Child protection in Germany

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Abstract
The article looks at the history of childhood in the society, the country of Germany, and abroad. Today’s view of children as legal persons, recognizing their endowment with competencies and resources but also their ontological dependence, is a rather ‘new’ perspective in human history. Therefore the article first focuses onto the UN-Child-Right’s-Convention which was ratified in Germany in 1992. Second, a closer look at the development of the legal foundations of child protection in Germany shows how child protection in Germany was developed. The reader will get an overview about the child protection system in Germany, afterwards. The article ends with some recommendations to establish a child-rights-focused perspective in the child protection system in Germany.

Keywords: child protection, UN-Child-Right’s-Convention, childhood, Germany

1. Introduction: historical development of childhood in Germany
Any¹ understanding of current child protection in Germany has to look at the history of childhood in the society, the country, and abroad. Today’s view of children as legal persons, recognizing their endowment with competencies and resources but also their ontological dependence, is a rather ‘new’ perspective in human history. In the Middle Ages, children were viewed as ‘little adults’ and, in later times, as beings ‘able to be reared’ and ‘in need of rearing’. It was not until the beginning of the twentieth century that the Swedish women’s rights advocate and liberal educator Ellen Key proclaimed the new century to be the ‘century

¹ Thanks to the translator Jonathan Harrow in Mulsum, Germany.
of the child’. The concern then became to shift the focus onto children’s need for protection and their rights to have a share of and participate in society.

**Viewing the child as subject: derivation from the history of childhood and childhood studies**

The particular vulnerability of children and, thereby, their specific need for protection, but also their own resources and powers, were not recognized from the start. This only took place, and is continuing to take place, as a function of ideas in society (‘orders’) and images of children and childhood (Lutz, Rehbein, 2016). Children and childhoods are not categories that exist per se; they are always constructed and then furnished with meanings and ideas that depend on society and are therefore mutable (Andresen, Diehm, 2006). These can change strongly as a function of societal and epochal ideas on children and their being. In her book *Kindheitsgeschichte* [Childhood history], Martina Winkler (2017) gives a detailed account of historical childhood studies. She points out that being able to understand and trace developments in society in their entirety calls for a thorough integration of both how children are seen and their history (Winkler, 2017: 12). The outlook on ‘the’ child was always diverse: ‘The breadth here extended from “fundamentally evil and afflicted with original sin” over a “tabula rasa” offering guardians unlimited possibilities of shaping the child, up to the ideal of innocence and goodness’ (Winkler, 2017: 12, translated).

Büchner (2002) points out how childhood—just like the family—is a way of living together that has developed historically. In the Middle Ages, children contributed their part to the adult world as soon as they were able to walk; and, just like their parents, they had to work to earn a living and ensure their survival. They learned the duties and rights prevailing in their society directly through life itself without any need for special institutions such as schools. Büchner (2002: 479, translated) notes that ‘the gradual separation of children’s lives from the society of adults and the increasing organization of childhood as a pedagogically protected space’ began at the end of the Renaissance. At the same time, childhood also started to be discovered as a resource that could be developed and exploited: children could acquire a value in the future. However, the idea of ‘the intrinsic rights of the child’ was formulated particularly by the philosopher and educator Jean-Jacques Rousseau (1712–1778) who addressed and

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2 In her book *Kindheitsgeschichte*, the historian Martina Winkler (2018: 100–101) is right to point out that Key’s arguments should certainly be viewed critically. With her strong social Darwinist attitude and the idea of a ‘better human species’, Ellen Key did not even rule out the use of euthanasia.
promoted it in his work *Emile*. Such ideas about the intrinsic value of childhood then evolved fully in the Age of Enlightenment and have persisted to this day.

This brief sketch of the history of childhood shows that childhood and being a child cannot be regarded as a natural state, but as a societal phenomenon or, to put in social science terms, a social construct (Alanen, 1988).

The ‘new’ view of childhood and children since the Enlightenment led to children being viewed as ‘growing up’ and ‘becoming’ and thereby ‘not yet finished’. Berry Mayall (2002) has pointed out how the way this perspective linked the label ‘child’ to that of the ‘adult’ resulted in children being defined *over* adults and vice versa (see also Fangmeyer, Mierendorff, 2017). Inherent to this is an understanding that children are ‘unfinished’; not yet ready, but incomplete and in a stage of development. This does not recognize or even blanks out the competencies and resources that children already possess as the subjects and constructors of their lifeworlds (Alanen, 1988 and 2005). Hence, even socialization theory contains the underlying concept that being a child and growing up have their ‘end and also [their] goal in being adult’ (Zeiher, 1996: 31, translated). Children are therefore socially becoming and not yet being (Alanen, 2005: 67).

The 1980s saw a paradigmatic shift in the perspective on the child with Scandinavian and English-language research taking a ‘pioneering role’ (Hengst, 2002: 57). These so-called new social childhood studies were particularly critical of the aforementioned view of the child as ‘becoming’, as an individual who is still being socialized and thereby not yet complete. It no longer viewed children only as ‘becoming’ but, in contrast, as ‘being’; as autonomous subjects and actors in their lifeworlds (Büchner, 2002). This led to the development of a concept of children as ‘social actors’ and ‘constructors of their own personality’ (Hurrelmann, Bründel, 2003: 44). James and James (2008: 128) summarize this as follows: ‘significantly, this has involved seeing children as social actors who engage with the social world, rather than just as the passive receivers of adult wisdom.’ The childhood phase is no longer viewed exclusively as an intermediate stage on the way to becoming an adult. Instead, children are viewed as being simultaneously both vulnerable and possessing resources. This changed outlook on children and childhood introduced by childhood studies gained momentum in

2. The UN Convention on the Rights of the Child and its implementation in Germany

Simply through being human, children also enjoy the universal rights that the General Assembly of the United Nations proclaimed and authorized in 1948 in the declaration of human rights in Paris. Article 1 of Germany’s Basic Law also recognizes the rights of every person. Nonetheless, there are good reasons not just to subsume children and youths under these universal rights, but also to assign them additional age-appropriate rights. Children and youths are not simply small adults, and they are also not just one of many sub-groups in society. As they grow from birth to maturity, they are in need of not only (1) particular protection but also (2) various forms of support and promotion. Because it is not just the circumstances but also the needs and interests of children and youths that differ from those of adults, they also need (3) age-appropriate opportunities to participate in society. These three particular needs and concerns of children in the areas of protection, support, and participation have been met by placing them on a legal footing worldwide. On 20 November 1989, the General Assembly of the United Nations adopted the ‘Convention on the Rights of the Child’ (UN-CRC). On 20 September 1990, the Convention became binding in international law. The UN-CRC’s definition of ‘child’ covers all people aged 0 to 18 years. One central aspect of the convention is that it recognizes children as having human rights. In all its activities, the state has to respect the best interests of children or that of the individual child concerned. The task of the signatory states is to implement the UN-CRC within their respective territories.

The Federal Republic of Germany ratified the UN-CRC in 1992, albeit with specific restrictions placing German law relating to foreign nationals above the convention. In 2010, the German government retracted these restrictions. Since then, the UN-CRC applies without restriction in Germany and has the status of a German federal law (Biesel, Urban-Stahl, 2018: 181). Nonetheless, it is necessary to point out that Germany has yet to implement the UN-CRC.

3 The rights to protection, support, and participation are the basic pillars of the UN-CRC. Because they are interlinked so closely, the impairment of one right will generally impose constraints on one of the others, and they need to be achieved together (see Prengel, 2016: 33).
4 For example, until 15 July 2010, it was still possible to detain children and youths pending deportation in contradiction to Article 3(1) of the UN-CRC.
CRC de facto in line with its legal status. For example, draft legislation that also affects children and/or youths is not checked consistently on either a national or state level to ensure that it is consistent with the well-being of the child (as set down in Article 3 of the UN-CRC). Moreover, the integration of the views of the child in measures or decisions affecting children can also be judged as still insufficient—among others, in respecting the views of the child and the child’s perspective in court rulings or in considering children’s needs in urban development measures. These are just some examples of the inadequate implementation of the UN-CRC; many others could be added (Schattenbericht National Coalition [will be published in 2019, in appear]). It is precisely the area of participation and sharing stipulated alongside the protection and support of all 0- to 18-year-olds in the UN-CRC that can be viewed as being in particular need of further expansion.

3. Child protection in Germany: historical development and current situation
The history of childhood and the configuration of the UN-CRC sketched above show that childhood and children have been viewed and valued differently across various epochal phases. The UN-CRC contains the essential and valuable protective rights for children and youths aged 0- to 18-years that are also the particular focus of this article. However, the history of child protection also reveals changes with regard to children and youths. A closer look at the development of the legal foundations of child protection in Germany makes this particularly apparent, and will be sketched in the following.

3.1 Child protection in German law and the example of non-violent upbringing
From a historical perspective, the introduction of the German Civil Code (Bürgerliches Gesetzbuch, BGB) in 1900 can be viewed as the starting point of the development to anchor child protection in German law. At that time, child protection had a completely different connotation, because children were viewed above all as being in need of rearing, as dependent on the guiding hand of adults and particularly of the father. This can be interpreted as a legacy of the understanding of childhood and family in the educated middle class. Article 1631(2) of the BGB in 1900 stated: ‘By virtue of his right of care and custody, the father may use fair and reasonable means of correction on the child.’ This regulation allowing corporal punishment remained law until it was modified in 1958. ‘However, the reason for this modification was not, as one might suppose today, criticism of the legitimation of violence in childrearing, but that the regulation violated the principle of equal treatment for men and
women’ (Biesel, Urban-Stahl, 2018: 186, translated). Put briefly, the perspective of the time was that if the father and thereby the man in the house should be allowed to (physically) discipline children, the mother and the woman in the house should have the same right.

This image of the child in which the relation between adults and children was based on a generational power hierarchy first started to change gradually in the 1980s. Such a changing view of ‘the’ child was also reflected in, among others, the working group set up on the basis of the draft convention on the rights of the child submitted by Poland to the Commission on Human Rights. This started work in 1979—the International Year of the Child—but did not submit the comprehensive outcome of its work until ten years later.

Through the ratification of the UN-CRC by Germany in 1992, Article 19 also became law. This states:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Almost ten more years would go by before this right to a non-violent upbringing anchored in the UN-CRC was actually reflected in German jurisprudence. ‘In the year 2000, the act to prohibit violence in the upbringing of children finally introduced the right to a non-violent upbringing in Germany’ (Biesel, Urban-Stahl, 2018: 188, translated). Article 1631(2) BGB now states: ‘Children have a right to non-violent upbringing. Physical punishments, psychological injuries, and other degrading measures are inadmissible’ (translated). This development can be taken as an example for how child protection has also changed over the years and correspondingly come to be understood in society. There are also further legal foundations that are relevant for the topic of child protection in Germany.
First of all, the rearing and care of children by parents is set down in the Basic Law of the Federal Republic of Germany. Article 6(2) GG states: ‘The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them’ (translated). The next section, 6(3), continues: ‘Children may be separated from their families against the will of their parents or guardians only pursuant to a law, and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect’ (translated). This obliges parents and legal guardians to ensure their children’s well-being. Sections 1666 and 1666a of the German Civil Code (BGB) regulate when custody must be taken away from the parents or legal guardians, and they do this through reference to the aforementioned sections of Article 6 in the Basic Law.

In addition, in 1990, after the reunification of the German Democratic Republic with the Federal Republic of Germany, the Eighth Book of the Code of Social Law (Sozialgesetzbuch VIII, SGB VIII) was introduced. This regulates the child and youth services in Germany that care for the needs of children, youths, and young adults up to the age of 27 years as well as those of their parents and legal guardians in a host of services (e.g. child day care, socio-educational provisions for young people, child and youth services, and much more). Alongside numerous amendments to SGB VIII, Article 8a in SGB VIII, introduced in 2005, is particularly relevant for child protection. This has promoted the legal regulation of child protection in Germany. It regulates mandates of protection for when the child’s well-being is threatened. Its initial focus is primarily on the youth office that has to ensure that appropriate measures are taken if it is suspected that a child’s well-being is at risk.

Finally, when presenting the legal framework on child protection in Germany, mention should be given to the Federal Child Protection Act (Bundeskinderschutzgesetz) that became law on 1 January 2012. Its main aspect is the so called Law on Cooperation and Information in Child Protection (KKG). This regulates, among others, ‘clarification of the cooperation with different professional groups active outside the child and youth services such as physicians and teachers […] in cases in which they become aware of serious indications of a threat to a child’s well-being’ (Biesel and Urban-Stahl, 2018: 192, translated)
3.2 Digression: experienced experts in the field

The formulation of Article 8a SGB VIII in 2005 resulted in a new work field: that of ‘experienced experts in the field’ known as insoweit erfahrenen Fachkräfte (IeF). The need for such trained professionals was further reinforced through the introduction of the Federal Child Protection Act in 2012. It stipulated that professionals who do not work in the traditional child and youth services are also obliged to report suspected child abuse. This required and requires expert consultants: ‘The IeF should support practitioners in the child and youth services and in other professions and work fields that do not have to deal with aspects of threats to children’s well-being in their daily work, and it should help them to assess concerns about the well-being of a child’ (Heinitz, Slüter, 2018: 46, translated). By taking further training courses, persons with professional training in education or psychology who already have practical experience with child protection can become certified IeFs.

The IeF’s task is to offer procedural counselling and support on cases of suspected child abuse to professionals working in child- and youth-related fields. One problem is that professionals seeking help are under great pressure due to an urgent need to act on their worries and concerns regarding the well-being of the child in their care or known to them.

The duty of the IeF ‘consists quite essentially in listening to the worries and questions of the advice-seeking professional who is responsible for the case and providing expert supervision and advice during the process of assessing the risk and planning assistance’ (Heinitz, Slüter, 2018: 48, translated).

An essential aspect here is how Article 8a of the SGB VIII specifies the inclusion of the parents and the children in procedural counselling. The IeF also supports and supervises the preparation of these discussions with children and parents. There are two problems here: the insufficient legal status of the IeF (Heinitz, Slüter, 2018: 57) and the insufficient resources assigned to them for their work.

3.3 Child and youth welfare services in Germany: the main actors

Drawing on the legal framing conditions for child protection in Germany, this section reports on the roles taken by the aforementioned and other main actors in the field. It is important to know that the relation between the state, parents, and children should be viewed as triangular.
Accordingly, child protection in Germany is organized as a family-oriented and family-preserving, but not as a punishment-oriented system (Biesel et al., 2019: 98). The Basic Law stipulates that parents are responsible for looking after and promoting the well-being of their children. The state offers a range of support services for this, but is not allowed to intervene without reason in the legally anchored parental rights and duties. At the same time, the state serves as a watchdog. If parental rights and duties are not exercised to the benefit of the child, the state can and must intervene actively. Nonetheless, ‘in accordance with the principle of proportionality […] intervening in parental rights is justified only to the extent necessary to ensure the child’s well-being. In addition, public services have precedence over interventions in parental rights if the former are suitable for ensuring the child’s well-being’ (Biesel, Urban-Stahl, 2018: 191, translated). These aforementioned public services are anchored in the child and youth services. The latest child and youth services report lists the following fields of activity as being essential in German child and youth services: day care services for children (Articles 22 to 24, SGB VIII), childrearing assistance (Articles 27 to 35, 41, SGB VIII), integration assistance (Article 35a, SGB VIII and chapter 6, SGB XII), child and youth work (Article 11, SGB VIII), social work for youth (Article 13, SGB VIII), threat assessments for the protection of children and youths (Article 8a, SGB VIII), taking into care (Article 42, SGB VIII), guardianships exercised by the local authority, statutory guardianships, guardianship procedures (Article 55, SGB VIII), and adoptions.

In Germany, youth offices have been assigned responsibility for carrying out the tasks in the child and youth services specified in SGB VIII. They can perform these tasks themselves or delegate them to actors in the private voluntary sector.

In the sense of the state’s function as a watchdog over child well-being, the youth office is also responsible for what are called ‘8a procedures’—inspections of potential threats to child well-being. If such inspections are urgent, responsibility for them is also shared with the family courts in Germany. In most youth offices, the general social work service [Allgemeine Soziale Dienst, ASD] is responsible for controlling and monitoring child well-being. ‘It is usually the general social work service in the youth office […] that has professional

5 The main task fields closely related to the topic of child protection are highlighted in bold. It also becomes clear here that the youth offices and also the general social work service do not just deal with the topic of child protection and threats to the child’s well-being, but also work in many other areas and fields involving children and youths.
responsibility for assessing risks and making decisions; occasionally there is also a specialized child protection service for this’ (Rauschenbach et al., 2018: 135, translated).

The current report on child and youth services (Kinder- und Jugendhilfereport 2018) states that in 2016, the number of 8a procedures in Germany was 136,925. This means that approximately 1 per cent of the under-18 population was subject to an 8a procedure (Rauschenbach et al., 2018: 138). The following graph from the 2018 report on child and youth services depicts the trend in assessing threats to child well-being in Germany from 2013 to 2016.

‘The general social services deliver and refer services and assistance aiming above all to support and strengthen families’ (Pothmann and Tabel 2018: 262, translated). Hence, ideally, the ASD is already involved before a threat to the child’s well-being emerges, and the family and children are already being cared for and supervised by ASD staff. ‘If serious indications [emphasis in original] of a threat to a child’s or youth’s well-being become known, ASD professionals perform assessments’ (Biesel, Urban-Stahl, 2018: 213, translated). If the professionals conclude that the child’s well-being is threatened, the youth office is obliged to offer appropriate assistance to the parents or legal guardians so that they can ward off the threat; or, otherwise, to refer the case to the family court in order, for example, to initiate taking the child into care (Zitelmann, 2011, 2018).

3.4 Preventive child protection: socio-educational provisions and early prevention

Germany has set up socio-educational provisions and early prevention to counter potential threats to a child’s well-being. In the sense of the state’s function as a watchdog, these ensure that parents and guardians are supported and supervised in their duty of caring for those in their charge.

The entry into force of the Child and Youth Well-Being Act (SGB VIII) in 1990/91, which codified central reforms in the sense of a stronger service orientation and culture of participation in the process of planning assistance (Article 36 SGB VIII), has led to both major differentiations and quantitative changes in socio-educational provisions. A look at the expenditures for public child and youth services reveals that
Socio-educational provisions are all those measures that can and should help parents to exercise their duty of care. They can take the form of, for example, a socio-educational family assistance that will support the family through regular home visits. This may additionally involve such instruments as counselling or supervisory work with parents, but also institutional care or foster care. ‘These services are roughly classified as ambulant, semi-residential, and residential support’ (Biesel et al., 2019: 105, translated). The central issue here is that the youth office cannot simply impose socio-educational provisions but always has to organize them together with the parents or guardians. Socio-educational provisions can be compulsory only in cases when the family court has to intervene because of an acute threat to the child’s well-being (ibid.).

With the term ‘early prevention’, the focus in recent years is on the preventive character of child protection in Germany. The introduction of the Federal Child Protection Act in 2012 was also accompanied by the launch of a national early prevention initiative and the setting up of the National Centre on Early Prevention (Nationale Zentrum Frühe Hilfen, NZFH) in the Federal Centre for Health Education (BZgA). The idea of early prevention should integrate other work fields alongside the child and youth services that also have an interest in child well-being such as the public health system. By taking a multi-professional perspective, this should link together professionals from various disciplines. To pursue this goal, a federal early prevention foundation (the Bundesstiftung Frühe Hilfen) started work on 1 January 2018, thereby consolidating the work of the national initiative for early prevention networks (Bundesinitiative Netzwerke Frühe Hilfen). ‘The national initiative’s task is to promote early prevention along with the psychosocial support of families with new-borns and infants aged up to three years. This involves bringing together all actors in child protection […] in a cooperative network.’

With the idea of early prevention, families with special support needs (e.g. socially disadvantaged families or families confronted with multiple stressors) should be accompanied
and supported right from the first family pregnancy. Thaiss (2016: 1245, translated) points to the need to optimize procedures here: ‘One precondition for early prevention to take effect is for early prevention and health education services to in any way gain access to larger numbers of vulnerable families.’ Biesel and Urban-Stahl note how important it is for services to trust those who are becoming or have just become parents, and hence the importance of early prevention being a voluntary provision: ‘In principle, early prevention is directed towards all new families or families with infants and young children. Its basis is trust. Families can, but do not have to take advantage of it’ (Biesel, Urban-Stahl, 2018: 314, translated). This is the reason for controversial discussions over whether to apply diagnostic procedures to determine a risk to the child’s well-being during early prevention and thereby ascertain specific risk factors in the families. One potential issue can be that it would create a danger that ‘[future] parents will be deterred by their application and could feel stigmatized’ (ibid.). It is also necessary to ensure that the early prevention for families that possibly have a greater need of support should not result in the establishment of a deficit orientation. Parents must continue to be seen and understood as partners who are oriented towards the well-being of their children (ibid.).

4. Outlook: in which direction can and should child protection in Germany develop further?

This article has shown that comprehensive child protection requires close cooperation between actors in the health system, the child and youth services, the police, the courts, and the psychosocial counselling services. Although the German child protection system has been developing in the direction of being family- and child-well-being-oriented in recent years, more work needs to be done on coordinating the different actors. Setting up so-called childhood houses\(^7\) throughout the nation in which children and youths exposed to violence could be cared for multi-professionally (through a cooperation between the police, prosecution service, medicine, psychological care, etc.) would be an important step in the more child-oriented direction.

At the same time, the general public needs to be better informed. Scandalous cases in the media involving extremely severe violations of child protection do not help to establish an

\(^7\) https://www.childhood-haus.de [retrieved on 28 April 2019]
understanding of child protection in which parents are clearly recognized as being primarily the protectors of children. As Biesel et al. (2019: 215, translated) note: ‘The broad general public, policymakers, and the media should acknowledge that Germany does a great deal to help children grow up well, but that—regardless of how much effort we make—we shall not succeed in protecting all children from threats to their well-being.’ This is a sad truth. Nonetheless, at the same time, it is still necessary to extend and further develop the established child protection system so that it can act according to a well-functioning, preventive approach. An essential element here is to increase the participation of children and youths themselves. The understanding of children and youths in society as a whole could be extended clearly in terms of how far the younger generation is perceived as being both able and willing to participate. Hence, viewing children and youths as actors and shapers of their lifeworlds should become established not just in childhood studies but in all the disciplines that work towards and for children. It is thought to be extremely problematic that the trends in child protection have not resulted in ‘children […] being consistently granted a perspective [of their own], and this being included consistently and in line with their developmental level in the process of providing assistance’ (Sehmer, Marks, 2018: 31, translated). In the sense of the UN Convention on the Rights of the Child, children and youths have to be recognized as the agents of their lifeworlds who have to be included in everything that concerns them. It is a task for society as a whole not only to inform children and youths about their rights, but also to create ways in which they can demand these rights. This requires adults as well to know just as much about the rights of children and youths and to honour these rights. It should not mean delegating responsibility for child protection only to children and youths themselves. That would be fatal. However, there is a strong need to broadly anchor and strengthen children’s perspectives and the naming of their needs. When the different professionals working with and for children and youths, the policymakers, and the general public in Germany as well as the children and youths themselves know children’s rights and thereby also the importance of child protection, and when compliance with these rights and protection is ensured in structurally anchored systems (e.g. corresponding ombudsman offices, corresponding professional knowledge among teachers, etc.), then progress will have been achieved in Germany’s child protection system.

References


