

TEN YEARS OF CHILDREN'S RIGHTS IN SWITZERLAND

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On March 26, 1997 Switzerland joined the Convention on the Rights of the Child as the 191st State party. Eight years after the international treaty entered into force, Swiss children were granted the same rights as millions of other human beings worldwide. Switzerland ratified with provisos. At present, ten years later, Switzerland has undertaken a lot and improved the legal situation, so that said provisos can be withdrawn. But much still needs to be done to implement children's rights also in the primary environment where children live.

February 27, 1997 was a special day for children in Switzerland. The Swiss Federal Parliament voted in favor of joining the Convention on the Rights of the Child. On March 27, 1997 the ratification process was completed, the adhesion of Switzerland to the Convention was under seal; from then on, the rights stipulated in the UN Convention on the Rights of the Child are granted to children. But more than that: Switzerland covenants to inform children on their rights and, furthermore, to report regularly on the progress in their implementa-

tion to the UN Committee on the Child's Rights. A special day – not only for the children, but also for all the governmental and non-government organization, decision-makers, and private persons who had advocated the realization of the Convention for many years.

Ratification with provisos

Today, its effects as well as the challenges are clearly visible. Switzerland has done a lot, in particular with regard to working off its provisos, for Switzerland had reserves concerning Articles 5, 7, 10, 37, and 40. This gave expression to the fact that those articles were incompatible with Swiss legislation at the time of ratification. The reserves to Articles 7, 10, 37, and 40 were based on the legal situation at that time and did not cause any substantial political discussions.

Article 5: A politically motivated reserve

Not so Article 5. The formulation in the Convention according to which the parents are to "provide ... appropriate direction and guidance" to the child caused a parliamentary debate against

the backdrop of the priority to be given to the child's well-being. The term of "parental authority" embodied in the Civil Code was felt to be less lenient by the legislators. There was fear that the welfare of the child would carry more weight compared to the parents' interests while the government's leeway was being restricted at the same time. Parliamentary criticism emphasized the need for preserving the term of "parental authority" which in the end led to the application of this artificial, ultimately politically motivated reserve. As a matter of fact, Swiss civil law already committed the parents at that time to act in the interest of the child;¹ parents have the essential responsibility, but it is not intended to be of an authoritarian nature, but rather of an accompanying sort. In this sense and with regard to content, the relevant Swiss legislation already met the requirements of the Convention on the Child's Rights at the time of ratification, all the more so as the findings on the development of the child and protection of the personalities of family members were increasingly attributed more importance.² But it took another seven years until Parliament withdrew this false reserve. The revision of the Swiss Civil Code, which took effect on January 1, 2000, and replaced the term of "parental authority" by the one of "parental care and custody," this fact was taken into account linguistically. Thus there was no further obstacle to the withdrawal of the reserve; Article 5 of the CRC entered into effect on April 8, 2004.³

Reserve to Article 7 can be rescinded

Article 7 of the CRC was also reserved because Swiss citizenship legislation does not grant any claim to acquiring Swiss citizenship. In Switzerland, the principle of *ius sanguinis* applies whereby a child acquires the Swiss nationality

when one or both parents are Swiss nationals, or if they have acquired it after passing a qualification test after having resided in Switzerland a specific number of years.⁴ Children of stateless parents were therefore also considered stateless; they had no claim to Swiss citizenship. This affected primarily children of refugees and children who were brought to Switzerland for later adoption. After the new federal constitution⁵ entered into force effective January 1, 2006, the reserve can now be withdrawn because the new constitution obliges Switzerland to naturalize stateless minors in a simplified procedure.

The legal adjustments to Article 10 have been made

A further reserve applied to Article 10, according to which the State parties are committed to treat petitions for the subsequent admission of family members benevolently, humanely, and in an accelerated way. At the time of ratification, the right to have family members immigrate was not granted to foreigners of specific categories of residence status. Adoption of the new asylum act and of the new federal act on foreigners by the people on September 24, 2006 allow to withdraw the reserve after these acts enter into force.

Transitory periods delay the withdrawal of the reserve

Article 37 lit. c) on the separation of juveniles and adults in detention pending trial and in penal institutions was also reserved. This article contains guarantees in case of imprisonment. Thus, a child has to be separated from adults in detention pending trial and in penal institutions, unless some other procedure is considered subservient to the child's well-being.

Detention pending trial in Switzerland is regulated by the codes of criminal procedure of the cantons, enforcement by the measures by the juvenile penal law of the Confederation. Although Article 37 lit. c would already have been compatible with the Swiss penal code,⁶ the separation could not be put into practice consistently for lack of accommodations. The new federal act on juvenile penal law, which entered into force on January 1, 2007, with the necessary amendments of the general part of the penal code, provides for the separation of juveniles and adults in detention pending trial and penal enforcement. This modification of penitentiary conditions allows to withdraw the reserve, but in view of the fact that installations for juvenile correction facilities are still lacking, the cantons have been granted a transitory period of ten years to implement the new federal act. Withdrawal of the reserve will therefore probably be further postponed, in spite of the modification of the provisions.

One reserve remains

Furthermore, Switzerland reserved certain sections of Article 40 of the CRC. Item 2 lit. b) II) grants children a legally versed and/or otherwise suitable advisor to prepare and safeguard the defense of the child. In Switzerland, not all cantonal juvenile penal procedures foresee a formal defense. Also, it was considered unnecessary and educationally adverse since a procedure targeted on protection and care ultimately only takes measures in the well-understood interest of the child/youth affected thereby. With the new federal act becoming effective, the reserve to item 2 lit. b) II) can be withdrawn. The only blemish in this context is the fact that children/juveniles continue to be without any compulsory claim to a defensive counsel *ex officio*

whatever the case. The right is a right to an optional defense throughout all matters of procedure, or a defense upon the court's own motion, respectively, if the gravity of the deed requires it, or if the juvenile or his/her legal representative is overtaxed by the defense.

The reserve that cannot be withdrawn is the one to item 2 lit. b) III). This calls for the immediate determination of any juvenile penal matter by an independent and impartial authority. In practically all cantons, however, the investigating as well as the sentencing, and possibly even the correctional authority, act in personal union. The principle of separation of powers is thus not met. The new juvenile penal law does not foresee any separation between the investigating and sentencing authority.

Item 2 lit. b) V) authorizes the child to have a penal decision and the measures imposed in consequence thereof to be reviewed by a higher authority. The judicial reform entrusted competence in criminal jurisdiction of the first instance to the federal criminal court, which initiated its activities on April 1, 2004. This permits to appeal sentences of the federal criminal court to the federal tribunal. Once the federal act on the federal tribunal enters into force, this reserve can also be withdrawn.

Item 2 lit. b) VI) grants the right to the child to have the free assistance of an interpreter if the child does not understand or speak the language used in the proceedings. This proviso was based on the reserve to Article 6 of the European Convention for protecting Human Rights and Basic Freedoms. Since withdrawal of this reserve has been initiated in the interim, the reserve concerning Article 40, item 2 lit. b) VI) of the CRC could also be withdrawn; the withdrawal became effective on January 12, 2004.⁷

Ten years after the CRC entered into force, practically all reserves have been cleared

10 years after ratifying the UN Convention on the Rights of the Child, the country can show continuous work in favor of the child with regard to the reserves presented at that time. The provisos to Articles 5, 7, 10, 37 and part of Article 40 have been or can be withdrawn in the coming months/years because the required legal adaptations have been made. Only the reserve to item 2 lit. b) III) cannot be revoked at the present time.

In addition, Switzerland has ratified the supplementary protocols to the Convention on the Rights of the Child, thus granting to the children on Swiss territory almost all rights stipulated in the Convention on the Rights of the Child, with few exceptions. Closing the gaps in legislation is the first, important step; the second step will be the implementation in practice, and this is where children's and human rights organizations see a need for catching up.

Concern about various aspects of implementation

By ratifying the Convention, Switzerland committed to present regular reports to the UN Committee on the Rights of the Child. The first government report was due in 1999; it was discussed in June of 2002. On the one hand, the Committee was impressed by Switzerland's achievements, but also expressed concern on various aspects of implementation: Lack of data; lack of a national action plan; incomplete application of the overriding principle of the child's well-being; discrimination of foreign children, and others.

Lack of data

The report⁸ on the situation of children and juveniles in Switzerland published in 1999 clearly showed the lack of data. But the collection of data is an important, indispensable tool for observing and controlling the effective implementation of various measures in favor of children and juveniles. In the absence of a regular, systematic, comparable collection of data at the federal and/or cantonal levels, a targeted, consistent children and juveniles policy will only be possible in a limited manner. Consequently, it is barely possible to measure its implementation, i.e. its successes and failures. Planning and the setting of priorities is made equally difficult in view of dwindling government resources. In addition, lots of data in Switzerland are not collected for all children and juveniles under 18 years of age, and often only as of the age of 15. But increased knowledge of the living circumstances of younger children is precisely what could give early insight into certain developments and strengthen preventive measures. Furthermore, the collection of data makes it possible to verify the effectiveness of government interventions. This closes an effective circle that assures the best possible benefit of legal and other measures in favor of children.

A consistent Swiss child and juvenile policy

Since the ratification of the Convention on the Rights of the Child, children's and human rights organizations have been calling for the elaboration of a national action plan for the implementation of the Convention on the Rights of the Child. Justifiably so. For even the UN Children's Rights Committee criticized the absence of such a plan. It enjoined Switzerland to work out such a plan on a legal basis and to implement

it bindingly. Various parliamentary thrusts ensued. National councilman Claude Janiak presented a motion⁹ requesting the elaboration of a Swiss children and juveniles policy. For Switzerland, this would probably be formulated in the shape of a skeleton law because the federative system of Switzerland, with the distribution of tasks among the federation, the cantons, and the municipality, would suggest this as the most appropriate form. But skeleton laws are a tricky business. As implied by the term, this law would indeed provide a skeleton for national action at the federal level, but funding it would probably be left to the cantons and the municipalities. This would reinforce a fact that was already argued by the children's and human rights organizations in 1999: The federative system of Switzerland cannot exclude discrimination of children and may diminish equality of treatment. Depending on where you are born, more or less money will be allocated to measures in favor of children and juveniles. One example of this is the matter of scholarships, which are a cantonal prerogative.

Government priorities are not in favor of children

The Federal Committee for matters of children and juveniles also sketched a possible Swiss children's and juveniles policy. But since children rarely have a lobby, such work usually suffers a similar fate: Due to lacking funds, and because other governmental services enjoy a higher priority, they are deferred. Thus the Janiak motion was filed as a postulate. The reasoning: A lack of funds. The allocated resources are sufficient for the working speed of a postulate, but not for that of a motion. For children and juveniles with a single period of childhood, this is difficult to comprehend.

The range of effectiveness of Swiss law always also concerns children

Of course, it has to be borne in mind that children are not often directly affected by the administrative effects at the federal level, and thus the attribution of a different priority is understandable. But the scope of Swiss legislation and administration affect children and juveniles much more frequently than is generally assumed. The current social security system will burden children now being born, or to be born in the future, much more than today's adults. Within a few years, the aging society will depend more strongly on the help of the few children and juveniles now growing up. The economy will need to take recourse to well-trained, young people, who take tolerance and the intercultural dialogue seriously and who are familiar with the rules of the game of ecology and economy. A Swiss children's and juveniles' policy based on the basic tenets of non-discrimination, participation, and the child's welfare will not only act in favor of the coming and the current generations, but also do justice to the leading ideas of the Convention on the Rights of the Child. It is therefore more than appropriate to formulate a national action plan for children and juveniles, with the firm will and clear intention of implementing it thereafter.

Ten Years of Children's Rights in Switzerland

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- 1** Art. 272, 301 Swiss Civil Code, ZGB.
- 2** Kinder und Jugendliche in der Schweiz: Bericht zu ihrer Situation, p. 116.
- 3** AS 2004 3877.
- 4** Art. 14 of the federal act of September 29, 1952 on the acquisition and loss of the Swiss citizenship (BüG).
- 5** Art. 38 para. 3 Federal constitution.
- 6** Art. 95, item 3 StGB (Federal penal code).
- 7** AS 2004 813.
- 8** Publisher: UNICEF Switzerland in cooperation with Pro Familia, Pro Juventute, Kinderschutz Schweiz, Stiftung Kinderdorf Pestalozzi, Organisation des Droits de l'Enfant.
- 9** Motion 00.3469, N 26.11.01, S 18.06.02, Claude Janiak "Rahmengesetz für eine schweizerische Kinder- und Jugendpolitik".

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