Child Welfare Policy in Germany and Finland: Some Comparative Remarks

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Abstract

This paper[1] discusses child welfare policies and systems of child protection in Finland and Germany from a comparative point of view. The German welfare system is much more complicated due to the disjointed system of political decision-making and administration in Germany. In Finland, child welfare has been developed as a relatively comprehensive whole in the frame of the welfare system based on the Nordic welfare model. The paper indicates how child welfare policies and practices are shaped, and roles and positions of social work within the child welfare systems determined largely by country-specific societal orders. In Finland social workers are key players of a relatively comprehensive system of child welfare in terms of multi-disciplinarian cooperation whereas in Germany the field of child welfare policy seems to be more complex both for social work and the other players.

Introduction

It is not easy, and indeed almost impossible, to understand German politics without knowledge of some fundamental facts about German federalism. They will be outlined here briefly (see also Detterbeck/Renzsch/Schieren 2010).

The German federal state is of the co-operative federalism model (see Lijphart 1984). The functions of the state are divided asymmetrically between federal and regional tier (Länder). A predominant proportion of legislation lies with the federal state (Sec. 72ff Basic Law), however, a predominant part of the administration lies with the Länder (Sec. 83ff Basic Law). Moreover, the Länder leave a significant part of their administrative duties to the local government.

With regard to the problems dealt with in this paper all three tiers of government are involved. Especially in the field dealt with here one can see that rights and duties are fragmented between them. Each tier holds only a part of responsibilities. The consequences are a dense and hard to understand thicket of responsibilities and competences. Several and different overlapping fields of law are involved (health, child and youth, data privacy protection, criminal law). For each field the distribution of legislative and administrative power is different. It is much the same with the different systems of social benefits and social services. Different players are responsible or entitled to deliver and to pay for them. To make a complicated system almost unworkable two of the three players have an absolute veto position (Scharpf, 2009, ch. 1 and 2). Without consensus between Bundestag and Bundesrat

[1]* The authors would like to thank the reviewer of this paper for his helpful remarks. Of course all mistakes still rest with them.
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legislation is impossible. No player is able to act on their own. Scharpf invented the notion "Politikverflechtung" (Scharpf/Reisert/Schnabel 1976) to describe the implication of this constitutional setting.

As we know from studies introduced by Georg Tsebelis (2002) political systems with many players who have a veto are less able to find and implement solutions to problems. If they nevertheless do, the result often is close to the notorious "lowest common denominator". One can show this by comparing child protection policy between Germany and Finland.

From 2006 - 2008 a series of brutal killings of small children greatly startled the public in Germany. Demands to improve child protection immediately emerged from many sides. Alas, the capacity of the federal system of Germany to conquer the issue did not cope with the importance and relevance of the problem. At the outset, it seems that a quick agreement about the problem was possible and adequate solutions were at hand because politicians of all tiers of government – federal tier, Länder and local politics –unanimously seemed determined to act. In the course of time, however, it turned out that beyond this fundamental agreement there was a deep dissent about the measures to be taken and about the question about whose duty and competence it was to act. After months of agonising debate chancellor Angela Merkel invited the prime ministers of the Länder twice to a so-called "Children's summit" (Kindergipfel). Nevertheless, in the summer of 2009 the draft bill of a "Child Protection Act" (accurate "Gesetz über die Zusammenarbeit im Kinderschutz (KiZusSchG))" failed to pass Parliament.

No doubt, one important reason for the failure was the blistering criticism given by the charity unions (Parliamentary Committee for Families, Hearing of May 25th, 2009, German Bundestag, Minutes 16/90). However, the question we would like to address here is: For what reason was the responsible Ministry for Families, headed by Federal Minister Ursula von der Leyen (Christian Democratic Union), unable to present a Bill better than she was able to present?

The way Germany devolves legislative and administrative power across the several tiers seems to be inefficient and impractical as far as politics of social care and social welfare is concerned. It makes sense to compare the German system with the Finnish one in which child welfare is an integrated whole based on the Nordic welfare ideology. In Finland, child policies and child welfare legislation are founded on the principle of universalism according to the Nordic welfare model emphasizing the role of public bodies to provide social security, protection and care as part of a comprehensive system.

Traditionally, since the first Child Welfare Act was passed in the mid 1930s (1936/52), the organizational structure of Child Welfare in Finland has been tightly integrated into the municipal provision of social services and due to this the Finnish word 'child protection' has connotations which hardly fit the English ones (e.g. Hearn *et al.*, 2004). The second Finnish Child Welfare Act (1983/683) was based on the concept of **'**broad child welfare' according to which all authorities are responsible for contributing to the welfare of children and child welfare; it is seen as a multi-professional system of social, health, schooling and leisure time organizations (e.g. Mikkola & Helminen, 1993). The new Child Welfare Act (2007/417)- the third one- amplified this philosophy further by strengthening the role of professional organizations in planning and developing child welfare services and by defining the duty to notify for persons employed by, or in positions of trust for, organizations dealing with children and families. Statutes have been clarified with some amendments (e.g. 2010/88;

2010/1380) aiming at a more and more comprehensive system based on the best interests of the child.

The "Child Protection Bill" in the Federal Thicket of German State Organisation

Duty of Invitation (verbindliches Einladungswesen) or Compulsory Early Diagnosis Examinations (Untersuchungspflicht)?

In quite an early stage of the debate on May 16th, 2006 the Federal Council (Bundesrat) enacted a resolution (Federal Council, Printed Papers No. 864/06[2]) that asked the Federal Government to deliver the legal requirements that would enable the public authorities to make the attendance of early diagnosis examinations[3] (Früherkennungsuntersuchung) for young children more binding. Those examinations are not compulsory, but they are recommended to attain knowledge of serious diseases at an early stage. Nevertheless, a considerable percentage of parents do not take part in these examinations. Due to the fact that infants are the most exposed group of children affected by serious or even lethal violence (see Rauschenbach, 2009, p. 18) the Federal Council expected to improve child care and child protection by raising the quota of early diagnosis examinations through a more binding procedure.

The instrument which was supposed to achieve this object was an all-embracing invitation to all parents with young children. Further, the exchange of information and data between the health system and youth welfare was supposed to be improved to gain early hints about a possible distress of a young child.

On November 21st 2006 the Federal government replied to the resolution (Federal Council, Printed Papers No. 864/06). It argued that in its opinion the measures suggested were not designed to serve the object (see also Fegert, 2008, p. 137f). The Federal government argued that a strengthened child and youth care system (aufsuchende Kinder- und Jugendhilfe) would be a more adequate system, as against the health care service that did not appear to be adequate. Effectively, what would a compulsory examination be able to achieve? There was no guarantee that the day after an examination with no hints and no reason to suspect abuse or neglect an infant would not be maltreated.

The most important argument, however, was, that the Federal tier (Bund) had no power to legislate an all-embracing invitation system for early diagnosis examinations. This was, the Federal government argued, "the competence (or power) of the Länder or, respectively, of the local government" and it was supposed to be "organized by the public health sector", not by the health insurance system. Finally, due to data privacy protection only the public registration offices (Meldeämter) were allowed to conduct an all-embracing invitation, not the health insurance. Besides, the health insurance had not the disposal over all data concerning children, because about 10 % of them were not their members. *"The competence to enact a Bill which renders an invitation more bindingly ... lies with the Länder"* (Federal Council, Printed Papers No. 864/06).

Thereupon, the Federal Council accused the Federal government of failing to act. In their view (2006/07) recent cases of maltreatment of infants the Federal Council extended its demands. Now, the Council asked the Federal government for legislation enacting a compulsory physical examination of all children younger than six years. Again the Council argued that a nationwide solution was necessary, though the Council had to admit that some

[2] The number after the slash indicates the year of the paper.
[3] The German Health Service offers nine of those examinations for children from ages 0 to 6.

Länder governments had already enacted similar legislation on their own. By changing some administrative details the Council expected it would be able to counter the objections of the Federal government (Federal Council, Printed Papers No. 823/06 and 898/06). Yet, the Federal government remained unimpressed. It stuck to its argumentation by blaming the Council for by-passing the all-important Basic Law (Federal Council, Printed Papers No. 240/07, p. 1f; see also Federal Constitutional Court, Decisions, vol. 88, p. 329f).

This was the situation when Chancellor Merkel invited the prime ministers of the Länder governments (Ministerpräsidenten) to her so called "Kindergipfel" already mentioned above (December 2007 and June 2008). The Chancellor and the prime ministers agreed upon some minimalist basic principles of a future child protection policy. And still, notwithstanding the very few compromises the participants were able to agree upon, the new attempt to accomplish a Child Protection Bill collapsed.

Duty to Notify in Question

Most cases of misuse and maltreatment of children are committed by parents or legal guardians. Also, in most cases, the authorities have some knowledge of the problems the families concerned have had in the past. The question, however, was: Why did the authorities fail to take action? Why do neighbours, paediatricians, nursery nurses and teachers not pass obvious indications of maltreatment and misuse to the authorities?

It seems that these persons are too anxious to be able to pass on their suspicions. Under German law, Section 203, German Criminal Law (§ 203 StGB) it is a criminal offence, if physicians, social workers or nursery nurses pass private information they have obtained in the exercising of their duty. However, there is another provision that allows them to reveal private information in case of an emergency- Section 34, German Criminal Law (§ 34 StGB) ("rechtfertigender Notstand"). Unfortunately this legislation is too imprecise to give the persons concerned the certainty and confidence to inform the authorities (see German Bundestag, Printed Papers 16/13770, p. 141).

To help this situation, after the "Kindergipfel", the German government presented a Child Protection Bill in summer 2008. This Bill introduced a provision that would entitle physicians, social workers, teachers, trainers etc. to pass their suspicions on to the authorities ("Befugnisnorm" – permission to inform). The intention was to release those professionals from their apprehension that they would commit an offence by informing others (see German Bundestag, Printed Papers 16/13770, p. 141, Fn. 56). However, oddly enough this regulation was supposed to be enacted not as a part of the German Criminal Law, but as a special regulation in the new Child Protection Act. Therefore, observers doubt that it really was designed to serve its purpose (Prestien, 2008, p. 59f).

Regardless of these objections the Federal government pushed the legislation and aggressively pursued– with weak arguments (Statement by the German Youth Institute, German Bundestag, Committee for Family, Printed papers 16(13)474k, p. 5) – that the competence for legislation lay with itself (section 74, subsection 1, No. 7 Basic Law). It further argued that it was necessary ("erforderlich") to enact a nationwide unitary legislation (section 72, subsection 2, Basic Law)- "*A manifold legislation by the Länder would lead to a fragmented law with serious consequences for the protection of children and youth"* (German Bundestag, Printed Papers 16/12429, p. 7).

As mentioned above, the permission to inform was supposed to include teachers as well. However, the education system is part of the legislative power of the Länder. As a consequence, the Länder government complained that the Federal government was trespassing into the realm of Länder competences (Federal Council, Printed Papers. 59/90-Beschluss). The Federal government repudiated this opinion. It argued that the Bill did not regulate education policy but the mode of how to handle "obligations and proceedings in child protection policy" (Federal Council, Parliamentary Papers, Session 856, March 6th, 2009, p. 87).

With regard to their claimed powers some Länder had already passed their own more far-reaching legislation. Instead of a "permission to notify" for example Bavaria passed a legislation that enacted a "duty to notify". Now, the Bavarian government was preoccupied that a nationwide legislation with provisions less far reaching would render the Bavarian law null and void (section 31, Basic law – Bundesrecht bricht Landesrecht). For that reason, Bavaria demanded the reassurance that Federal law would only regulate a minimum standard leaving more far reaching regulations untouched. The Federal government agreed (Federal Council, Parliamentary Papers, Session 856, March 6th, 2009, p. 87, German Bundestag, Printed Papers 16/12429, p. 15). This seems quite odd because the Federal government originally had reasoned its competence by arguing that the whole issue demanded a nationwide legislation. Thus, the federal government contradicted its own argument.

However, prima vista it seems there was a way out. Why didn't the Federal government propose to pass a nationwide regulation enacting a "duty to notify" instead of a "permission to notify"? For two reasons: First, most experts were preoccupied, that a "duty to notify" would be contradictory to the purposes of the legislation (Parliamentary Committee for Families, Hearing of May 25th, 2009, German Bundestag, Minutes 16/90), and, second, undoubtedly an uncontested "duty to notify", in contrast to a "permission to notify", would have been – especially after the reform of the Basic Law in 2006 (Föderalismusreform 2006, see Schieren, 2010, p. 266ff, p. 280ff) – an unlawful trespassing into the realm of Länder competences, if teachers were still intended to be addressed by the new law. The alternative would have been to omit teachers. However, such a provision would have been contradictory to the objects of the legislation that was supposed to deliver a scheme that would guarantee a close network of vigilance and information.

Therefore, as a consequence of the fragmented powers in the different fields of politics concerned here the Federal government had only a very unpleasant alternative. On the one hand, it could allow the Länder to preserve their more far reaching legislation by contradicting its own argument that a nationwide unified legislation was necessary. On the other hand, it could join the far reaching Länder legislation by enacting a nationwide "duty to notify" by contradicting the objectives of its legislation. Whatever outcome was possible, it was unsatisfactory. The reasons, therefore, lie within the constitution that does not allow a comprehensive policy in this field. For these reasons, the Child Protection Bill finally failed at an early stage of the legislative process in parliament (see German Bundestag, Minutes of Parliamentary Proceedings, 16th election period, 217th Session, April 23th, 2009, p. 23619 D).

Developing Child Welfare as a Complete System

Child Welfare in the Frame of a Welfare-Based Societal Order

After World War II, especially since the 1960s, the Finnish society has been ordered according to the Nordic model of social welfare. Due to this, governmental organizations have

a significant responsibility for citizens' social security. The Nordic societal order is based on the idea of 'social citizenship' according to which citizens have broad social rights and duties (see Finden & Johansson, 2007). Social welfare is a common endeavour financed by taxes and huge income transfers from rich to poor people which have been organized in the name of equality, social security and prevention of social problems. Child welfare in Finland has been developed as a part of this wider comprehensive Nordic welfare system. Due to this is has been possible to make a relatively consistent child welfare policy.

In the Finnish welfare system national insurance is relatively comprehensive in terms of health insurance, unemployment benefit, retirement pension and other benefits. The model is called 'universal' due to its inclusive nature. The basic philosophy is to offer social security on the basis of people's needs. Social work takes advantage of the social political system and the system takes advantage of social work. It is an important professional instrument in the social political infrastructure in which *"social workers are mostly civil servants whose fundamental task is to fulfil citizen's social rights in society"* (Hämäläinen et al. 2010:45). A central task of social work is to help citizens to use the system of social benefits and services according to their rights, including in the field of child welfare. All in all, there is a strong belief in the preventive role of the system. Prevention through the system is emphasized also in the field of child welfare.

In Finland, municipalities are primarily responsible for organizing adequate social and health services. The welfare system has been developed as a whole and multi-disciplinarian cooperation has been strongly emphasized therein. Child welfare is an integrated part of this totality. In the system of child welfare, social work is the main professional organization exercising public power fixed by law. Social work – together with other welfare professions – puts the socio-political system to good use. Professional qualification in social work is based on the MA degree level of university studies. Municipalities are the main employer of social workers and most of the Finnish social workers are closely engaged with public authorities within the local social and health care system.

Social work has both a supporting and controlling function in society. Especially in the field of child welfare, two fundamental tasks of social work are to strengthen families in their child rearing and to investigate the quality of family life from the point of view of the need for taking children into public custody. Often, it is difficult to fit these two tasks together. The position and role of social work as a professional system varies in this sense significantly in different countries. In Finland, social work has the power to make an intervention in family privacy in the name of the child's best interests as fixed by law (e.g. Satka & Harrikari, 2008). This is social work's professional right and responsibility in all the cases when the family does not offer adequate care for the child. Social work has a key role in the process of investigating the needs for interventions.

The new Finnish Child Welfare Act (2007/417) which came into force in the beginning of the year 2008 aimed to include child welfare and fit it into the modern social order. Some 14 years had gone by since the former Child Welfare Act (1983/683) which was already based on the modern idea of subjective rights of a child. The new Act emphasized more and more preventive measures and cooperation between authorities from different administrative fields. The new law gave detailed instructions for this purpose from which many, at least partly, had already been in use in administrative practice. It obliged municipalities also to draw up a plan for arranging and developing child welfare services, to review it at least every four years, and to take this plan into account when drawing up the budget of the municipality (2007/417,

section 12). This statute brought about and pushed ahead strategic planning of the local child welfare policy and strengthened the unity of child welfare as a comprehensive system.

As the new Child Welfare Act emphasized cooperation between local authorities, the recent renewal of the Finnish Youth Act (2006/72) strengthened the idea of multi-professional collaboration in youth work and youth policy further. According to the new government statement which came into effect in the beginning of 2011, youth work and youth policy is to be realized as a multifaceted cooperation between local authorities and in cooperation with young people, youth associations and other youth work organizations, and for planning and developing the execution of this cooperation a municipality must have a guidance and service network including representatives from the fields of education, social and health, youth, employment and police services (2010/693, section 7). In accordance with the ideology of the Nordic social order based on the idea of comprehensive social protection for all citizens, youth work and youth policy is seen and developed as a comprehensive multi-professional system – as with child welfare and child welfare policy.

The Principles of Child Protection Notification and Compulsory Early Diagnosis Examinations in the Finnish Child Welfare

The new Act obligates the municipalities to respond to notifications of child protection concerns within seven working days from the date of receiving them. In practice, it is a task of social workers to examine if there is need for further investigation of the necessity of child protection in the case. This investigation is also carried out by social workers and must be done within three months. The preceding Child Welfare Act had already put authorities in all fields of administration as well as other professionals of social, health, school, police and church organizations under an obligation to inform child welfare authorities if they find out that a child may need individual or family-based protection (1983/683, section 40). The new law explicated and completed this obligation intrinsically "notwithstanding any confidentiality regulations" (2007/417, section 25). The obligation of notification has become a fundamental principle of child protection justified by the idea of "the best interests of the child". In addition to professionals, the duty of notification is incumbent on all citizens.

The duty to notify the authorities about the need for child protection inquiries is based on the fundamental law of Finland, according to which the Government is responsible for protecting people in socially harmful situations (1999/731, section 19). The duty to notify expresses the idea of prevention which has been the basic element of the Finnish welfare ideology for many years in terms of the Nordic welfare ideology, and the idea of "early intervention" plays an important role therein (Räty, 2008:148). It is justified primarily on the ground of the principles of prevention, early intervention and the best interest of the child which are the bases of the child welfare legislation.

Already, before the decree of the new law, and especially since the turn of the 21st century, the number of child protection notifications was increasing because many organizations had developed policies and procedures for this. In 2006, the ombudsman of the Finnish Parliament organized an investigation about the need of child protection notification (Oikeusasiamies, 2006). This found that the situation across all administrative and professional fields was unsatisfactory because those to whom it concerned did not all follow the law as required. There were significant differences in the realization of the obligation of notification between municipalities and institutions. Many professional institutions had fulfilled the obligation, for example many kindergartens, but there were also remarkable imperfections in the policies and procedures. The new Child Welfare Act, after coming in force from the beginning of 2008,

led to a significant increase in child protection notifications, especially by the police, the school system, emergency services, and informal quarters (Ristimäki *et al*., 2008).

The investigation of the need for child protection is assessed by the social worker responsible for the child's affairs. This includes *"an assessment of the circumstances in which the child is being brought up, and of the prospect for the custodians or other persons who are at that time responsible for the child's care and upbringing, and of the need for child welfare measures"* (2007/417, section 27). A client plan must be drawn up and reviewed for every child who is a child welfare client, if possible in cooperation with the child and custodian (section 30). Social workers who are responsible for the processes are allowed to get all the information they need from other professional groups. The new Act actually obliged municipalities to ensure that social workers responsible for a child's affairs *"have at their disposal expertise in child growth, development and health care, and legal and other expertise necessary in child welfare work"* (section 14). In this sense child welfare is a multi-professional system containing all the local organizations dealing with children and families.

Confidentiality legislation has complicated the realization of child protection notification, especially among health professionals. Attention to the complexity of the relation of confidentiality and child protection in multi-professional cooperation had been given in legal research (e.g. Mahkonen, 2003: 111-168). A particular aim of the new Child Welfare Act was to clarify and standardize the customs of confidentiality within different fields of administration. This resulted in a system in which confidentiality is thoroughly subordinated to child protection and the principle of the best interest of a child.

A good example of this is the statute according to which an administrative court can authorize an examination by a physician or other expert upon application by the social worker dealing with the investigation of the need for child welfare *"if the examination is essential for investigating the need for child welfare but the custodian forbids it"* (2010, 1380, section 28). This example illustrates well the united character of the multi-professional service system concerning child welfare. All aspects have been attempted to subordinate to the whole. In the case of the investigation of the need of child welfare the information needed therein must be offered and produced without exceptions.

Conclusions

As we tried to show child welfare policy in Germany and Finland feature some differences we attribute to two factors. The first factor we did not outline in detail seems to be a different approach both countries have towards the relation between families and children respectively on the one hand and the authorities on the other hand. The comparably high scale of interference in private family matters by the State we come across in Finland, with regard to Sec. 6 German Basic Law (Protection of Family from interference by the State), seems to be impossible in Germany. The German tradition of family policy renders it very unlikely that Finland's policy could be taken as an example for Germany.
However, apart from such fundamental differences resting in different political cultures, we might assume that in Germany child protection policies are less efficient and comprehensive than in Finland due to state organisation. With the fragmentation of rights and responsibilities, of legislative and administrative powers, as the result of several players who have the power of veto in the political system of Germany, it maybe that that the Germany's performance in child protection policies is less strong than in unitary Finland.

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