

National CRC Monitoring Mechanism

Children's Rights into the Basic Law

Questions on the current legislative proposal for Article 6 (2) of the Basic Law

Factsheet, January 2021

Background

The incorporation of children's rights into the Basic Law (*Grundgesetz*), Germany's constitution, has been a key demand of children's rights advocates for years. Since its establishment in 2015, the National Monitoring Mechanism for the UN Convention on the Rights of the Child at the German Institute for Human Rights has been among those actively urging their inclusion in the Basic Law. The UN Committee for the Rights of the Child has repeatedly addressed recommendations to this effect to Germany, most recently in its 2014 Concluding Observations.

The Federal Government declared its intention to incorporate children's rights into the Basic Law in its current coalition agreement (line 801 ff.).

A federal-Länder working group set up to realise this intention published a first set of proposals for the wording in its final report in October 2019. Another draft came out in late November 2019, this time from the Federal Ministry of Justice and Consumer Protection (BMJV). This draft, which took the form of a clause to be inserted into Article 6 of the Basic Law as paragraph 1a, drew widespread debate and criticism (inter alia here and here on www.verfassungsblog.de, in a study by the Research Services of the Bundestag and in a position paper of the German Institute for Human Rights). It was never conveyed to the Federal Parliament as it was never officially published as either a ministerial or government draft.

Another working group was then set up within the coalition committee, based on an agreement among the leaders of the coalition parties. This group's proposal for a clause incorporating children's rights into the Basic Law came out in the press on 11 January 2021 and was published in a press release by the BMJV the next day, 12 January 2021. In the meantime, an official government draft was published¹.

Since 11 January 2021, the current draft, which aims for the extension of paragraph 2 in Article 6 of the Basic Law, has been the subject of debate as well as criticism (on Verfassungsblog.de, in numerous press releases, including this one from Aktionsbündnis Kinderrechte ins Grundgesetz, and elsewhere).

¹ The government draft in German language can be found here.

The provisions from the UN Convention on the Rights of the Child, the EU Charter of Fundamental Rights, the BMJV draft (2019) and the current draft (2021)²

UN Convention on the Rights of the Child	EU Charter of Fundamental Rights	Draft provision of 25 Oct. 2019	Draft provision of 11 Jan. 2021
<p>General principles of the UN CRC</p> <ul style="list-style-type: none"> - Non-discrimination principle (Art. 2) - Primary consideration of the best interests of the child (Art. 3) - Child's right to life, survival and development (Art. 6) - Children's right to be heard and have their views taken into account (Art. 12) <p>Of particular relevance with respect to the draft provision:</p>	<p>The Charter of Fundamental Rights of the European Union (2010/C 83/02) addresses children's rights in Article 24</p>	<p>The draft that came out on 25 Oct. 2019 provided for the insertion of a paragraph 1a into Article 6 of the Basic Law, worded as follows:</p>	<p>The draft released to the press on 11 Jan. 2021 provides for the extension of Article 6, paragraph 2 of the Basic Law as follows:</p>
<p>Article 3, UN CRC</p> <p>1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.</p> <p>Article 12, UN CRC</p> <p>1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.</p>	<p>Rights of the Child</p> <p>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.</p> <p>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.</p> <p>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.</p>	<p>"Every child shall have the right to respect for and protection and promotion of his or her fundamental rights, including his or her right to development as a responsible individual in the social community. The best interests of children must be taken into account in an appropriate manner in all state actions directly concerning their rights. Every child has the right to a hearing in front of the law in all state decisions directly concerning his or her rights."</p>	<p>"The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty. [current version of para. 2 ends here] The constitutional rights of children, including their right to development as responsible individuals, must be respected and protected. Children's best interests must be taken into account in an appropriate manner. The constitutional entitlement of children to a fair hearing in front of the law must be ensured. The primary responsibility of the parents shall remain unaffected."</p>

² The German language drafts can be found [here](#) (p. 112) and [here](#). The translation of the current proposal is that on [the website of the Federal Government](#), which was apparently prepared primarily for informational purposes. In it, certain German terms are rendered differently than they are in the English translation of the Basic Law on the same site. The translation of the earlier draft, prepared for this factsheet, uses the terms used in the Government's translation of the later draft to avoid suggesting that the language in the two drafts differs in those points. But see notes 2 and 6 – trans.

Questions

In the view of the National CRC Monitoring Mechanism, the latest draft clause (for insertion in Article 6 (2) of the Basic Law) raises the following questions:

What, specifically, is meant by “constitutional rights of children”?

Is unclear what, specifically, the phrase “constitutional rights of children” is intended to convey: Is “constitutional” used in a restrictive sense – do the constitutional rights of children constitute a different set of rights than those articulated the UN Convention on the Rights of the Child? Alternatively, is the adjective intended to strengthen children’s rights by underlining their constitutional status?

Why are the best interests of the child to be “taken into account in an appropriate manner” rather than be a primary consideration?

The draft provides for children’s best interests to be “taken into account in an appropriate manner” since it follows from the proportionality principle that any legal status protected by fundamental and human rights must be taken into due account, this is an empty phrase in constitutional law.³ Using the formulation “primary consideration”, the standard of the Convention on the Rights of the Child, instead would not mean that the state would cease to seek an equitable balance between affected legal interests: a state that gives primary consideration to the best interests of the child might still take a decision that runs counter to those interests if doing so would protect overriding legal interests and be proportional.⁴ The decisive factor here is that the best interests of the child constitute only “a” primary consideration, not “the” primary consideration. Thus, the legislature should understand the wording of Article 3 of the Convention on the Rights of the Child (UNCRC) and of Article 24 of the EU Charter of Fundamental Rights (EUCFR) as a success story to be learned from.⁵ In the view of the National CRC Monitoring Mechanism, the wording in the Basic Law should not fall short of the standards in the UN Convention or the EU Charter.

Why are children only entitled to “a fair hearing in front of the law”?

The draft amendment provides for children to have a constitutional entitlement to a fair hearing “in front of the law”⁶ (in line with Art. 103 of the Basic Law). The right of children to express their views in all matters which concern them is one of the key standards of the Convention on the Rights of the Child (Article 12, UNCRC). It is by no means confined to judicial or administrative proceedings but pertains to all state actions. The same broad scope is present in Article 24 of the Charter of Fundamental Rights. In the view of the National CRC Monitoring Mechanism, the entire provision in Article 12 of the Convention on the Rights of the Child should constitute an indispensable part of any constitutional amendment of this kind.

What, precisely, is meant by “the primary responsibility of the parents”?

Children’s rights are set out in the same paragraph that sets out parental rights. Is the last sentence in the draft provision intended as a repeated reference to parental rights, or what is meant, exactly, by “primary responsibility of the parents”? The parent-child relation in Germany is in balance – and it is

³ For more information on this, see Deutsches Institut für Menschenrechte (2019): Kinderrechte ins Grundgesetz. Stellungnahme. Berlin, page 5; for a more in-depth treatment, see Grzeszick, in: Maunz/Dürig, Grundgesetz-Kommentar, 87. EL, March 2019, Art. 20 GG Rn. 107.

⁴ UN Doc. CRC/C/GC/14, para. 39.

⁵ The choice to use the indefinite rather than the definite article before primary in Art. 3, UNCRC, was deliberate; further, a deliberate decision was taken to use the adjective “primary” rather than “paramount”. For a detailed treatment of this topic, see OHCHR, Legislative History of the Convention on the rights of the child, Volume I, 2007, pp. 339 and 344 ff.

⁶ “*rechtliches Gehör*”. The English translation of the Basic Law on the Federal Government’s website renders this as “in accordance with law” in the context of Article 103 (1): “In the courts every person shall be entitled to a hearing.” Cf. note 2.– trans.

guaranteed not only by Article 6 of the Basic Law but also by Article 5 of the UN Convention on the Rights of the Child.⁷

Conclusion

From a children's rights perspective, it is necessary to modify the wording in the current draft provision intended to incorporate children's rights into the Basic Law in such a way that the Basic Law provides the same objective guarantees provided by Articles 3 and 12 of the UN Convention on the Rights of the Child and Article 24 of the EU Charter on Fundamental Rights, without restriction and coinciding in all points. One particularly cogent argument in favour of the legislature allowing itself to be guided by the wording in Article 3 of the Convention and in Article 24 of the Charter is that the phrasing in those articles is the result of years of negotiations in which ways were sought and found to address the very same concerns that are now being voiced once again in the current debate.⁸

When drafting new constitutional provisions, the legislature should ensure congruence with international law, and formulate the fundamental rights in light of the international human rights conventions. This point is of particular relevance for the application and validity of the EU Charter of Fundamental Rights, for by failing to ensure such congruence in a constitutional amendment, the legislature would contribute towards refuting the presumption that the application of the fundamental rights enshrined in the Basic Law will ensure the level of protection that the Charter provides.⁹

Bearing in mind the points of criticism set out above, the incorporation of children's rights into the Basic Law, as a political undertaking, is worthy of unqualified support, and is well suited to strengthening the rights of children and increasing their visibility.

The National CRC Monitoring Mechanism wishes to point out that the weaknesses in the latest draft provision cannot be remedied simply by including of clarifying remarks in the explanatory memorandum. In the view of the National CRC Monitoring Mechanism, revision of the wording is absolutely necessary from the perspective of children's rights.

UN Convention on the Rights of the Child

The UN Convention on the Rights of the Child was adopted by the General Assembly of the United Nations on 20 November 1989. It is an instrument of international law that formulates the special provision, protection and participation rights of children as human rights holders. The Convention entered into force in Germany on 5 April 1992 after its approval by the Bundestag and the Bundesrat. Its general principles include the principle of non-discrimination, formulated in Article 2; the best interests of the child as a primary consideration, Article 3; the child's right to life, survival and development, Article 6; and children's right to express their views and have them taken into account (participation), Article 12. Of key importance in this respect is that these general principles are interdependent and also come into play whenever any other individual Convention rights are applied.

National CRC Monitoring Mechanism

Since its establishment in mid-2015, the National CRC Monitoring Mechanism has supported and monitored the implementation of the UN Convention on the Rights of the Child (UNCRC) in Germany. In doing so, it pursues the mandate of promoting and protecting children's rights within the meaning of the UN Convention on the Rights of the Child and of monitoring and assessing, through a critical lens, the

⁷ In addition to the parent-child relation there is also a child-state relation, c.f. Deutsches Institut für Menschenrechte (2019): *Kinderrechte ins Grundgesetz*. Stellungnahme. Berlin, p. 7. For further information on this, see the opinion prepared by legal scholars Prof. Dr. Dr. Rainer Hofmann and Dr. Philipp Donath: "Gutachten bezüglich der ausdrücklichen Aufnahme von Kinderrechten in das Grundgesetz nach Maßgabe der Grundprinzipien der UN-Kinderrechtskonvention", (2017).

⁸ This holds particularly true with respect to the objectively inaccurate premise that a primary consideration of the best interests of the child would establish an abstract/universal primacy of the best interests of the child. An absolute effect of the best interests of the child of this kind is recognised by the UN Convention on the Rights of the Child only in the context of adoption, cf. Article 21; the Basic Law need not incorporate a special provision of this kind.

⁹ BVerfG, Order of the First Senate of 06 Nov. 2019, BvR 16/13, para. 55, and Gerbig, Stephan (2020): *Kinderrechte ins Grundgesetz – Potenzial für eine menschen-rechtliche Erfolgsgeschichte*. Online at: <https://verfassungsblog.de/kinderrechte-ins-grundgesetz-potenzial-fuer-einemenschenrechtliche-erfolgsgeschichte/> (last retrieved: 13 Jan. 2021).

implementation of the Convention in Germany by all public authorities. The independence of the National CRC Monitoring Mechanism, as part of the German Institute for Human Rights, is guaranteed by the Act on the Legal Status and Mandate of the German Institute for Human Rights (GIHR).

Further information

Deutsches Institut für Menschenrechte (18 Jan. 2021): Kinderrechte ins Grundgesetz – Institut fordert mehr Kindeswohl und Beteiligungsrechte. Press release.

<https://www.institut-fuer-menschenrechte.de/aktuelles/detail/institut-fordert-mehr-kindeswohl-undbeteiligungsrechte>

Deutsches Institut für Menschenrechte (2020): Kinderrechte ins Grundgesetz. Stellungnahme zum Referentenentwurf eines Gesetzes zur Änderung des Grundgesetzes zur ausdrücklichen Verankerung der Kinderrechte. Position paper.

<https://www.institut-fuer-menschenrechte.de/publikationen/detail/kinderrechte-ins-grundgesetz>

Deutsches Institut für Menschenrechte (20 Feb. 2020): Kinderrechte ins Grundgesetz – mit einem starken Beteiligungsrecht. Press release.

<https://www.institut-fuer-menschenrechte.de/aktuelles/detail/kinderrechte-ins-grundgesetz-mit-einemstarken-beteiligungsrecht>

Contact

National CRC Monitoring Mechanism – German Institute for Human Rights

e-Mail: un-krk@institut-fuer-menschenrechte.de

Website: www.institut-fuer-menschenrechte.de

Twitter: @DIMR_Berlin

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