

A quick reminder of the Convention on the Rights of the Child and its application during the pandemic in Germany

 jean-monnet-saar.eu/

29.09.2021

An article written by Julia Jungfleisch*

1. Introduction

The Convention on the Rights of the Child (CRC) was adopted on 20th November 1989 and entered into force on 2nd September 1990. Today it is almost universally ratified (except for the United States of America) and complemented by three Optional Protocols.^[2] According to Art. 59 (2) of the German Basic Law, the Convention has the rank of federal law. The Federal Constitutional Court however uses international human rights treaties as a standard of interpretation for the national fundamental rights. Besides its formal rank of a federal law, the CRC thus has influence on the interpretation of the German constitution.^[3] In contrast to the International Covenant on Civil and Political Rights (ICCPR)^[4] and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)^[5] a derogation from the CRC in times of war or emergency is not foreseen and thus not possible. Consequently, during the COVID-19 pandemic, the CRC is binding for Germany without any derogation.

In its List of Issues in relation to the combined 5th and 6th periodic reports of Germany the Committee on the rights of the child requires Germany *inter alia* to “[...] explain the measures taken or envisaged: (a) to ensure the protection of children’s rights in the context of the coronavirus disease (Covid-19) pandemic and to mitigate the adverse impacts of the pandemic; (b) to constitutionalize children’s rights; [...]”^[6]

Whereas for (b) the story is quickly told: after a long debate, constitutionalising children’s rights failed due to a lack of consent on the concrete formulation.^[7] However, (a) deserves a more thorough consideration.

What has been done and what should have been or should be done for children during the pandemic? This is not only interesting for the *ex-post* evaluation of the past measures to contain the virus but also with regard to the requirements for the expected measures caused by new mutations of the virus after the summer. As there are 40 Articles in the Convention on the Rights of the Child (CRC), exceeding the scope of a blog post by far, the focus of this contribution will lie on the four core principles of the CRC:^[8] non-discrimination (Art. 2), the best interests of the child (Art. 3), the right to life, survival and development (Art. 6) as well as the respect for the views of the child (Art. 12).

2. Non-discrimination

Art. 2 CRC prohibits discrimination of any kind concerning the rights set forth in the Convention and obliges the state to “*respect and ensure*” the rights of the child. This imposes not only negative but also positive obligations on states, requiring them to take (at least certain) action.^[9] The prohibition of discrimination is accessory and thus dependent on the applicability of another CRC right. It is important to bear in mind – especially with regard to containment measures against the pandemic – that the prohibition of discrimination does not protect a child from being treated differently because of her being a child. A different treatment of children and adults is therefore not prohibited by Art. 2 CRC.^[10] Such unequal treatment can, however, be covered by the ICCPR and the ECHR, whose prohibitions of discrimination also apply to children and explicitly prohibit discrimination on the grounds of age.^[11] For the purposes of this blog post, however, the focus will be on the CRC and its prohibition of discrimination, which concerns only the unequal treatment of children compared to other children on the usual illicit grounds (race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status).

During the pandemic the prohibition of discrimination was, is and will be of special importance for two rights: the right to health (Art. 24 CRC) and the right to education (Art. 28 and 29 CRC).

Children and their right to health

Vaccinations are the best way to avoid a severe COVID-19 infection. Besides those children who cannot get the vaccine due to pre-existing conditions, allergies or immunosuppression, children under the age of 12 are currently categorically excluded from the vaccination. The vaccination for 12–17-year-old children is in Germany only recommended for children with a special risk for themselves or their environment, in case of an infection.

The unequal treatment of children that are younger than 12 years or do not have a special risk, can however be justified by reasonable grounds: currently we do not have sufficient data on the effects of the vaccine on children and those who are infected normally do not have severe courses (only 1% have to go to the hospital) and fatalities occur rarely (0,001%). However, as the state has the obligation to protect all lives equally, there is arguably also the duty to constantly check the development of the vaccine and the possibilities to protect all children alike. Thus, relying on „only a few deaths“ is inadmissible with regard to Art. 6 CRC and not compatible with the state’s duty to protect in conjunction with the prohibition of discrimination.^[12]

Another problem with regard to the prohibition of discrimination and the pandemic is the situation of children that are asylum-seeking and the children of asylum seekers. Already before the pandemic hit Germany, equal access to health care was especially problematic for these children, and it has been further aggravated by the pandemic.^[13] A revision of the Asylbewerberleistungsgesetz (Asylum seeker benefits act) is long overdue^[14] and also necessary with regard to Art. 24 CRC.^[15]

Children and their right to education

The CRC requires states to fulfil their positive obligation regarding the right to education and the prohibition of discrimination, which is to ensure equal access to education. This means that during school closures due to the pandemic, the state must ensure the 4 A's for all children,^[16] regardless of their background. This can include face-to-face teaching for those children who cannot be taught at home, or financial help to get a laptop or a smartphone in order to participate in online teaching, as was made clear by German social courts.^[17] With a view to the coming measures after the summer break and for the new school year, it must be ensured that the gaps in education that have arisen are made up for and disadvantages that have been suffered are compensated for, with special support for disadvantaged children. The German Government set up a "Catch up-package" of two billion Euros for tutoring and support programmes. As the title already states, it is a catch-up plan, showing that there have been shortcomings with the provision of adequate education and thus a failure to comply with the obligations under the CRC, a situation, that was even worse for asylum-seeking children/ children of asylum-seekers:

The access of these children to education in Germany depends on the laws of the concrete constituent state/municipality the family lives in, because education falls under the competences of the constituent states (Länder) and not the federation. This results in a situation where refugee children either have direct access to schools or only after a certain time span, once specific decisions have been made and communicated. This amounts to an unequal treatment which is not in line with the German obligations under the CESCR and likewise, the CRC. This adds an additional layer to the problem of equal access to education during the pandemic and aggravates the situation of these children. Refugee children are thus also particularly affected in the context of the right to education and the problem of intersectional discrimination becomes particularly evident. During the school closures children of asylum seekers (even if they could normally attend school) were additionally prevented from exercising their right to education, due to the lack of digital means in the refugee accommodation centres.

The best way to avoid inequalities in access to education, besides the necessary alignment of school access for refugee children and the equipment of accommodation centres throughout Germany, is ultimately to avoid further school closures through more effective pandemic control measures. This will be achieved, when the best interests of the child are taken more into account:

3. Best interests of the child

Art. 3 CRC requires the states^[18] to take the *"best interests of the child"* as a *"primary consideration"* in all actions concerning children. As the committee on the rights of the child points out in their General Comment No. 14, the concrete *"best interests"* of a child or a group of children are, need to be examined on a case-by-case basis in the light of the *"specific circumstances of the particular child, (...) the particular group of children, (...) The expression "primary consideration" means that the child's best interests may not be considered on the same level as all other consideration (...) (and) that the child's interests have high priority and (are) not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best. (...) All decisions on measures and actions concerning a specific child or a group of children must respect the best interests of the child or children, with regard to education."*

The following example, about containment measures (which entailed regulations on testing, vaccination etc.) shows, that regarding the children's right to education, the best interests of the child are currently not appropriately, if at all, considered in the decision-making process:

In March 2021 the so called *"Bundesnotbremse"*, an agreement between the federal government and the Länder entered into force,^[19] which aims at coherent regulations for the situation of high COVID-19 case numbers throughout Germany. Inter alia, testing in schools and kindergartens was expanded, however, as the agreement itself states: *"on the one hand, these measures will achieve better infection protection in schools and daycare centres, and on the other hand, they will also support the detection and interruption of infection chains in the general population."* In the end, the measure also serves the children and includes their interests and their well-being, but it is equally clear that the emphasis is on the general well-being and the protection of the population through the containment of the pandemic. The chains of infection need to be interrupted, not the children's right to education secured, a right that is not even mentioned in the *"Bundesnotbremse"*, neither are the best interests of the child. The protection of children's rights as well as their best interests, is therefore no more than a marginal aspect and not the primary consideration as required by the CRC. For upcoming decisions to contain the 4th wave of Covid19 in Germany, this should be changed and the best interests of the children and especially their rights should be accorded primary importance in the decision-making process. After all, for other fundamental rights such as the freedom of religion this is already the case,^[20] but their advantage is, of course, that they are explicitly written into the constitution.

4. The right to life, survival and development

Just like school closures need to be avoided, it is equally important to protect the life and well-being of the children when attending school during a pandemic. Since more than half of all adults have been vaccinated by now and the Standing Commission on Vaccination (Stiko) is also recommending the vaccination of 12–17-year-olds now, the risk of an infection and of severe cases is reduced for these groups. However, the delta variant of the virus remains dangerous for children under 12 years. These children have the right to be protected from an infection by the state under Article 6 of the CRC, as states must respect (refrain from violations), protect (from violations of private actors) and fulfil (i.e. enable the actual enjoyment of) the right to life, survival and development.^[21]

In addition to the state's obligation to protect children from infections and thus prevent severe courses of disease, the state also has a duty to protect and promote the development of children. This requires to ensure *"the child's physical, mental, spiritual, moral, psychological and social development."*

The state must protect the lives and development of children, but at the same time protect the health of the rest of the population and their lives. The less interpersonal contact there is, the easier it is to contain the virus, which is why schools and kindergartens were closed at the beginning of the pandemic. This proved to be effective for the containment of the virus.^[22] However, besides a violation of the right to education as demonstrated above, the school closures led also to a violation of the right to development for many children due to the lack of social contact with peers^[23] and the danger of domestic violence, that increased with the duration of the lockdown.^[24] For the 4th wave now, the introduction of safeguards like contact tracing, testing, change lessons and air filters, enables the state to keep schools open and

still fulfil its obligation under Art. 6 CRC. Especially in view of the increased numbers of domestic violence due to the lockdown measures^[25] and the importance of the school for the psychological well-being for children,^[26] schools should only be closed, as a last resort, if at all, as has been agreed upon by the Länder.

5. Respect for the views of the child

Art. 12 CRC requires the states to pay due respect to the views of the child, which necessitates their participation e.g., in judicial proceedings (Art. 12 (2)), but also in other areas that concern them (Art. 12 (1)).^[27] It suffices for the child to have “a sufficient understanding to be capable of appropriately forming his or her views on the matter”,^[28] to have a right to be heard and their views given due weight.

For the fulfilment of the obligations under the CRC, the Committee on the Rights of the Child urges states to *inter alia* “establish independent human rights institutions, such as children’s ombudsmen or commissioners with a broad children’s rights mandate.”^[29]

Germany is one of the few European countries that does not have an ombudsman or children’s commissioner.^[30] The only body that monitors the implementation of Children’s Rights Commission is the German Institute for Human Rights. Unlike the Parliamentary Commissioner for the Armed Forces, there is no such representation of children’s interests in the German Bundestag.^[31] This means that there is also no central point of contact for children to express their views, or the possibility of regular hearings and inclusion of these views by the legislator on the federal level. Even the Children’s Commission (a subcommittee of the Committee on Family Affairs, Senior Citizens, Women and Youth) of the Bundestag only hears adult experts in its meetings, but no children or young people.^[32] Especially during the pandemic, there was a lot of talk about children instead of with children, the lack of representation of interests in the parliaments at federal and constituent state level led to decisions that mostly forgot about children. Thus, shops were opened before schools, hotels and restaurants before children’s playgrounds and gyms/sports facilities, where children could spend their free time.

Hence, even if children’s rights are not included in the constitution, at least the creation of a children’s ombudsman should be addressed in the next legislative period. If there is no political consensus on that, a first step towards an effective implementation of the CRC would be the actual consideration of already existing children parliaments etc. during the decision-making process.^[33] This is necessary to fulfil the obligations under Art. 12 CRC.

6. Conclusion

As has been shown, the implementation of the Convention on the Rights of the Child in Germany is inadequate, meaning that the (best) interests of children are not sufficiently considered, especially by politicians, which leads to situations where children’s rights are not adequately secured. This has become particularly evident during the pandemic. For the situation of children in Germany, it would therefore be helpful to give children’s rights constitutional status in order to constantly remind the legislative, executive and judicial branch about them. The constitutionalisation should be an objective of the next legislative period.^[34] At the very least, however, the Convention on the Rights of the Child should actually be given due consideration in future measures to contain the spread of the pandemic, as has been pointed out in this short reminder.

*Dipl.-Jur. Julia Jungfleisch, LL.M. is Research Associate and PhD candidate at the chair of Prof. Dr. Thomas Giegerich, LL.M.

^[2] Optional Protocol to the Convention on the Rights of the Child on involvement of children in armed conflict, UNTS vol. 2173, p. 222; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, UNTS vol. 2171, p. 227; Optional Protocol to the Convention on the Rights of the Child on a communications procedure, A/RES/66/138.

^[3] See e.g. BVerfG, Order of the Second Senate of 29 January 2019 – 2 BvC 62/14 –, paras. 61ff.

^[4] Art. 4 ICCPR.

^[5] Art. 15 ECHR

^[6] Committee on the Rights of the Child (CRC), List of issues in relation to the combined 5th and 6th periodic reports of Germany, CRC/C/DEU/Q/5-6, para.2.

^[7] N.N., Kinderrechte vorerst nicht im Grundgesetz, Tagesschau online, <https://www.tagesschau.de/inland/innenpolitik/kinderrechte-grundgesetz-113.html>.

^[8] see e.g. CRC, General Guidelines, CRC/C/58/Rev.3, para.23.

^[9] Besson/Kleber, The Right to Non-Discrimination in: Tobin (Ed.), The Convention on the Rights of the Child, p. 51f.

^[10] Schmahl, Kinderrechtskonvention, 2nd ed. 2013, Art. 2, para.6.

^[11] Art. 14 ECHR, Art. 2, 26 ICCPR

^[12] as there are other vaccines for children being clinically tested, protection for children under the age of 12 becomes foreseeable, as does the adjustment of the state’s recommendation for vaccination.

^[13] Monitoringstelle UN-Kinderrechtskonvention, Ergänzung zum Parallelbericht der Monitoringstelle UN-KRK, p. 1, https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Weitere_Publikationen/Ergaenzung_zum_Parallelbericht_der_Monitoring_Stelle_UN_I Lindner, Ansprüche auf Gesundheitsleistungen für Asylsuchende in Deutschland – Rechtslage und Reformbedarfe, p. 22, https://forum-midem.de/cms/data/fm/user_upload/Publikationen/TUD_MIDEM_PolicyPaper_2021-2_.pdf

- [14] with concrete recommendations see: Lindner, Ansprüche auf Gesundheitsleistungen für Asylsuchende in Deutschland – Rechtslage und Reformbedarfe, p. 22-24, https://forum-midem.de/cms/data/fm/user_upload/Publikationen/TUD_MIDEM_PolicyPaper_2021-2_.pdf
- [15] see already before the pandemic: Schmahl, Kinderrechtskonvention, 2nd edition 2017, Art. 24, Rn. 27f.
- [16] Availability, Accessibility, Adaptability and Acceptability, CESCR, General Comment No. 13: The Right to Education (Nr. 13), E/C.12/1999/10.
- [17] See for example: LSG Thüringen, Beschluss vom 08.01.2021 – L 9 AS 862/20 B ER and LSG Nordrhein-Westfalen, Beschluss vom 22.05.2020 – L 7 AS 719/20 B ER, L 7 AS 720/20 B.
- [18] “encompassing all public and private social welfare institutions, courts of law, administrative authorities and legislative bodies involving or concerning children”
- [19] The non binding agreement is available at: <https://www.bundesregierung.de/resource/blob/974430/1872054/66dba48b5b63d8817615d11edaaed849/2021-03-03-mpk-data.pdf?download=1>; a binding version of the Bundesnotbremse was added into §28b of the Infection protection act in April 2021 (BGBl. 2021, Teil I Nr. 18, p.802-807; however, the child’s best interests and the right to education were also not considered during the legislative process.
- [20] even if a judgement of the federal Constitutional Court was necessary at first: http://www.bverfg.de/e/qk20200429_1bvq004420.html
- [21] Peleg, Tobin, in: Tobin, (ed.) The UN Convention on the Rights of the Child – A commentary, 2019, Art. 6, p. 198f.
- [22] so for example for the US: Auger, K. A., Shah, S. S., Richardson, T., Hartley, D., Hall, M., Warniment, A. et al. (2020). Association between statewide school closure and COVID-19 incidence and mortality in the US. *Jama*, 324(9), 859-870.
- [23] Dritte Adhoc-Stellungnahme der Leopoldina 13th April 2020, p. 13, https://www.leopoldina.org/uploads/tx_leopublication/2020_Leopoldina-Stellungnahmen_Coronavirus-Pandemie_1-7.pdf.
- [24] on the effects of the general containment measures see: Campbell, An increasing risk of family violence during the Covid-19 pandemic: Strengthening community collaborations to save lives, *Forensic Science International reports* 2 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7152912/pdf/main.pdf>
- [25] Hans Bertram, Kinder – Unsere Zukunft! Der Unicef-Bericht zur Lage der Kinder in Deutschland 2021, S.98.
- [26] Langmeyer et.al, Kind sein in Zeiten von Corona – Ergebnisbericht zur Situation von Kindern während des Lockdowns im Frühjahr 2020, p. 65, <https://www.dji.de/themen/familie/kindsein-in-zeiten-von-corona-studienergebnisse.html>
- [27] the Committee on the Rights of the Child interprets “all matters affecting the child” in a broad way: “Thus states should carefully listen to children’s views wherever their perspective can enhance the quality of solutions.” General Comment No. 12, The right of the child to be heard, CRC/C/GC/12, para. 27.
- [28] CRC, General Comment Nr. 8, para. 21 (Article 12).
- [29] General Comment No. 12, para. 49 with a hint to General Comment No. 2 on the role of independent human rights institutions.
- [30] *Liebel* in: Ausschuss für Familie, Senioren, Frauen und Jugend, Protokoll der 52. Sitzung 25.01.2016, S. 16.
- [31] the children commission is a subcommittee of the Committee on Family Affairs, Senior Citizens, Women and Youth and thus has even less competences and can be easily abolished. It is not comparable with the Commissioner for the Armed Forces.
- [32] even during the discussions about the constitutionalization of children’s rights, children were not heard by the institutions, see: Wapler, Und ewig grüßt das Kindeswohl, *Verfassungsblog* 14.01.2021, <https://verfassungsblog.de/und-ewig-grust-das-kindeswohl/>.
- [33] Ergänzung zum Parallelbericht der Monitoring Stelle UN-KRK, S. 10, https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Weitere_Publikationen/Ergaenzung_zum_Parallelbericht_der_Monitoring_Stelle_UN_I
- [34] See election programmes of Bündnis 90/Die Grünen, p. 43; SPD, p. 40 and Die Linke, p. 30; the constitutionalisation is not mentioned in the programs of CDU/CSU and FDP. The AfD wants a state goal of family-friendliness, but explicitly does not want to include basic rights for children, S. 109.