

WELLCHI NETWORK Workshop 2:  
**“Which are the provisions in Family Law that foster children’s well-being and  
which kind of reforms should be envisaged in this respect”**

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**Parental education, public education – a shifting balance. Some remarks on recent  
developments in Germany**

Abstract

- Education, care, schooling - how the relationship between parental rights and obligations and state intervention changed over time
- Education and care for children below school-age in Germany between public provision and maternal education: the factual situation and the legal framework
- Change is needed – but very slow and continuously blocked: the case of the ‘Day Care Development Act 2005’ in the FRG
- Why is this the case? Some remarks on particular institutional features: the importance of federalism and the strong position of the Federal Supreme Court

To educate and socialize children is a primary task of parents, and legally it is a main obligation of parents and a central aspect of ‘parental responsibility’. However, to socialize children is also a societal task, and through the introduction of obligatory schooling, starting in the second half of the 19<sup>th</sup> century, the state intervened into parental rights and limited them. Changing societal needs of qualifications and competences of individuals in a so-called ‘knowledge-based society’ where life-long learning is required, have not only lead to comparative empirical evaluation of pupils performance through studies like PISA and TITMUSS – and their results caused public concern, since the FRG was quite behind in the ranking. But also early childhood education of children below school age has attracted more and more public attention over the last years - the OECD-study ‘Starting strong’ (2001) can be taken as an indicator, and finally also the FRG participated, as the 19<sup>th</sup> country study.

Although the subject of early childhood education has gained publicity in debate in the FRG, political and institutional change is very slow. In the old Länder, the provision of child care is seen primarily as a maternal task, and public places for children under three or full-day places in kindergarten for those above three years are scarce. The new Länder display different patterns of provision; although serious cut-backs have taken place after reunification, the offer of full-day places for children of all age-groups below school-age meets in general the demand and is exceptional (OECD 2005). In order to improve the situation mainly in the old Länder of the FRG and to strive for compliance with the EU benchmarks to provide places for 33% of all young children up to the year 2010, in 2004 a draft statute was brought into parliamentary debate which involved reforms of public daycare provision as well as reforms of youth welfare law.

Only part of it was implemented by 1<sup>st</sup> of January 2005 as law, which brings about only modest reforms in the provision of public childcare: the central part of the Act is that minimum standards for the number of places are formulated explicitly (mainly related to both parents being employed or involved in training measures or full-time education). The whole parliamentary procedure was dominated by quarrels over financing structures and the distribution of competences between the Federal State, the Länder and municipal communities, which blocked further progress. The governing Socialdemocrat-Green coalition refrained even from more far-reaching initiatives in the 'shadow' of the case-law of the Federal Supreme Court on restrictions of legislative competences of the Federal State under the rules of the German Basic law.

The paper argues that a change in the relation (and regulation) of private (mainly maternal) and public education for young children in the FRG is urgently needed, but very slow or even blocked due to legal and institutional features, and explores these institutional aspects more in depth.

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## **Parental education, public education – a shifting balance**

### **Some remarks on recent developments in Germany**

#### **Education, care, schooling - how the relationship between parental rights and obligations, children's' rights and state intervention changed over time**

To educate and socialize children is a primary task and legally a main obligation of parents. However, to socialize children is also a societal task, and through the introduction of obligatory schooling, starting in the 18<sup>th</sup> century, the state intervened into parental rights and limited them. The limits of parents' rights to decide on the education and professional education and the extent to which the state may impose obligatory schooling have been subject to political fights and controversies, involving also the Church as a main provider of education in many countries. After compulsory schooling had been introduced in all European countries, it was extended up to the ages of 16 or even 18, mainly after WW II. Since parents have to maintain their children, the prolongation of obligatory schooling and educational periods has obvious financial consequences for parents. Parents' rights to intervene into a young person's decisions about future training or the job were already subject to judicial control under the General Prussian Code (ALR) of 1794, which allowed sons to participate in the decisions and provided for judicial control of conflict between a son and his parents.

The German Civil Code, in force since 1900, abolished these right of sons and re-established full paternal authority in deciding on the child's education and profession.

At the time, this was a matter of concern only for upper classes, but the expansion of education affected also other classes.<sup>1</sup> Case-law at the begin of the 1970ies shows the conflict level: the OLG Köln had to decide on a case where a 20 years old son had taken up a University study of sociology and philosophy, while the parents refused to consent and held that this was a 'breadless art'. The court upheld the parental decision and stated that parents had not abused (schuldhaft) their parental authority gravely and that therefore no room for state intervention was left.<sup>2</sup> At the end of the 1970ies, statutory reform took place, and parental authority rights with regard to decision-making on education became bound to the principle of the 'best interest of the child'; parents have to consider the capabilities and interests (Eignung und Neigung) of the child in taking decisions about its education and profession (this is the wording of para. 1631a German C.C. since 1980); in case of conflict another person (teacher or so) should be consulted, and the Court can substitute for the parental decision. The increasing maturity and insight of the child shall be taken into account; and in case of conflict parental rights and the child's right to choose an education and profession have to be balanced. The lowering of the age of majority to 18 years in 1974 helped to avoid many similar conflicts between parents and grown-up children (and shifted them to litigation about financing training and education of young adults).

Parental rights and duties are enshrined in art. 6 sec.2 German Basic Law, while the duty to attend school is regulated in the constitutions of the *Länder* – a consequence of federalism, which assigns the competence to regulate culture and formal education to the *Länder*. The relation between parental education and public education is subject to change and adapting to changing societal needs regarding the qualification of the future workforce; the borderline is shifting, not permanently fixed or quasi-natural, but a contested issue of policy-making. Nonetheless, suggestions like the one to lower the age limit for obligatory schooling to 5 years, or to introduce a kind of an obligatory 'kindergarten year' for 5-year old children – usually motivated by the idea of improving

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<sup>1</sup> Another development was the gender-neutral formulation of children's rights to education as part of parents' maintenance duties; the former obligation to provide a dowry for a daughter was abolished (in Germany in 1957).

<sup>2</sup> Oberlandesgericht Köln, decision of 20 November 1972, FamRZ 1973, 265.

the educational chances of children with insufficient knowledge of the German language or of disadvantaged family backgrounds – touch upon a taboo and risk to be emphatically rejected in the name of natural parental rights (although some countries, such as the Netherlands, took exactly this measure, in pursuit of the goal of reducing inequalities and enhancing equal opportunities). – Over the last years, the emphasis has come to lie on flexibility and life-long learning. Not only formal education, but also informal education for younger children below school-age is under debate currently. However, the legal framework and the relation between parental responsibility, children's rights and state intervention is profoundly different in this area.

### **Education and care for children below school-age in Germany between public provision and maternal education: the factual situation and the legal framework**

Changing societal needs of qualifications and competences of individuals in a so-called 'knowledge-based society' where life-long learning is required call for a change of the educational system in the FRG. The results of comparative empirical evaluations of pupils' performances through studies like PISA and TITMUSS have raised considerable public concern in the FRG, since Germany was quite behind in the international ranking. But not only school education, but also early childhood education of children below school age has attracted more and more public attention over the last years. The OECD-study 'Starting strong' (2001) can be taken as an indicator, and last year the FRG participated finally as the 19<sup>th</sup> country study (OECD 2005).

In the old Länder, the provision of child care has often been assigned primarily as a maternal task - although an expansion of childcare institutions had been demanded by women's lobbies for years, and surveys show that mothers of young children want to extend their employment hours and demand better childcare services. Public places in creches or with child-minders are provided only for 2.7% of children under three in the old Länder (compared to 37% in the new Länder). Full-day places in kindergarten for those above three years up to school age (starting with 6 years) are available only for about one fifth of all children of this age group. Places in after-school care (Hort) – remember that school ends in Germany at about 1 p.m., without provision of school meals – are available only for 6.4% of the children aged 6 to 10 years in the old Länder (compared to 67.6% in the new Länder). Within this 'split culture' in the FRG, the new

Länder display different patterns of provision; although serious cutbacks have taken place after reunification, the supply of full-day places for children of all age-groups below school-age in general meets the demand and is exceptional (OECD 2005).

The regulation of public childcare for children below school-age in the FRG is not integrated into the education system (as it was the case in the former GDR, and different from countries which follow the 'preschool model', such as France, Belgium, Luxemburg or Italy), but part of the youth assistance and welfare system. This has historical reasons – and is, taken together with some institutional features of federalism, a serious impediment for the further expansion and development of childcare institutions, as will be explained later on. While the 'kindergarten' was still under the auspices of school supervisors in pioneering times in the second half of the 19<sup>th</sup> century, it became integrated into the developing municipal health, youth and welfare services at the turn of the century. When the 'Imperial Youth Welfare Statute' was enacted in 1924, kindergarten, creches and day-care figured as part of youth welfare services within the responsibility of municipalities for communal services. Under the influence of the Catholic 'Zentrumspartei', the priority of 'private' charities and associations in providing these services – the so-called 'subsidiarity principle' which even nowadays dominates public social service provision in the FRG – was enshrined into this statute; the associations affiliated to the catholic or protestant church are therefore the most important providers of childcare services (at least in the old Länder). The 'path dependency' of this institutional and structural decision is still visible today (see below), although the integration of daycare institutions for young children into the educational system has been on the agenda since the 1970ies.

The provision of daycare for children is based on an integrated pedagogical concept which encompasses education and care (Erziehung, Bildung und Betreuung); but how far this broad concept has been implemented is subject to critical debate. The short opening hours were (and still widely are) based on the idea of the 'mother at home' available to care for the child and of the kindergarten only 'supplementing' parental education. The report of the OECD (2005) calls this the 'maternalist assumption' of the (West)German daycare system, that young children are best cared for by their mother. More extensive provisions were targeted at children 'at risk' and from families where

both parents or a lone parent ‘had to work’.<sup>3</sup> It was only in 1991 that a universal right to a place in a kindergarten for each child aged 3 years and above was introduced as part of the abortion law reform after German reunification; it is limited in so far that it does not grant a right to a full-day place. This marked a shift of the legal approach from a ‘targeted’ individual right (for children ‘at risk’ or with special educational needs) to a universal right of all children above three years to a kindergarten place – and raised doubts related to the legislative competence: should it not be shifted from the ‘welfare’ competence of the national legislator to the ‘education’-competence of the Länder? However, in a case regarding the income-related scaling of parental fees for kindergarten in 1998<sup>4</sup> the Federal Constitutional Court confirmed that the legislative competence for ‘public welfare’ encompasses not only assistance to youth ‘at risk’ (‘Jugendfürsorge’), but also services and social work for youth in general (‘Jugendpflege’); both areas of social work are considered to be neatly intertwined and can therefore be put under the competence for ‘public welfare’. This competence extends to preventive measures, and the main focus of the kindergarten is even nowadays – says the court – the care for children, with the aim of promoting social behaviour and thus prevention of conflicts; the goal of preschool education comes second to public welfare considerations.

With regard to children under three, full-day places or after-school care for children of school-age, the statute does not grant claim rights to the child, but states that the competent municipal authority has the obligation to provide a sufficient number of places in daycare institutions according to need<sup>5</sup> and to take this into account in the obligatory planning process. This obligation existing since 1991 has been widely ignored and inefficient, and since no subjective right is granted to the child or a parent, it cannot be invoked or controlled through legal proceedings before the courts. Access to childcare institutions (Krippen, Kindergarten) for children is legally regulated through national law<sup>6</sup> as follows (some *Länder* grant somewhat more extensive rights):

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<sup>3</sup> Children ‘at risk’ may have a claim under certain conditions even if they are younger, or a right to a full-day place under the scheme of ‘educational aids’ (now para 27 of the Youth Welfare Act 1991), but this is not very transparent, well known or explicitly formulated; I do not know of any empirical research on how many children receive ‘educational aid’ in the form of access to a kindergarten or creche.

<sup>4</sup> Decision of the Federal Constitutional Court of 10 March 1998 (BVerfGE 97, 332, 342), which confirms a former judgement (Decisions of the Federal Constitutional Court, BVerfGE 22, 180).

<sup>5</sup> Para. 24 a.F.? Youth Welfare Act 1991.

<sup>6</sup> Regulated in the Youth Welfare Act 1991 = Social Law Book VIII, para. 24.

	<b>Half-day places</b>	<b>Full-day places</b>
<b>Children under three years</b>	No personal right; obligation of municipalities to plan and provide for a sufficient number of places for under-threes	No personal right; obligation of municipalities to plan and provide for a sufficient number of full-day places
<b>Children from 3 years up to school age</b>	Personal right to a kindergarten place half-day	No personal right; obligation of municipalities to plan and provide for a sufficient number of full-day places
<b>Children ‘at risk’</b>	a parent may have a right to a place as ‘educational aid’ if this is necessary since otherwise an education in the best interest of the child is endangered <sup>7</sup>	
<b>Lone parent</b>	no special right; but priority when scarce places are distributed; income support and employment agencies shall help them to find a place in cooperation with the local youth office	

Parents have to pay fees, often scaled according to income; fees can be reduced or taken over by the Youth Welfare Office for parents with low income (notice that, contrary to childcare within the ‘youth welfare’ system, the ‘preschool model’ does not in general demand parents to pay fees). The administrative competence and the connected burden to finance childcare institutions lie with the municipal authorities, who receive only little financial support by the Länder (subject to different legislation in the 16 Länder), while no financial support by the Federal State is even permitted, due to constraints resulting from constitutional rules on principles of financing. The consequence is that municipalities are overburdened by these expenses, put different priorities and hesitate widely to expand the childcare sector. However, the national legislator State has priority to regulate this area of child welfare through national statutes, while the ‘concurring’ legislative competence of the Länder is secondary and designed to implement national framework legislation through statutory law of the Länder, or to fill ‘gaps’ the Federal legislator left, or to grant more generous rights above the federal law standards. A comparison of legislative competences in the area of schooling and of youth welfare shows the following characteristics:

	<b>Legislative competence</b>	<b>Administrative competence</b>	<b>Financing competence</b>

<sup>7</sup> Para. 27 Social Law Book VIII.

<b>Youth welfare/day care</b>	Priority of national legislation ('competing legislation')	municipalities	Municipalities (with some support of the Länder)
<b>Schooling and education</b>	Länder	Länder	Länder

**Change is needed – but very slow and continuously blocked: the case of the ‘Day Care Development Act 2005’ in the FRG**

Although the subject of early childhood education has gained publicity in debate in the FRG, political and institutional change is very slow. In order to improve the situation (particularly in the old Länder of the FRG) and to strive for compliance with the EU benchmarks to provide places for 33% of all young children up to the year 2010, in 2004 a national draft statute was brought into parliamentary debate which involved reforms of public daycare provision as well as reforms of youth welfare law. Only part of it was implemented by 1<sup>st</sup> of January 2005 as law, which brings about only modest reforms in the provision of public childcare: the main change brought about by the reform is that the obligation of municipalities to provide a sufficient number of places for children under three and of full-day places, which existed already in former legislation (mentioned above) has been explicitly specified, but no further subjective rights of the child or a parent have been introduced. The specification of standards to investigate how many places are needed states that places should be provided by municipalities at least for children of whom the two parents (or the lone parent) are employed, involved in training measures or in full-time education.<sup>8</sup> The lack of full-time places is not tackled explicitly (the duration of daily care hours shall be defined according to individual need). – The reform also resulted in some regulation of quality management<sup>9</sup> and in a further regulation of registered private childminders<sup>10</sup>, which was criticized mainly because the necessary qualification and training for registered childminders were defined very vaguely and at a low level. Furtheron, it is feared that

<sup>8</sup> Para. 24 sec. 3 Social Law Book VIII, as amended from 1 January 2005 onwards.

<sup>9</sup> The providers of institutional childcare shall ensure quality through adequate conceptions and evaluation measures, para. 22a sec. 1 Social Law Book VIII.

<sup>10</sup> Smaller improvements are definitions of fees for registered private childminders, including the costs of work accident insurance and a part of pension insurance costs, para. 23 Social Law Book VIII..

the intended 'equalization' of registered private childminding ("Tagespflege") and early childhood education in daycare institutions leads to a lowering of quality standards, and opens up a cheaper alternative to municipalities who are not willing to invest more in creches and kindergarten to fulfil their obligation to secure the needed minimum number of places.

The whole parliamentary procedure was dominated by quarrels over financing structures and over the distribution of competences between the Federal State, the Länder and municipal communities with regard to childcare and early childhood education. The 'Bundesrat', the second chamber of the national parliament, voted against the draft law based on these arguments. However, this veto of the Bundesrat was overruled by a majority vote of the First Chamber of Parliament ("Bundestag") and came into force on 1 January 2005. This was possible only since the draft law is based on the 'competing legislative competence' of the national legislator – here it was based on the competence to regulate 'welfare law', art. 74 no.7 German Basic law, which grants priority to the national legislator. But the governing Socialdemocrat-Green majority has refrained from any more far-reaching reforms (such as extending rights to daycare) in the 'shadow' of the case-law of the Federal Supreme Court on restrictions of legislative competences of the Federal State under the rules of the German Basic law.

### **Some remarks on particular institutional features: the importance of federalism and the strong position of the Federal Supreme Court**

#### *The risks of federalism – the 'federal policy-entanglement trap'*

The structure causing these problems and blocking reform due to particular features of federalism has been named the 'federal policy-entanglement trap' by the political scientist Scharpf (Scharpf 1985). It characterises a decision-making structure which produces systematically inefficient and problem-inadequate solutions due to its institutional logics, and which is at the same time incapable to change the institutional frames of its decision-making logics. It is due to a complex system of split legislative competences, administrative competences and financing competences between the Federal state and the Länder in the FRG. The interconnectedness of these issues, the necessity for the first and second chamber of parliament, the 'Bundestag' and 'Bundesrat' (representing the Länder, where most of the time the political parties not

represented in the federal government have a majority) to cooperate in the legislative process, and a sort of a 'veto position' of the Bundesrat in those legislative matters which require its consent, and the complexities of the financing system (which involves revenue sharing and intergovernmental grants within the fiscal mechanism of the intransparent 'Länderfinanzausgleich'<sup>11</sup>) all together favour strategic behaviour and can block reform processes, as the example has shown, since fiscal aspects and power games (here especially controversies over the distribution of legislative competences) overrule arguments related to the subject matter. With regard to the financing of childcare institutions in Germany, it has been called the '*federal financing trap*'. While the national legislator assigns rights and duties related to childcare in the context of the competence to regulate youth welfare, the administrative and financing competences lie with the local municipalities who receive only some subsidies from the Länder (this varies, since this is regulated by the Länder), and no financing subsidies from the Federal state. The municipalities are overburdened by this task. Direct subsidies granted from the Federal state to the Länder in this area are even forbidden according to the constitutional principle that the financing competence has to follow the administrative competence (called the 'connexion principle', art. 104a German Basic Law), therefore only an 'indirect' shifting of financial burdens between the Federal State and the Länder in 'package arrangements' can take place. The Federal State has argued that financial subsidies have been shifted to the municipalities as part of the social law reform of unemployment benefits and income support, while the Länder have claimed this was not enough – an endless poker, and no solution in sight.

A few months ago, a high-level experts group, formed of members of Parliament of all parties, the Länder, and Government chaired by a social democrat and a christian democrat of the CSU, who had jointly proposed a complex compromise package how to reform federalism and shift some more power towards the Länder after lengthy bargaining procedures, failed at the last minute – the veto of the Länder and parliamentary opposition was finally based upon the argument that the proposed changes in the area of education and culture were insufficient. There is little hope and goodwill for another attempt at this stage – and many decisions are shifted from the policy arena to the Federal Supreme Court, which occupies a central position in the

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<sup>11</sup> There is a large body of economic literature related to the political economy of fiscal federalism, its risks and (in)efficiencies, and problems of public finance within federal multi-level government systems.

German institutional setting, since it can control and overrule decisions of the legislator as part of its judicial control of compliance of legal norms with constitutional rules.

*The restricted interpretation of federal legislative competences in the case-law of the Federal Constitutional Court after the Basic Law reform 1994*

During the revision of the constitution in 1994 after German reunification, the conditions under which the Federal state has the right to use the legislative competences prior to the Länder in the field of the ‘competing legislative competences’<sup>12</sup> and for framework law<sup>13</sup> have been restricted<sup>14</sup>: the Federal State can take the lead to regulate an area prior to the Länder only under the condition that federal legislation is necessary to reach the goal of creating living conditions of equal worth within the FRG and that this goal cannot be reached otherwise without federal intervention, or under the condition that this is necessary to secure the unity of law or the economy in the interest of the whole state which cannot be maintained without legislative intervention of the Federal state. These reformed preconditions have been narrowly interpreted by the Federal Constitutional Court in a number of cases; the Court has turned down the priority of legal competences of the Federal state in a number of cases related to different subject matters of legislation<sup>15</sup>, stating that the Federal state has the competence for legislation prior to the Länder only if a drifting apart of living-conditions in the FRG damages the social order of the Federal state, or if concrete hints for such a development are noticeable. The tendency is to restrict the federal competences; and the areas related to youth welfare, to education and framework legislation for the university sector are highly contested. As a result, the governing majority of the Socialdemocrat/Green coalition has suggested only a slight modification of childcare law in the draft law ‘Day Care Development Act 2005’, trying to avoid a negative judgement of the Federal Constitutional Court that could challenge the legislative competences if ‘new’ law or further-reaching legal rights were enacted, while

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<sup>12</sup> The subject matters of the ‘konkurrierende Gesetzgebung’ are listed in art. 74 German Basic Law which encompasses, among others, civil law, penal law, migration law, labour law, economic law, and the above mentioned competence to enact legislation in the field of welfare law and social law.

<sup>13</sup> In this area, the Federal legislator can enact only framework law and legal guidelines related to employment in the public service, general guidelines for the university sector and a few others (art. 75 German Basic Law).

<sup>14</sup> Art. 72 sec. 2 German Basic Law, amended in 1994.

<sup>15</sup> At stake was federal legislation related to the professional education and qualifications needed for old-age helpers; opening hours for shops; restrictions for keepers of so-called ‘fighting dogs’, regulation of university matters (junior professorships, fees for university students; introduction of students representatives and commissions).

simple ‘changes’ to former law could pass even after the constitutional reform of 1994 unchallenged.

*The interests of children, parents, mothers in enhancing early childhood education... institutionally trapped?*

Although reform in the relation (and regulation) of private (mainly maternal) and public education for young children in the FRG is urgently needed, and public early childhood education should be extended and upgraded, this process is very slow or even blocked due to legal and institutional features – structural impediments win over legitimate or ‘best’ interests of children, parents, mothers and others. This is not the ideal path towards a so-called ‘knowledge society’ and the improvement of flexible, life-long learning; economists might call it an ‘under-investment in human capital’ in the context of early childhood education (also negatively affecting the employment chances of mothers, poverty risks of children and families, especially one-parent families, which are quite frequent in the FRG, and gender inequalities). Instead of fostering early childhood education, which could contribute to the reduction of social, class and gender inequalities, politicians continue to pursue their particular interests, channelled and shaped by institutional constraints; it is improbable that change (here especially: reform of federalism) will come about in the near future.

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