



BOFAXE

Hello, Can You Hear Me? (PART 1)

On Germany's Failure to Actively Listen to Its Children

— In March, the former Council of Europe Commissioner for Human Rights (“the Commissioner”), Dunja Mijatović, published a [report](#), following up on her visit to Germany in November 2023, where she had met with a variety of German authorities and civil human rights interlocutors. The report focuses on the structures that exist to protect and ensure human rights as well as on the accessibility of social rights. Therefore, it looks deeper into three aspects: the situation regarding children, persons with disabilities, and protection from discrimination (*Mijatović*, [para. 9](#)). This blogpost will focus on the aspects concerning children, providing the opportunity to look at this sector in more detail.

Taking the Commissioner’s criticism regarding the current (non-)existing structures and putting it in context with Germany’s obligations under the Convention on the Rights of the Child (“CRC”), it becomes apparent that it is not only a matter of how children’s rights could be strengthened in Germany. Rather, this comparison of the actual situation and the legal framework reveals that Germany is currently violating two of the key principles of the CRC: the best interests of the child and the child’s right to be heard. Thus, ultimately, depriving children of the opportunity to raise their voices.

The International Legal Framework

Article 3 (1) CRC orders the State Parties to take the best interests of the child into primary consideration in all actions concerning children. It obliges them further, to interpret legal provisions in a way which suits the child’s interests best and to guarantee that the child’s interests are included in the decision-making process (*GC No. 14*, [para. 6](#)). Since the child’s best interest can only be assessed properly when there is weight given to the child’s opinion, it is inseparably connected to Article 12 CRC, the child’s right to be heard (*GC No. 14*, [para. 43](#); *GC No. 12*, [para. 74](#)). Article 12 (1) CRC guarantees the children’s right to express their views freely and requires due consideration of these views. Adding to this, Article 12 (2) CRC imposes an obligation that within any kind of judicial and administrative proceedings, children must be provided with an opportunity to express their opinion. The Committee on the Rights of the Child (“Committee”) specifies that in case of a violation of Article 12 CRC, the child must be guaranteed access to complaint procedures and remedies, in a way that it feels confident in using these mechanisms (*GC No. 12*, [paras. 46-48](#)). Thus, while Article 3 (1) CRC sets the objective of realizing the child’s best interests, Article 12 CRC contains the procedure for hearing the child (*GC No. 14*, [para. 43](#); *GC No. 12*, [para. 74](#)).

The Current Situation in Germany

The CRC has the status of federal law in Germany, which is subordinate to the German Constitution (“GG”). However, in Germany, human rights are primarily protected in the form of constitutionally enshrined fundamental rights. While children certainly hold these fundamental rights, children-specific rights are limited to educational and family rights, in which children are rather seen as objects of care.

It could be argued that, due to the jurisprudence of the German federal constitutional court (“BVerfG”), in which international treaties have to be taken into account when interpreting German constitutional law (so-called “*Völkerrechtsfreundlichkeit des GG*”, e.g. *BVerfG*, [paras. 32, 33](#)), the CRC is already influencing decisions regarding children, thus leading to a comprehensive standard of protection. However, it should be noted that this interpretation may be easier to apply to equivalent rights that are already contained in the fundamental rights catalogue (e.g. right to life) than to child-specific rights that have no equivalent, such as the rights at issue here. Additionally, even assuming all German courts consistently applied the principle of “*Völkerrechtsfreundlichkeit*”, international law is not a direct constitutional standard of review (see e.g. *BVerfG*, [para. 32](#)). Consequently, even though people in Germany are entitled to raise a complaint in front of the BVerfG in cases where the state possibly impaired their fundamental rights (*Towfigh and Gleixner*, [p. 429](#)), they cannot raise a direct complaint regarding the violation of a human right contained in an international treaty (see e.g. *BVerfG*, [para. 32](#)). Therefore, including children’s rights (especially the CRC’s key principles) in the constitution, would not only lead to a higher recognition of these rights among the relevant authorities (*Mijatović*, [paras. 12, 49](#)), but open the possibility to directly claim these rights, albeit with the assistance of a legal representative. Despite the potential positive effects, this inclusion must be done in a way that truly reflects the high standard of the CRC and does not result in a watered-down protection of children’s rights (see *Graf* for a thorough debate on this risk). Whilst it would be a desirable step, the fact that the rights at issue have not yet been included in the GG does not in itself constitute a violation of the CRC.

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BOFAXE

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— However, Article 4 of the CRC obliges the State Parties to undertake all measures for the implementation of the rights within the CRC. This rather broad obligation is concretized by the Committee on the Rights of the Child (“Committee”) within its General Comments. To ensure compliance with Article 3 and 12 CRC, states are required to not only appropriately integrate the child’s best interests but to provide consistent application of them in every public action affecting children (GC No. 14, [para. 14](#)). The Commissioner describes a lack of binding standards regarding proceedings involving children and finds no coherent concept for the participation and position of children in these (*Mijatović*, [paras. 11, 49, 50](#)). Given that the consistent application of the child’s best interests is one of the core obligations of Article 3 (1) CRC and an important precondition to realize the child’s right to be heard, the lack of such a binding standard constitutes a violation of the CRC.

To ensure the right to be heard, States are obliged to provide independent structures for legal complaints (GC No. 12, [paras. 46-48](#); GC No. 5, [para. 24](#)). The report states that while there are some ways in which children are able to raise complaints or seek advice, there are only a few complaint mechanisms where children can turn to independently from their parents (*Mijatović*, [para. 49, 50](#)), which are mostly non-independent internal structures in schools (see *Deutsches Institut für Menschenrechte*). The proposed Children’s Commissioners (GC No. 12, [para. 49](#)) have only been established in four *Ländern* and their mandate does not extend to the receipt of individual complaints from children (*Mijatović*, [para. 14](#)). By not providing any independent, individual complaint mechanisms for children, Germany currently does not adequately guarantee the children’s right to be heard. Adding to this, children in care institutions are often not even made aware of their rights and/or are insufficiently consulted on measures taken on their behalf (*Mijatović*, [para. 18](#)), and there is an overall absence of systems supporting active participation and self-organization (*Mijatović*, [para. 17](#)). Although no specific measures to promote children’s self-organization are required of the State Parties, given Germany’s failure to implement any of the proposed measures, Germany cannot convincingly argue that it lives up to its obligations under Article 12 CRC.

The first two fundamental steps for Germany to live up to its commitments under Article 3 and 12 CRC would be (i) the adoption of a binding procedural standard that regulates how children are to be involved in a procedure that adequately addresses their interests and (ii) the establishment of easily accessible independent complaints mechanisms at multiple levels (e.g. school, municipal, Länder level). The fact that these essential requirements are not realized yet, significantly factors into the problem that seems to hinder effective implementation. Given that both the current government and the previous (more conservative) one have listed plenty of goals in their coalitions’ agreement as to how they will improve the situation for children (*Koalitionsvertrag 2021*, [pp. 93-102](#); *Koalitionsvertrag 2018*, [pp. 19-26](#)), the question of why these goals have only been implemented sparingly so far is certainly justified. Since most parties are in favor of strengthening children’s rights, a complete inability to agree on possible policies cannot be a plausible argument, leading to the conclusion that the implementation of these goals simply is not a priority. Germany, like other countries, is currently facing (international) crises, and the response seems to be to address the issues that are voiced most strongly. The identified lack of systems in which children can voice their opinions and make themselves heard, leads to their concerns being overlooked. Additionally, since children under the age of 16 are not allowed to vote (16-18 year-olds [are allowed](#) to vote for the European Parliament and partly at Länder level), they have little opportunity to actively participate, which results in their interests taking a back seat to those of potential voters. The consequence of all these factors is a vicious circle in which children have no opportunity to raise their voices and are therefore not heard.

Conclusion

While it is to be appreciated that the current German government included aspects to improve children’s rights in their [coalitions’ agreement](#), it is falling short of these promises and indeed of its obligations under the CRC. As Germany is directly confronted with the consequences of demographic change, the importance of ensuring youth participation is constantly rising. Though we may live in troubled times, neglecting children will not pave the way to a better and more peaceful future. Germany, it is time to listen to your children.