individualisation of problem formulation opens up space for an extended coercion and that children’s access to individual rights is conditional and dependent on an active and capable individual.

Keywords
Children’s rights, coercive care, social rights, welfare, welfare state

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Introduction

On 1 January 2020, the United Nations Convention on the Rights of the Child (UNCRC) was incorporated into Swedish law. This can be seen as a result of a growing trend to give the perspective of the rights of the child a prominent role within the Swedish legal system. In 2010, the government formulated a new strategy to strengthen the rights of children by transforming all legislation regarding children in line with UNCRC (Government Bill, 2010). Consequently, there has been an increasing focus on children as rights-holders and autonomous legal subjects. Sweden is thus no exception when it comes to the trend that Teubner (1987) has termed as a juridification of social spheres but follows the global direction of incorporating rights into law in the line of ‘freedom-guaranteeing’. Being on the leading edge of advocating for human and children’s rights is a part of the national self-picture (e.g. Leviner, 2018; Schoultz, 2014; Silander, 2007).

However, scholars studying the consequences of this juridification have argued that when rights are translated into law, they are also replacing a discussion on moral issues (e.g. Banakar, 2010a, 2010b; Gustafsson, 2018; Smith, 2002). The moral issues referred to are those that ‘[a]rise from and must be justified by moral reasons’ and that today are talked about as human rights (before becoming juridified) (Smith, 2002: 47, emphasis in original). On the one hand, the translation of rights into law tells us, at a theoretical level, how to act in different situations that might otherwise have been characterised by moral hesitations and dilemmas. On the other hand, in real life, rights are fluid and open to interpretation. It seems safe to argue that there is a general agreement on principles of human rights, but not so much on how and when they should be applied (Banakar, 2010). As several scholars have argued, the use or infringement of rights is dependent on cultural context (e.g. Atria, 2015b; Banakar, 2010a, 2010b; Smith, 2002). There is thus a need to study rights discourse in the context of different political and legal settings, such as the incorporation of UNCRC into Swedish law and the transformation of social welfare legislation accordingly.

During the period from 2015 to 2018, the Swedish state-driven coercive care of children following the Care of Young Persons Act (CYPA) was transformed according to UNCRC. Framed as a social right, protective legislation and duty legislation, the CYPA is part of the welfare system. The CYPA is not conditional but coercive, and defines and signals what is socially destructive and deviates from the fundamental norms of society. Nevertheless, it is a social right and considered a legal benefit. In a Swedish context, social rights have to be placed within a broader collectivistic discourse in which the state has a certain responsibility for its citizens (cf. Kotkas, 2017). As argued by Kotkas (2017), the Swedish welfare state does not traditionally focus on an individual’s social rights, but on securing the well-being of the population as a whole. In this context, social rights are mainly formulated, not as demandable rights for the individual to claim, but as an obligation, a duty, for the state towards individuals, mainly its citizens (Gustafsson, 2018). While rights legislation applies to individuals emphasising their demandable rights, duty legislation refers to the duty and responsibility of the state and public authorities towards individuals (Berggren and Trägårdh, 2006). Regarding the latter, the state will act in a way that is considered best for the collective. Thus, in this context the function of the CYPA as a social right differs from the UNCRC and the discourse on
the rights of the child, which, although including both positive and negative rights, focuses on the individual and more or less demandable rights. Consequently, a new conflict was introduced when the CYPA was transformed in accordance with UNCRC: between the *collectivistic discourse* and the *discourse on the rights of the child*. The present article explores this conflict in the process of formulating new coercive care legislation with the formal aim of strengthening the perspective of the rights of the child. Specifically, the study seeks the answers to the following questions: How are the collectivistic discourse and the discourse on the rights of the child negotiated in this transformation process? How does the transformation process affect the orientation of state-driven coercive care?

The article is structured as follows: First, I provide a contextualisation of the development of coercive care of children in Sweden, the collectivistic discourse and the introduction of the perspective of the rights of the child. Thereafter, I present the theoretical framework applied to grasp the transformation as a process of rightification. I then outline the methodology, before moving on to the analysis of my empirical material where I consider the conflict between collectivistic discourse and child’s rights discourse, as well as the changing orientation of coercive care. The final section offers a concluding discussion, where the study’s findings are presented and further discussed in a broader context of the consequences of the rightification process.

**From Child Welfare to Child Protection – Contextualising Coercive Care of Children in Sweden**

One of the most central ideas that have been developed in today’s welfare state is the idea of the state having a certain responsibility for children (Lundström, 1993, 2017). During its development, children have gone from being viewed as the property of their parents to ‘both a collective resource, and as individuals of their own, with particular needs of protection and care’ (Berggren and Trägårdh, 2006: 229). In this way, it is not only a right for the state to intervene in a child’s private life, but a duty. As introduced above, this logic is based on a collectivistic ideology of state responsibility to protect its citizens and ensure social rights.

The guiding principle of the coercive care legislation has moved from the protection of the society in 1902, when the first real child welfare regulation in Sweden was introduced, to the child’s need of protection when a new Social Service Act (SSA) came about in 1980. This signified an important ideological break as the new SSA took an explicit stand against societal protection being a part of child welfare (Lundström, 2017). Instead, the protection of the child specifically – and not of society – came into focus. From this point in time, child welfare regulation has been included in the SSA. It is the municipalities through municipal welfare boards and Social Services that are responsible for the protection of children (Chapter 5 §1 SSA). This responsibility includes, if necessary, the ability to place a child in out-of-home treatment. As the SSA is built upon principles of voluntariness, involuntary out-of-home-placement – formally termed coercive care – is regulated in complementary legislation – the CYPA.

The CYPA is exceptional legislation and thus shall only be used if care and treatment cannot be offered on a voluntary basis following the SSA. Since it is protective
legislation, Social Services are not allowed to place a child within coercive care with regard to general prevention or public order (Lundström, 2017). It is solely a way of protecting the child from harming its own development. The CYPA allows the coercive apprehension of a child due to harmful living circumstances – the so-called environmental case regulated in §2; or the child’s own behaviour – the so-called behavioural case regulated in §3. A decision on coercive care pursuant to the CYPA requires a court order. It is the municipal welfare board that applies for a court order at the administrative court. However, in emergency cases the board can make a decision on a care order on its own, which must be processed by the court within 2 weeks. Thereafter, the care order is reviewed by the board every 6 months. Hence, there are no time limits for how long an involuntary care order may continue, the upper limit of which is when the child reaches the age of 21.

There is an important distinction as to whether a child is apprehended due to the environmental case or the behavioural case. If apprehended following the latter (§3), the child may be placed in locked state-driven coercive care. While the decision on coercive care is a legal one, the decision on where to place the child is purely administrative. Social Services decides whether to place the child at a family home, at an open institution, or in a locked institution. It is the assignment of these locked institutions that constitutes the focus of this article. It should be emphasised that children placed at these institutions have not been sentenced for any crime and the placement orders are not in any way connected to the penal system. The decision to place a child in state-driven coercive care may be based on behaviour that is considered problematic, but not ‘enough’ to be handled by the criminal justice system. These behaviours might concern involvement in some sort of criminal activity, drug use, prostitution, run-aways, or other so-called ‘socially destructive behaviour’ (similarly to what is termed status-offences in the US).

In practice, the state-driven coercive care institutions are very reminiscent of prisons. The buildings are locked, with either bars covering the windows or bulletproof glass, surrounded by walls and barbed wire. Similarly to prisons, the staff have the legal authority to perform coercive measures such as solitary confinement, physical restraint, intimate body searches and involuntary testing for drugs. These institutions have been active during most of the 20th century, first as a part of a philanthropic movement, then increasingly taken over by the state. The 1980s can be thought of as an exception, as the new SSA and CYPA brought a decentralisation of state-driven coercive care with a change of authority from the state to county councils and municipalities. This changed again in 1990, when a new CYPA came into being. This was accompanied by a new change of authority, back to the state and the creation of a new public authority in 1994 – the National Board on Institutional Care (NBIC) – which currently operates locked coercive care.

Today, scholars as well as practitioners involved in childcare regulation, talk about an ongoing shift from a child welfare perspective to a child protection perspective. The latter is usually connected to the rights of the child and the strengthening of children’s roles as autonomous legal subjects. This shift can be seen as a break from a control and disciplinary perspective as children are given a more active role. However, the growing influence of the rights of the child is accompanied by a discussion on how increasing
rights are contributing to higher expectations and demands on the child (Kaldal and Tärnfalk, 2017). In her dissertation, Lina Ponnert (2007) has studied how an emphasis on children’s rights has affected the reasoning of social service agents on whether or not to place a child in coercive care. According to Ponnert, the rights perspective has been used as an argument in favour of coercive care, as children and youth are viewed as being responsible for their behaviour to a larger extent. How the introduction of the rights of the child has affected the locked state-driven coercive care system from the perspective of governance is, as far as I know, not yet studied. Thus, the question remains how the incorporation of the UNCRC, and the transformation of the CYPA accordingly, affect the nature and orientation of the state-driven coercive care of children. The inherent conflict is apparent: between collectivistic protection and demands on individual rights. The object of this article is to explore how this conflict is formulated in relation to the perspective of the child that has been introduced in the CYPA.

A ‘Rightification’ of the Welfare System?

It seems safe to argue that, at a general level, there is an ongoing shift within political discussions to talk in terms of rights rather than state obligations (e.g. Banakar, 2010; Gustafsson, 2018). While this has been discussed as being a process of juridification (e.g. Banakar, 2010a, 2010b; Teubner, 1987), Håkan Gustafsson has termed this shift in discourse as a rightification, rättighetifiering, of the welfare state and of social rights:

With this [rightification] I mean that there is an increasing tendency to dress societal, economic, political and administrative circumstances in rights terminology, but also an understanding that problematic circumstances can be solved in an effective way through a simple legal transformation of circumstances into rights. (2018: 54)

Clearly inspired by Teubner’s (1987) understanding of juridification as an expropriation of conflicts, Gustafsson (2018) argues that politicians appear to be overly confident in viewing rights as political tools for conflict resolution. Gustafsson (2018) has identified three components in this process of rightification. Firstly, an individualisation of rights. This individualisation is, according to Gustafsson, a distinguishing characteristic of the process. Rather than seeking solutions of a more general socio-political nature – which has traditionally been the case for the Nordic welfare states – the current political order tends to lean towards providing individual demandable rights. Accordingly, societal problems are presumed to be solved through the activation of a right, i.e. a legal process. What this demands is an active individual who is capable of initiating that legal process. Otherwise, the legal protection that is offered by the right will not be activated. Additionally, this individualisation does not necessarily initiate changes at a system-oriented level but rather is focused on changing the circumstances for a single individual. Thus, the system-oriented and structural problems that presupposed the infringement of the right would not be affected or changed, but most likely will remain the same. Secondly, Gustafsson talks about a fragmentation of rights as an effect of the individualising process. Through individualisation, rights are specified in detail. Although this will increase predictability and ensure that interventions comply with the rule of law, it
also means that rights are narrowed and limited. Consequently, ‘empowering and combined rights are replaced with particular rights’ (Gustafsson, 2018: 55). As a result, the responsibility of society is fragmented as well. Lastly, the component of disciplinary rights, meaning that rights have disciplinary functions on both individuals and society. In the context of state-driven coercive care the disciplinary function, at an individual level, is the demand for an organised family life and a confirmative lifestyle, in order for the child to be released from a locked institution. At a societal level, it has the disciplinary function in that needs must be framed as rights. Thus, this governs how needs are framed. Additionally, by framing a social need as a right, the focus is transferred to securing the right, rather than meeting the actual need. One could object to this argument by saying that framing a social need as a right and then securing that right sometimes meets the need. However, as we shall see in the analysis below, when focus is placed on the right, structural concerns are often left behind, which makes it difficult to see need from a broader perspective.

Gustafsson argues that his view of rightification differs from Banakar’s (2010b) discussion of juridification. While Banakar talks about a juridification of rights, Gustafsson talks about a juridification/rightification through rights: ‘The rightification, as it is presented here, views rights as a part of a rightificating context and constitutes central concepts within the rightification: they are not primarily rights that are to be rightified’ (2018: 58, note 35). Hence, Gustafsson’s concept of rightification is something more, a broader process that is taking place through the dimension of individualisation, fragmentation and discipline. Although there are differences between Gustafsson’s and Banakar’s view of the rightification/juridification process, I read them as having corresponding views on societal effect and social consequences. Gustafsson does not use morality as a concept but talks in terms of a fragmentation of social responsibility as a consequence of the rightification process. My understanding is that they both are inspired by the same ideas as Smith (2002) and see a loss of solidarity, engagement and responsibility from the perspective of the individual as well as the state. Thus, although the analysis is centred around the concept of rightification, I see the work and ideas of Banakar and Smith as providing a complementary aspect of morality that adds to the complexity of rightification.

Inspired by this discursive framework, I analyse the transformation of the CYPA in accordance with UNCRC as a rightification process. This allows for an exploration of how and in what way the CYPA is being rightificated, and what roles the collectivistic discourse and child’s rights discourse play in this process.

Methodology

The primary source material in this article consists of official state documents from the period between 2012–2018 when the CYPA was transformed according to the UNCRC. The Swedish policy process relies to a large extent on Inquiry reports, and it is carried out following a request from the government or the parliament. In this case, the request was made by the right-wing alliance that led the government between 2010 and 2014 but was replaced by the Social Democratic Party and Green Party that formed a minority government in 2014. When an inquiry report is made public, interested actors – consultative
bodies – are invited to comment on the report. External stakeholders, such as ordinary citizens, are also welcome to leave their comments. The documents in this study include one Governmental Inquiry presented in 2015, which received 142 consultative responses, all of which are a part of this study. The next step is for the government, based on the Inquiry report and the consultative responses, to write its own consultative response to the Council on Legislation. This response also informs this research, as does the government bill, which was presented to the parliament in March 2018. Thereafter, all members of parliament have the right to comment on the bill in individual or party motions. In this case, three motions were presented, which have been analysed together with the protocol from the parliamentary debate. Lastly, the final report on the new CYPA from the Committee on Health and Welfare presented in May 2018 is included in the analysis. Additionally, one older memorandum from 2011 with six subsequent consultative responses, which are referred to in the transformation process, have been included.

Through a textual analysis of these official documents, I have aimed to capture what Wacquant (2009) has termed both a material and symbolic dimension of the rightification process. Material in terms of actual, concrete decisions taken by political actors, and symbolic in terms of discursive rules and its logic of action. Drawing on Garland’s (2002) theoretical and methodological discussion in *Culture of Control*, I have directed my attention to what (material) decisions are taken and what (symbolic) meanings can be ascribed to them. Hence, ‘discursive statements and rhetorics – and the knowledge based or value based rationales that they involve – will thus be as important as actions and decisions in providing evidence about the character of the field’ (Garland, 2002: 24). This understanding of symbolic meaning is closely connected to the disciplinary function of the rightification process; hence, the analysis is inspired by a Foucauldian notion of discipline. A broad coding of the material as a part of the collectivistic discourse and child’s rights discourse respectively has been made. Arguments and suggestions have been categorised as the former if they include terms such as obligation, state duty, and protective supervision; and as the latter if they include individual rights, right to, rights holder, and autonomous legal subjects. The aim has not been to cover the transformation process as a whole, but rather to focus on how questions are caught and described, and to analyse the framing of problems and solutions with a specific interest in the conflict between the collectivistic discourse and child’s rights discourse.

**Rightificating Coercive Care?**

Inspired by the theoretical perspective introduced above, I present the analysis in three parts. The transformation process is not presented as a whole or as a chronological process, but as an ideological conflict including contradictory symbolic and material ideas and suggestions. First, I engage in the disciplinary function of the process, with emphasis on protection and its symbolic meaning within both the collectivistic and the child’s rights discourse, and the ideological conflict around who is to be protected. The second and third parts address material suggestions and show how the proposed measures stem from the seemingly contradictory discourses, which results in both an individualisation of rights and a fragmentation of responsibility.
Part I: Disciplinary Resistance

It is... important that the legislation considers individual rights and rule of law, and simultaneously recognises the need for safety and security.

In both the Governmental Bill (2018: 35) and the Governmental report to the Council on Legislation (2018: 34), the quotation above is used to underline the need for new legislation. The inherent conflict between the emphasis on the child’s rights discourse on individual rights and the demands of the collectivistic discourse for state protection, is explicit. According to the inquiry report, ‘the new legislation shall aim at ensuring children and youth protection and good care’ (Government, 2015: 222). This aim is included in the proposed new CYPA together with the previous aim: ‘the society’s duty to ensure children’s and youth’s care and treatment’ (Government, 2015: 222). The latter goal of in recent years has been the higher aim of the legislation. By investing the legislation with a new aim, that of ensuring protection, both the child’s right to protection and society’s duty to protect are brought to the forefront. To emphasise protection alone is thus compatible with both the child’s rights discourse and the collectivistic discourse, in that the CYPA is protective legislation. However, the new aim of protection is, according to the inquiry, connected to the UNCRC:

The aim of the regulation in the new CYPA harmonises with Article 20 in the UN Convention on the Rights of the Child stating that a child being deprived temporarily or in the long term of its family environment, or for the sake of its own best interests, cannot be allowed to stay in this environment, and has the right to specific support and allowance from the state. (Government, 2015: 233)

The governmental inquiry further refers to UNCRC Article 39, which states that:

The State’s Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflict. Such recovery and reintegration shall take place in an environment, which fosters the health, self-respect and dignity of the child. (UNCRC Article 39)

Thus, the complementary aim of protection could be said to be a way of harmonising the CYPA with the UNCRC, in that it emphasises protection, support and allowance as a demandable right. However, taking a closer look at the underlying meaning of the new aim – to ensure protection – there is something more to it. According to the governmental inquiry of 2015, ‘the word protection marks a serious situation or a situation that threatens to aggravate. The word ensuring marks the Social Welfare Committee’s duty to give protection and care to the child or the youth against the will of the child, the youth or the caregiver’ (Government, 2015: 222). The latter serves as an explicit example of the collectivistic discourse. Thus, the combining of ensuring with protection strengthens the collectivistic discourse and makes it superior to the child’s rights discourse. According to
the governmental inquiry, the transformation process means ‘that the society is given a specific responsibility for children’s right to protection and good care’ (Government, 2015: 179). Hence, the position of the state, in relation to the child’s, is strengthened, rather than the opposite. This could be understood not only as a disciplinary element, but also as a form of resistance with respect to the rightification process.

Turning to the article that is said to legitimise the coercive care of children in accordance with international conventions, the strong position of the collectivistic discourse becomes evident:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: [... ] the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority. (EU Convention for the Protection of Human Rights and Fundamental Freedoms, Article 5.1, Emphasis added)

In the governmental inquiry’s translation of this article, the term educational supervision is translated as protective upbringing, skyddsuppostran (Government, 2015: 333). The term protective upbringing stems from the 1902 legislation regulating vicious individuals (1902: 67) and is closely connected to the idea that it is not only children who are to be protected, but that society and the social order need to be protected from these children as well. Accordingly, the state’s duty is to protect the population as a collective. This an ideology that was formally abandoned with the new Social Service Act in 1980. However, the legitimisation of coercive care through this terminology suggests that it might not have been completely relinquished after all.

This brings us to the question of whose protection is in focus. As noted earlier, it is the child’s need for care specifically – the risk of harming the health or development of the child – that constitutes the grounds for coercive care following the CYPA and not the protection of society (Government, 2015). Turning to the Inquiry’s motivation for strengthened protection, we see an expanded understanding of who is to gain from this protection:

A strengthened support and protection of children and youth in coercive care [... ] can contribute to better prospects regarding health, education, personal development and working life. In a longer perspective, this is also beneficial for the economy of the society. Several of the proposed changes aim at avoiding an increase of the problems, which would demand additional societal expenses. Taken together, these propositions should lead to a decrease in expenses for both municipalities and the state. (Government, 2015: 9)

This reasoning suggests an expanded understanding of the term ‘protection’. Thus, it is not only about protecting the child, but also about larger societal economic gains. An expansion, or perhaps better described as a relaxation of the term ‘protection’ to include the general society, is further shown in the parliamentary debate where the representative of the Christian Democratic Party describes state-driven coercive care as one of the ‘public institutions that are to create security for the individual and for the society’
(Parliamentary debate, 2018: 45). This statement has not resulted in any debate or faced any opposition from other political actors taking part in the parliamentary debate. It is thus possible to assume that the statement is not viewed as a radical one by other members of parliament. Hence, the conjunction of the collectivistic discourse and the discourse on the rights of the child seems to pave the way for an expanded understanding of who is to be protected that goes beyond the formal aim of the CYPA.

What I suggest in this section is that the term ‘protection’ – and the emphasis on the child’s right to protection – are used, not to strengthen the role of the child towards the state, but to legitimise a strengthened position of the state towards the child, dressed in the language of the rights of the child. Furthermore, this strengthened position of the state seems to pave the way for a relaxation of who is to be protected, to include not only the child but also society at large. This illustrates the disciplinary element of the rightification process. However, it also shows resistance towards the process through the strengthening of the collectivistic discourse, which is the opposite of what one might expect.

While this section has been occupied with the symbolic meaning of conflicting discourses, the two following sections illustrate the materiality presented by the governmental inquiry. Thus, we now turn to two concrete suggestions, the first of which comes from the perspective of strengthening the collectivistic discourse; while the second aims at strengthening the rights of the child. Thus, as we will see, the conflict between collectivistic discourse and child’s rights discourse does not only operate at a symbolic level, but also through material decisions stemming from opposing ideologies.

**Part II: Strengthening the Collectivistic Discourse Through an Individualisation of Rights**

In an official letter to the government in 2011, the public authority in charge of state-driven coercive care, the NBIC, expressed a need for more routine use of coercive measures. In this letter, two new coercive measures were proposed: protective search (a body search using the hands of staff or a metal detector) and room search (giving staff the authority to search the rooms of children placed at the NBIC) (Ministry of Health and Social Affairs, 2012). These proposed changes were formulated using the Prison Act and the Detention Act as models. According to the NBIC, there was a need to routinely perform these new coercive measures, without prior suspicion and without demands for documentation. The letter resulted in a memorandum, which was sent out to a number of consultative bodies and received eight replies in 2012. However, the memorandum and consultative reports did not result in a proposal to amend the relevant legislation. Instead, it was later included in the larger governmental inquiry on a new CYPA. As a consequence, the suggestions are again addressed in the 2015 inquiry. This allows us to compare how the same suggestion is handled and negotiated, first in 2012 and then in 2015 when the inquiry had the official perspective of the rights of the child (which was not a pronounced aim during the first ‘round’). Interestingly, despite being only 3 years apart, the negotiation process in the consultative reports differs significantly.

In the 2012 round, the consultative reports engaged in a discussion on whether it was appropriate for proposals to be based on the Prison Act and the Detention Act. The
arguments of the consultative reports of 2012 have a clear system-oriented perspective, emphasising the systematic differences between the CYPA as care legislation, and the Prison and Probation Service as part of the criminal justice system. Thus, the reports engage with the classic conflict between care and punishment:

The work carried out by the NBIC has at least partly different perspectives compared to prisons and jails. This means that one should not, without further considerations, implement regulations designed for inmates at prisons and jails into care legislation. It is also important that regulations on coercion are not implemented into care legislation without clearly declaring the need for such regulation. (Ombudsman of Law, 2012: 1)

It is unacceptable that children treated according to the CYPA and the SSA and that have not been sentenced for any crime should be exposed to coercive measures implemented from the Prison Act. It is especially remarkable that this will concern a large number of children under the age of 15. The purpose of apprehending is to give these children and youths care, not to infringe on their human rights (Ombudsman for Children, 2012: 5).

Thus, the majority of the consultative bodies took an explicit stance against the adoption of prison regulations into the CYPA context. As expressed by the public authority, the National Board on Health and Welfare (2012: 2), ‘[...] most children and youths treated under the CYPA [...] are neither suspected of nor charged with any crime [...]. Their needs and demands cannot be equated to those detained and placed within the prison and probation service’. The criticism of the suggestions came from consultative bodies advocating children’s rights, the Ombudsman for Children, and the Ombudsman of Law, as well as from a public authority. Overall, it is clear that the care aspect is paramount from the perspective of protection.

Three years later, the inclusion of the two new coercive measures is again addressed, this time as part of the larger inquiry aimed at transforming the CYPA in line with the UNCRC and with the new aim of ensuring protection. This time the consultative bodies took a different stance towards the inclusion of the two new coercive measures and the majority gave their support. The previous discussion on implementing coercive measures from criminal law into care legislation is absent. Instead, the focus has shifted towards ensuring security in individual cases. This is illustrated in the following statement from the Ombudsman for Children:

The Ombudsman for Children considers the protective search as a violation of personal integrity, but we share the inquiry’s evaluation that it is of major importance that children and youths treated at institutions are given the opportunity of meaningful leisure time and that they are offered different activities. The need for security must in this case be paramount in relation to the infringement of personal integrity [...]. (Ombudsman for Children, 2015: 14)

What we have here is a clear shift in focus, from a system-oriented discussion on the relationship between punishment and care to one that focuses exclusively on individual rights and security. Furthermore, the quotation above illustrates how the collectivistic discourse is used to argue in favour of a ‘greater good’, that is the need for security.
According to the government, ‘to establish what is best for the child is, among other things, to evaluate what factors or circumstances are especially important in a specific situation’ (Governmental report to the Council on Legislation, 2018: 34). This shift in focus, leaving system-oriented concerns behind, is to be expected. However, it brings us to the question of what consequences this has for the children placed at coercive care institutions.

The focus on specific situations at an individual level, rather than system-oriented concerns, seems to open up a space for a use of protection and security to justify expanded coercion. One example is the following statement by the NBIC, in which the relationship between care and protection is discussed:

[...] it is important that the inmate is given good care at the NBIC and that he/she has access to different types of activities and meaningful leisure time [...] With respect to security both for the inmate and everyone else at the institution, a protective search may be necessary if an inmate returns to the home department after having spent time at the carpentry, garage, canteen, school, or at another section of the institution. The need for performing security searches can arise several times during the day. (NBIC, 2015: 6)

Note the terminology used, which describes apprehended children as inmates. Further, according to the NBIC, ‘routine-like room searches are an important part in the preventive work on security and in creating a safe and secure environment for all youths and clients within the NBIC’ (2015: 5). Hence, the need for implementing new coercive measures is motivated by the extended duty to ensure protection, not only for a single individual, but also for other clients as well as staff. Accordingly, the protection is of the collective. The final report from the Committee on Health and Welfare was in line with the suggestion from the NBIC. What this means is that two new coercive measures, inspired by the Prison Act and the Detention Act, which are to be used in a routine manner without prior suspicion of any kind, were included in the CYPA in 2018. The lines of argument reflected in the quotations above are examples of how the collectivistic discourse is used to argue in favour of increased coercion. However, and I want to be clear here, this is not to say that the collectivistic discourse favours coercion. Rather, I would argue that the increased focus on individual rights following the harmonisation of CYPA with UNCRC enables increased coercion. In other words, the increasing focus on the perspective of the rights of the child seems to have brought about a shift whereby system oriented problem formulations, such as the care-punishment discussion, are moved to the background, giving room to individualised framings and solutions. In the absence of system-oriented discussions, there are no moral mechanisms (cf. Banakar, 2010a, 2010b.) setting the limits for the expanded use of coercion, motivated primarily by the state’s duty to protect. Thus, in this way, the collectivistic discourse and the rights of the child are working in tandem, rather than against each other.

Part III: Strengthening the Discourse on the Rights of the Child and a Fragmentation of Responsibility

According to the governmental inquiry, the focus on children’s right to protection includes ‘a new way of treating children as actors’ (Government, 2015: 191). This view
of children as rights-holders motivated an expanded right to appeal decisions on coercive measures in 2018. This means that children and youth now have greater opportunities to appeal decisions, for example, concerning solitary confinement, intimate body search, locked care, testing for intoxication, room search, as well as surveillance of mail. Additionally, the government decided to give children under the age of 15 the right to public counsel if they wish to appeal a decision on a coercive measure (Final report, 2018). This extended right to appeal is presented by both the inquiry and the government specifically as a way to strengthen the rights of the child, and would further serve as a tool for control and guidance (Government, 2015).

However, an appeal can only take place after the child or youth has already been exposed to the coercive measure. The Court of Appeal (2015: 3) argues in its consultative report that the possibility to appeal ‘[…] will not make a difference for the individual as the decision is already executed at the time for the appeal’. The Court of Appeal (2015: 3) was of the opinion that ‘[…] both from a principal and procedural perspective it is peculiar to suggest an appeal of already executed decisions’ and has ‘[…] difficulties seeing in what way these decisions can be of value both regarding control and guidance’. In addition, the Swedish National Courts Administration (2015), the Bar Association (2015) as well as several of the administrative courts support this argument. Some, such as the public foundation Allmänna Barnhuset (2015), the Bar Association (2015) and the Ombudsman of Law (2015) demand that all children independently of age are given the right to public counsel, referring to recommendations by the UN Child Committee that all children apprehended by the state are given the right to public counsel. However, this critique was not commented upon in the final decision by the Committee on Health and Welfare.

According to the Inquiry report, the mean age of the children and youths placed at the NBIC is 16 years and 7 months (Government, 2015), which means that the majority exposed to coercive measures are over 15 years old and will thus not have the right to public counsel. These youth often lack a social network and education, coming as they do from socially vulnerable situations, and many are unaccompanied refugees (cf. Leviner and Lundström, 2017). It is not farfetched to argue that few of these children will be capable of initiating a legal process to activate their rights. However, this has not been discussed by the government or any political party at any stage of the process. Instead, the extended right to appeal coercive measures is justified by politicians as a means of strengthening the rights of the child. As noted above, adopting a children’s rights perspective involves a view of children, not as vulnerable objects, which has been the case in the traditional child welfare perspective, but as autonomous actors and legal subjects. This shift is discussed in the governmental inquiry report as follows:

The actor perspective means that the child is viewed as an actor with his/her own room for manoeuvre and ability to act. The subject perspective means that the child’s human value and right to integrity are to be respected, which means that children, like adults, are to be treated as holders of rights[…]. The view of children as subjects and actors are closely connected – if a child is to be treated as an independent subject with rights, it is demanded that he/she is recognised as an actor capable of actions. (Government, 2015: 191)
Thus, it seems that treating children as subjects with rights is dependent on children being capable of taking certain actions. What this means is that access to individual rights within the coercive care legislation is conditional, while the responsibility of society is fragmented (c.f. Gustafsson, 2018).

Coercive Care as an Anti-Social right. A Concluding Discussion

This article has explored the transformation of the CYPA in line with the UNCRC as a rightification process. This approach facilitated an analysis of how and in what way the CYPA is being rightificated, and what roles the collectivistic discourse and the discourse on the rights of the child play in this process. That is, how the two discourses are negotiated in the transformation process, and how the transformation process affects the orientation of state-driven coercive care. Firstly, I have suggested that the terminology of protection and the emphasis on the child’s right to protection is used, not to strengthen the role of the child towards the state, but to legitimise a strengthened position of the state towards the child, dressed up in the language of the rights of the child. Additionally, I have shown that the strengthened position of the state seems to pave the way for a relaxation of who is to be protected, to include not only the child but also society at large, which goes beyond the formal aim of the CYPA. This illustrates the disciplinary element of the rightification process. However, it also shows a resistance towards the process through the strengthening of the collectivistic discourse, which is the opposite of what one might expect. Secondly, I have proposed that the process of transforming the CYPA in accordance with the UNCRC contributes to a shift from a system-oriented and structural perspective to an individualisation of problem formulation. This shift was expected and in line with previous scholarship (cf. Gustafsson, 2018). However, the complete abandonment of the classic (moral) conflict between punishment and care that has been a central part of the dialogue surrounding Swedish coercive care is remarkable. Further, this absence of structural, moral and system-oriented concerns paves the way for extended coercion to take place as the ‘bigger picture’ is lost. In this way, the collectivistic discourse and the rights of the child are working in tandem rather than against each other. Thirdly, I have argued that children’s rights are becoming not only individualised but also fragmented through the rightification process. It seems that treating children as subjects with rights is dependent on children being capable of taking certain actions, such as initiating a legal process by themselves. This means that access to individual rights within the CYPA is conditional and dependent on an active and capable individual. Hence, it is a finding that supports what has been proposed by Gustafsson (2018) in his analysis of rightification. This finding illustrates how the attempt to strengthen the perspective of the rights of the child results in a fragmentation of social responsibility and a shift to personal responsibility. Furthermore, it is a finding that indicates that what Ponnert (2007) highlighted in her study at an individual level – how the rights perspective has been used as an argument in favour of coercive care – also takes place at a policy level. Together, these findings show that the transformation of the CYPA in accordance with the UNCRC is not a linear or clear rightification process (cf. Gustafsson, 2018). Although it includes the elements proposed by Gustafsson (2018) – disciplinary,
individualisation and fragmentation – it is a complex process that both endorses and resists the rightification of the CYPA.

What does this mean for children and for the adoption of rights discourse more broadly? The intention from the side of the legislators was to make children’s voices heard, which has elsewhere been found to result in interventions that better reflect the child’s perspective (e.g. Heimer et al., 2018). However, the emphasis on an increased right to protection has resulted both in increased coercion and a strengthened position, not of the child towards the state, but of the state towards the child. One of the strengths of the collectivistic discourse, I would argue, is the emphasis on structural concerns and disadvantages, providing a ‘bigger picture’; while the strength of rights discourses is, I believe, the emphasis on moral considerations (cf. Smith, 2002). Unfortunately, the combining of, or struggle between, these discourses in the transformation of the CYPA does not seem to bring out the best in each other. This shows that we must be careful when adopting global rights discourses to national ideologically loaded legislation. We need to pay attention, not only to what material changes are brought about to the content, but also to the construction of new symbolic meanings.

What is perhaps most interesting in my findings is that the rightification of the CYPA is primarily an administrative question and not a political one. The present analysis is based primarily on the governmental inquiry and consultative responses as the questions I wanted to explore are largely absent from party motions and parliamentary debate. The two material suggestions explored in this analysis – the inclusion of new coercive measures and the extended right to appeal – are simply not discussed by the political parties or political actors. There is a clear consensus among the political parties that the perspective of the rights of the child is ‘the way to go’. The ideological conflict between the collectivistic discourse and children’s rights that should be highly relevant in a Swedish political context instead is absent. Thus, consistent with what Gustafsson (2018) has suggested, the government seems to believe that simply transforming the CYPA in accordance with the UNCRC will serve as a tool for ideological conflict resolution. The absence of political concern for the state-driven coercive care of children – being one of the most severe interventions in private life that the state is able to practise – does not resonate very well with the official Swedish self-image as being at the forefront in advocating for children’s rights (cf. Leviner, 2018).

This increased ‘rights-talk’ with its focus on individual rights, leaving system-oriented and moral concerns as well as societal responsibilities behind, can be further understood in the context of Chantal Mouffe’s classic distinction between ‘politics’ and the ‘political’ (2008): ‘by “the political” I mean the dimension of antagonism which I take to be constitutive of human societies, while by “politics” I mean the set of practices and institutions through which an order is created, organising human coexistence in the context of conflictuality provided by the political’ (2008: 18). The former refers to a field characterised by power, conflicts and differences – an expression of antagonism – while the latter refers to conventional political organs, institutions and organisations. According to Mouffe (2008), there has been a global shift from the political to politics, a shift aimed at ignoring the antagonistic dimension of the social sphere. This is an aspect that she finds essential for the survival of democracy. However, it is not the task of democracy to set the antagonistic dimension of politics free, but to transform it into agonism.
(Mouffe, 2008). That is, turning the hostile division between ‘us and them’ into a fruitful conflict relationship where both parties recognise the other as legitimate opponents, not enemies. Only by this transformation can the antagonism be ‘tamed’. According to Mouffe, the current shift within politics strives to find common ground between ideologically different parties while overseeing differences. She calls this a process of ‘de-politicisation’. In other words, politics is becoming increasingly apolitical in the search for consensus and harmony. This reasoning seems especially evident when it comes to the discourse of human rights. Gustafsson uses Mouffe’s distinction to develop his thesis on rightification, arguing that suggestions made within the field of ‘politics’ are discussed in neutral terms as a rights discourse (2018). In that way, rights discourse redirects focus away from the underlying political issue. Instead, the debate will be dominated by a ‘rights talk’ and rights terminology focusing on solving individualised problems in specific situations, while losing ideological and moral considerations (cf. Banakar, 2010; Smith, 2002). Drawing on the work of these scholars, I am suggesting that the process of rightification of the CYPAct also contributes to a process of de-politicisation of state-driven coercive care. For example, as I have shown above, the political discussion on coercive care no longer involves a conflict between coercion and care but is talked about in neutral terms regarding how to strengthen individual rights while ensuring protection through the state. In a sense, the ‘opponent’ has faded away and is replaced by a common agreement on liberal ‘rights-talk’. Another indication of the absence of the political is in how unequal power structures are understood by political parties in the transformation process. An example is the increased right to appeal a decision on coercive measures, which only gives children under 15 years of age the right to public counsel. The idea that children over 15 years old, of which the majority are from socially deprived backgrounds, will be able to initiate a legal process by themselves in order to activate their individual rights, shows either an inability or unwillingness to recognise unequal social resources. According to Mouffe, the liberal ideology with its individualistic perspective excludes such a recognition. Hence, it seems as if the loss of the opponent in Mouffe’s terms is accompanied by the loss of moral and structural considerations within rights discourse.

Furthermore, when choosing not to give these children the right to a public counsel, the conflict between the child and the state in a way is expropriated by the state (cf. Gustafsson, 2018; Teubner, 1987). When leaving system-oriented concerns behind, it seems as if we also abandon the social aspect of social rights (cf. Gustafsson, 2018). This leads to a fragmentation of social responsibility, which is ironic as the Swedish government states that the introduction of the perspective of the rights of the child gives the state an increased responsibility to protect the child. What is needed instead is a re-politicisation of coercive care to bring back moral and structural concerns, such as the punishment and care conflict, that recognises unequal power structures, which become crucial if children are to have access to their individual rights. Measures to strengthen the perspective of the rights of the child, such as the right to appeal, must be placed in a cultural and social context when transformed into national law, otherwise children’s rights will do little to strengthen the position of marginalised children. In other words, we must strive to return to what is ‘social’ within social rights (cf. Gustafsson, 2018). To be clear, I do not propose a de-rightification. However, I suggest that attention must be
paid to both structural and moral concerns in order to avoid an expropriation of conflicts by the state, both on an individual level – such as the ability to appeal a decision – and on a policy level. This is especially the case when it comes to legislation as sensitive as involuntary state interventions.

This article has focused exclusively on the transformation process of Swedish coercive care legislation in line with the UNCRC. This narrow focus constitutes both its limits and its strengths. Its limits because the results cannot be generalised to other transformation processes in line with the UNCRC or how Sweden generally approaches the rights of the child. Nevertheless, this is also its strength. We know from previous work on rights discourse that the application and effects of the rightification or juridification of rights needs to be examined in specific cultural contexts, and this is exactly what this study does. It offers a contextualised analysis of how the transformation of the perhaps most severe Swedish legislation in accordance with the UNCRC affects marginalised children’s access to rights. However, it also shows the risks of ignoring structural and moral concerns as well as a broader cultural context, when transforming national legislation to conform to international conventions. If viewing a ‘re-politicisation’ of coercive care as being the way forward, I suggest that it is also necessary to understand how ‘de-politicisation’ came about. However, future research should not only explore the rightification process and de-politicisation’s relationship to ‘rights talk’ but also other aspects of liberal discourse, such as the neoliberal principles around which welfare services have become organised.

Declaration of Conflicting Interests
The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding
The author(s) received no financial support for the research, authorship, and/or publication of this article.

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Note
1. I do not engage in the discussion on the relationship between positive (social) rights and negative rights (e.g. Atria, 2015a, 2015b; Garland, 2015; Keat, 2015). The absence of this discussion does not mean that I consider it irrelevant, however, my focus is on one specific social right, the coercive care of children, which must be contextualised and thus placed within a collectivistic discourse. A discourse that is, due to cultural concerns, functionally different from the discourse on the rights of the child. It is thus the relationship between these broader discourses that constitute focus.

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