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Children’s “Best Interest” Locked up – On the Situation of Children’s Rights during the COVID-19 Responses

SUMMARY

The constitution of the WHO as well as the UN Convention on the Rights of the Child both emphasise the unique position of children, the significance of healthy development and the obligation of public and private actors to always consider the best interest of the child. There is – at least in the case of Germany – no evidence that this obligation has been fulfilled in due manner during the COVID-19 reactions. On the other hand, there is clear evidence from different parts of the world that the closure of schools and all places of social encounter has deeply harmed the social, emotional and even intellectual development of many children. The children’s rights therefore have not been safeguarded during the corona-reaction-crisis. The article argues that this disregard of the position of children has its roots in public health’s utilitarian perspective on the health of peoples instead of individuals. In order to safeguard the rights of children in public health operations, the procedures already foreseen by the UN Convention and its implementing regulations to take into account the best interest of the child must be truly implemented in the future.¹

Keywords: COVID-19 reactions, lockdowns, children’s rights, public health operations, advocacy.

Introduction

According to the WHO definition, health is realised in the harmony of physical, mental and social well-being. With regard to the special situation of children, the constitution of the WHO states: “Healthy development of the child is of basic

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importance; the ability to live harmoniously in a changing total environment is essential to such development.” (WHO, 2020, p. 1) The UN Convention on the Rights of the Child also requires that in all measures concerning children, their best interests must be given “primary consideration” (UN, n.d., part I, art. 3).

This did not work out well in the worldwide responses to COVID-19. The best interest has certainly not been given priority, it has probably not even been considered in many cases. This has now been addressed in a whole series of studies around the world (UNICEF, 2021; Rider et al., 2021; Ontario, 2020) – even if it is still largely hidden from the eyes of the public and politicians. But why this is so, why the position of children and young people, why their rights and their needs have been and remain unconsidered, is unclear. I would like to present a preliminary attempt at an explanation in four steps. To this end, (1) something has to be said about the idea of public health (PH) and public health operations (PHO), (2) The idea of children’s rights will be critically discussed and (3) the responses to COVID-19 in relation to children and young people and their harmful effects on children’s health will be presented in this context. As the benefit of school-closures is unclear and the harmful consequences are evident, closures are not an adequate action to be taken in public health interventions. (4) In order to take care of the best interest of the child further measures are to be taken in future.

Objectives of public health

Health is not a matter of the individual, nor is it a matter of chance. Rather, it is a matter of populations and as such can be influenced in a planned manner. This is the fundamental conviction of public health research. Progress can be made by changing certain conditions (e.g. preventing harmful environmental conditions or providing general access to health-promoting services) but also by changing the behaviour of individuals (e.g. by promoting behaviour that is considered healthy or by reducing the consumption of fat, sugar, tobacco and alcohol). Whereas medicine is concerned with the health of the individual who visits the doctor when he or she subjectively has a problem, public health focuses on the population as a whole. It has its sights set on improving good health and thus pursues a goal that is in principle not completely reachable.

So-called public health operations (PHO’s) are preventive in nature, which entails two things: they must define a behaviour or relationship that may not yet be considered as problematic (and establish this definition as such), and they must enforce an appropriate intervention for it. In both areas, public health is expansive, because hazards, since they belong to the realm of possibilities, can always be named further.

Like any preventive measure, PHO's are thus potentially useless, inappropriate and disproportionate – just as preventive self-defence is sometimes indistinguishable from an attack.

In the Hippocratean corpus the term “epidemiology” stood for the study of individual illnesses and their cures. The modern term “epidemiology” concerns the study of the distribution of health conditions and their determinants in the population, not in the individual. It is considered to be the methodological basis of health sciences that are to be distinguished from medicine as the art of treating and curing the sick. Epidemiology is based on the fundamental assumption of the statistical calculability of (disease and mortality) risk and the experimental assessment of the importance and (potential) causal potency of risk factors. This is the basis for what Alan Petersen and Deborah Lupton in their work on “New Public Health” call ‘governing by numbers’ (Peterson & Lupton, 1996, p. 27). This is organised by state bureaucracies, they argue, and it is closely linked to the rise of epidemiology to control and discipline the ‘population’, leading to processes of normalisation and the social constitution of the ‘risky self’, that is always in need to justify its potentially dangerous way of life.

PH has a utilitarian approach in that it considers group benefits and tries to steer groups (Bellefleur & Keeling, 2016). Individual freedom comes into play not so much as a reason and goal of interventions, but rather as an irrationality that makes prognoses difficult and at the same time provides the leverage for possible control attempts (as in so-called nudging). Fear also plays an important role as a steering moment. Furthermore, due to its basis in statistics, PH is a matter of experts and expert knowledge and as such contrary to its name not a public matter. It does not know of public deliberation about the goals, it rather wants to steer them – as the current reaction to COVID-19 also showed. Contributions like those of the No-COVID or Zero-COVID ideologues are in any case not suitable as contributions to a democratic deliberation.

The example of the situation of children shows well that PH addresses them as objects of research but not as subjects with their own perspectives and needs, for instance, when they are only studied as potential virus spreaders.² Furthermore, when the COVID-19 control measures were defined, no risk assessment was carried out to assess the consequences of the control measures on the health and development of

2 Due to the evolution of the rights of children, the perspective on children in public health discussions has changed in the last twenty years, so that they are seen as subjects with their own rights and obligations from the side of the public (cf. Brinkman & Stanley, 2014). Nevertheless in practice the corona-discourse showed them being mere objects of public measures and discussions (cf. as an example from the Canadian discourse Ciotti et al., 2022; for Germany see Voigts, 2021).

children's freedom.³ Likewise, there was no evidence of the necessity and effectiveness of the chosen defensive measures and – as far as Germany is concerned – no efforts were made to obtain such evidence (Sachverständigenausschuss, 2022).

Against this background, governing by numbers appears to be an imaginary construct, because the incomplete, inappropriate and constantly redefined numbers are not at all what they suggest to be. They lack the appropriate measure. Moreover, in COVID-19 prevention, the focus on infection control is currently overriding the New Public Health approach, which should be directed less towards disease control and more towards strengthening resources in settings such as educational institutions, companies, but also outpatient and inpatient health care facilities, for example through health concepts developed in a participatory manner and supported by organisational counselling. The Ottawa-Charter for Health Promotion did have such a subject-related focus that was mainly devoted to empowering the individual in his or her social environment to be the master of her own health.⁴

Rights of the Child

No subject is preserved in its subject position unless other subjects recognise it as such in their actions. In order to secure such relations of recognition and to make their realisation more probable, there are various programmes (in the literal sense: regulations), some of which are codified as positive law. For example, the subject position of children and adolescents is now even recognised in a binding way in its own UN Convention (worldwide, except in the USA), and documents from the field of PH also speak of children's rights. Children do not have different rights than people of other ages, but due to their special situation as adolescents they are subject to special dangers, which is why the general rights are codified for them in a special way. Thus, in article 3, the UN CRC calls for special protection of the interests of children: "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" (UN, n.d., part I, art. 3). These interests are (a) a substantive right and the obligation to be considered primarily when different interests are being considered (CRC,

3 This is not different from the situation of adults: The effectiveness of so called non-pharmaceutical-interventions as lockdowns is by far out of evidence, cf. already Fock et al. (2001), this situation has not changed since 2001.

4 The Ottawa Charter of 1986 states: "Health promotion is the process of enabling people to increase control over, and to improve, their health. To reach a state of complete physical mental and social well-being, an individual or group must be able to identify and to realise aspirations, to satisfy needs, and to change or cope with the environment. Health is, therefore, seen as a resource for everyday life, not the objective of living." Its focus lies on empowering individuals to make their own decisions concerning their health. Health is described as a matter of social enablement and not of technical-medical control (Ottawa, 1986).

2005), (b) They are an “interpretative legal principle” in the light of which other rights must also be interpreted and (c) they are “a rule of procedure”. Decisions must always include an evaluation of the possible impact on the children concerned, and it has to be documented, what has been considered to be in the best interest of children, on what criteria this is based on and how did one get to the conclusions.

As with any general concept, there is criticism of the vagueness of the concept of the best interests of the child and its supposed emptiness. Is it about the best interests of the child in its immediate “now-being”, or rather about the view of who the child will become the – hopefully – fully rational person? Are there objective criteria of well-being or does its definition lie solely with the child itself? Do all children worldwide have the same interest? Who has primacy in interpretation: children themselves, parents, professionals or the state? None of these questions can be answered in only one direction. However, contrary to many reservations, the UN CRC makes it clear that it is first and foremost the family that has to recognise and safeguard the interests of the child. Neither professionals nor the state have a defining primacy here.

The general freedom function of all rights becomes particularly clear in children's rights: it is the child's own being that is to be protected, not only its future position imagined by the adult, but its possibility to position itself. Self-positioning is also the central task of growing up, which cannot be taken away from any child and which needs open spaces for development – sometimes also free from parents and state institutions of upbringing and education. It is from this freedom that the scope of one's rights opens up, both in the objective sense (i.e. to be protected by the state) and in the subjective sense (i.e. in the individual sense of entitlement).

Philosophically speaking, this means that the child is not only a “world being” but also a “world citizen” (Kant, MS 6: 280–281), the goal of its nourishment and education is its emancipation (Kant, MS 6: 281–282): Immanuel Kant formulated in his lectures “On Pedagogics” that parents and princes are the greatest danger to this right of the child. For instead of being oriented towards the child's own future as the realisation of the idea of humanity, both would usually only have the immediate present in view (primarily the expansion of state power and family good), which is, as it were, heteronomously determined by society's ways (Kant, Päd 9: 448).

It is essential to listen to children and young people so that they can change from being affected to being involved and so that their own sense can come to the forefront. This applies even if it can be assumed that the child is not yet of age, because if the child is not treated as reasonable, they cannot become reasonable. Therefore, the UN CRC speaks in Art. 12 of the child's right to participation: “For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or

through a representative or an appropriate body, in a manner consistent with the procedural rules of national law” (UN, n.d., part I, art. 12). Participation has at least four different levels - simply being informed, expressing a view, influencing a decision and being the main decider. It is clear that the extent of participation depends on the child’s development. However, the UN CRC always envisages an active role for the child in this regard, albeit in the form of advocacy for the child’s interests. Children must never become mere objects of third parties’ decisions, i.e. the weighty interests of others must sometimes take a back seat to the developmental needs of children.

There can be no exception to the primacy of the best interests of the child or to the participation of children. On the contrary, the law speaks precisely of the interests of children taking precedence in a possible conflict of interests. – If, however, as in winter 2020 repeatedly stated by the influential Bavarian Prime Minister Söder, “it is not the time for differentiation”, if reason, whose business it is to differentiate, is to have no power, then children and young people are ignored.⁵

In the context of health and medicine, “[...] a multitude of ethical problems [...] touch on the moral interests or rights of children, for example in reproductive medicine, genetic diagnostics, research with minors, euthanasia, enhancement, cosmetic surgery for adolescents, dealing with ADHD or intersex, genital mutilation of girls or – as has recently become clear - circumcision of boys. The legislator [in Germany] has determined the “best interests of the child” as the goal of parental care (§ 1626 BGB (Civil Code)) and as the decisive orientation of child-related family law. The legal boundary is the concept of a risk to the welfare of the child (§ 1666 BGB). It assumes parental primacy for the interpretation, promotion and protection of the child’s interests (Article 6 (2) sentence 1 of the Basic Law).” (Maywald, 2016; own translation) In isolated cases, family courts in the Federal Republic have applied this legal concept of the best interests of the child to strengthen the position of children and ordered exemptions from distance and masking orders. In one high-profile case, this was followed by a legal investigation, including a house search against a judge, who was accused of bending the law.

One of the last major PHOs, the introduction of case-based fixed rates in hospital treatment, led to a massive deterioration in the position of children. This led to the closure of many children’s hospitals in Germany (Maywald, 2016).⁶ As a result,

5 In order to find out whether there really was no more differentiation during 2020 and 2021, I contacted members of all parties and ministries represented in the Bavarian state parliament. In fact, it turned out that at no point were the children’s own interests or even their own voices taken into account in a weighing process.

6 Between 1991 and 2017 a third of the hospital-capacities for children disappeared in Germany by closing wards or whole children’s hospitals. More details in an interview with the president of the German Society of Pediatrics and Adolescent Medicine: DGKJ, n.d. (see also Klein & Ruther, 2021).

children are cared for together with adults. In addition, care is provided by staff who are not trained to treat children. As it was stated repeatedly: The voice of children is also insufficiently heard in medical treatment practice (Franklin & Sloper, 2006).

Children under stress

While the fight against the COVID-19 pandemic usually focuses on the physical aspect of health (prevention of virus infection, utilisation of hospital capacity, questions of healing and vaccination), while the mental, spiritual and social dimensions of health, which are more difficult to determine, are often lost from view, despite the available expertise. This proves to be problematic for children, who are particularly affected. The closure of educational and care facilities not only impairs their right to education, they also lose contact with their peers, which is crucial for their development and therefore cannot be “postponed”. In this context, it must be emphasised that children have not only a right to protection but also a right to social contact, social participation, play, and social interaction as well as early childhood and school education.⁷

Since June 2020, two decisive studies investigating the effects of COVID-19 reactions on children and adolescents have been conducted in Germany. The second Youth and Corona study, based at the University of Hildesheim, is titled “The Corona Pandemic Took Valuable Time from Me” and it warns that for young people, the Corona Pandemic period “will be inscribed in their generational experience as lost youth time” (Andersen et al., 2020).

Due to a lack of social contact with their peers, children are impaired in their right to social participation and in their ability to position themselves, which is one of the three “core challenges” of adolescence, according to the 15th Children and Youth Report of the German government. According to the German Institute for Human Rights (DIMR), children are at risk of being “inhibited in their developmental progress or even suffer regression that they find difficult to catch up on” (Monitoring-Stelle UN-Kinderrechtskonvention, 2020). Disruptions in development can in turn affect children’s health in the long term. Empirically, the lack of social contact leads more often to mental illness. For example, the recently published representative COPSY long-term study of the University Medical Centre Hamburg-Eppendorf, in which 1586 families with children aged 7 to 17 were surveyed, states: “We found that children and adolescents in Germany feel significantly burdened by lockdown, social distancing and homeschooling measures. They experience significantly lower

⁷ Cf. on this, among others, Articles 9, 10, 15, 16, 18, 20, 24, and 31 in: UN, n.d.

HRQoL [health-related quality of life] and more mental health problems, especially hyperactivity and peer problems.” (Ravens-Sieberer et al., 2022) The prevalence of mental health issues increased from 17.6% before the COVID-19 pandemic to 30.4% (Ravens-Sieberer et al., 2022). Thus, mental health issues, mainly depression and anxiety disorders, were reported in one of three children. These are mainly depression and anxiety disorders (Pieh et al., 2021; Racine et al., 2021). There are no nationwide figures on this, so all that remains is anecdotal evidence from my personal environment: at a school with a total of 200 pupils, in whose administration I am involved, the 8th-grade teacher reports that out of her 25 pupils by now the second girl is in inpatient treatment for suicidal tendencies. A new staff member at my college, who previously worked in a child and adolescent psychiatric clinic, tells me that their acute ward (also responsible for severe depression and suicidal tendencies) has 12 beds, but has been occupied by 24 children for months. – “Particularly burdened were children and adolescents,” the study continues, “whose parents have low educational qualifications, who have a migration background and/or who live in confined spaces (<20m² living space/person)” (Ravens-Sieberer et al., 2020). The lack of consideration of the position of children and young people is thus complemented and reinforced by socio-economic inequality. A reason for this might be that policies are typically formulated by those who do not come from these disadvantaged populations.

The general health behaviour of children has also deteriorated. Media consumption has increased by 70% and for a third of them, it takes up more than four hours per day, 20% are not involved in sports at all and a quarter of children and adolescents eat significantly more sweets than before.

In France, the French Pediatric Society (*Société Française de Pédiatrie*) warns of the multiple negative consequences of school closures, concluding that: “The educational and social benefits provided by school far outweigh the risks of a possible SARS-CoV-2 contamination of children in school environments” (Cohen et al., 2020). An increase in mental health issues as a result of the pandemic has also been noted in Sweden in general – whether this is milder among children, given the reduced restrictions, is still unknown, according to an August 2020 study. However, the potential impact of responses to COVID-19 on children’s well-being and development in Sweden was addressed at the outset of the pandemic and weighed in favour of children’s rights (Lindblad et al., 2021).

The increased burden on children caused by school closures can therefore be considered proven. It also has a socio-economic impact and affects weaker children much more. In contrast, the epidemiological advantage of closed schools is uncertain, as shown in a review of 7474 publications. (Walsh et al., 2021) Considering the lack

of evidence regarding the benefits of this intervention in children's rights, it should not be carried out on a regular basis.

With regard to the treatment of children and adolescents, policies in Europe have varied and continue to do so. This may also be due to the role generally assigned to the child in the different political cultures of Europe. Is the child viewed as a citizen and is the state seen as particularly responsible for their well-being or is the child more "familiarized," i.e., viewed not so much as a citizen but as a minor to be cared for primarily by the family, which is why, in the event of school closures, the family is also primarily responsible?

Germany has been one of the most restrictive countries with the longest school, sports, music, education, youth recreation, and other closures (OECD, 2021). If the situation of young people has been addressed at all, it has only been in their role as pupils, and here again as "final year pupils." The evidence for this is numerous (Alberth & Marke, 2021); it is an expression of the fact that there is no politically effective conception either of the educational and developmental processes of children or of their essential relationality. What came to the forefront in an earlier Federal Family Report (1994) was something called the "structural ruthlessness" towards children and families. Their development is left to – very unequally distributed – luck. PHOs thus make the health of children and families a private matter. If we assume with Hegel that the modern state treats the well-being of the individual as a right (cf. Hegel, *Elements of the Philosophy of Right*, §230) and that it becomes the representative of concrete morality through the fact that individuals know that their well-being is safeguarded in it and therefore take an interest in it, then the present constitution of the state – at least as far as the Federal German case is concerned – seems to be a step backward. If the principle of politics is pre-modern, then no digital helper apps will help to enlighten it.

Conclusion

What would help in this situation? The voices of children and youth should inform policy responses – especially when they are directly interfering with their life situation and development, which cannot be postponed. When surveyed about what makes them happy, children continually emphasised the importance of being loved, protected, and listened to, and while they do not deal with finances directly, they stress the importance of having well-funded schools and family finances to meet basic needs. Within this rapidly evolving situation, a proactive and concerted policy focus on children is required at a national and local level. This is valid for the direct responses to public health endeavors. Measures should never be taken without

children mainstreaming in which the voices of children and their advocates have to be listened to. This is a matter of right, not a nice one to have. Public administration also has to ensure that children's rights are not further overlooked in the pandemic recovery phase.

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Zaključavanje „najboljeg interesa” djece – o statusu dječjih prava tijekom reagiranja na COVID-19

SAŽETAK

Ustav Svjetske zdravstvene organizacije i UN-ova Konvencija o pravima djeteta naglašavaju jedinstveni položaj djece, značaj zdravog razvoja i obveze javnih i privatnih dionika da uvijek razmišljaju o najboljem interesu djeteta. Nema dokaza, barem u Njemačkoj, da se ta obveza prikladno ispoštovala prilikom reagiranja na COVID-19. S druge strane, postoje jasni dokazi iz različitih dijelova svijeta da je zatvaranje škola i svih mjesta društvenih okupljanja značajno oštetilo socijalan, emocionalan čak i intelektualan razvoj mnoge djece. Prava djece nisu bila zaštićena tijekom reagiranja na koronakrizu. Ovaj se članak zalaže da ovo zanemarivanje položaja djece potiče iz utilitarističkog gledišta na zdravlje svih, umjesto pojedinaca. Kako bi se zaštitila prava djece u javnozdravstvenim aktivnostima, procedure predviđene UN-ovom konvencijom i njezine regulative koje vode računa o najboljem interesu djeteta moraju se pravilno implementirati u budućnosti.

Ključne riječi: reakcije na COVID-19, *lockdown*, prava djeteta, javnozdravstvene aktivnosti, zagovaranje.