



## Summary

# Implementation of the Right to Participation of Children regarding Art. 12 of the UN Convention on the Rights of the Child in Switzerland

**Study on the legal foundations and practices in nine cantons in the areas of family law, juvenile criminal law, education, health and youth parliaments**

Christina Weber Khan

Sandra Hotz

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Schweizerisches Kompetenzzentrum für Menschenrechte (SKMR)

Centre suisse de compétence pour les droits humains (CSDH)

Centro svizzero di competenza per i diritti umani (CSDU)

Swiss Center of Expertise in Human Rights (SCHR)

Schanzeneckstrasse 1, Postfach, 3001 Bern

Phone +41 31 631 86 51, [skmr@skmr.unibe.ch](mailto:skmr@skmr.unibe.ch)

## I. COMMISSIONING OF THE STUDY

The Children and Youth Politics thematic cluster at the Swiss Centre of Expertise in Human Rights (SCHR) is responsible for reviewing and promoting the implementation of international children's rights obligations in Switzerland. The SCHR was mandated by the Federal Office of Justice (FOJ) – on the basis of postulate 14.3382 of the National Council Science, Education and Culture Committee – to produce a study for the attention of the Federal Council on implementation of Article 12 of the UN Convention on the Rights of the Child (hereinafter referred to as UNCRC) in the cantons, taking into account international and national law. Under Article 12 UNCRC, children have a right to participate, and in particular to express their opinions and to be heard in all aspects of life that affect them.

The FOJ and the SCHR agreed that the study would examine the following subject areas: *family law, juvenile criminal law, child protection, education, health, and cantonal youth parliaments*. This SCHR study was commissioned in line with the recommendations of the UN Committee on the Rights of the Child (hereinafter referred to as the Committee) of February 2015, which called on Switzerland to increase its efforts to implement Article 12 UNCRC. The Committee on the Rights of the Child is the United Nations body responsible for monitoring and implementing children's rights.

The study is intended to provide the basis for the development of the Federal Council's report requested by the National Council's Committee for Science, Education and Culture with postulate no. 14.3382: "*Droit de l'enfant d'être entendu. Bilan de la mise en œuvre en Suisse de l'article 12 de la Convention des Nations Unies relative aux droits de l'enfant.*"

## II. CONCEPT AND BASIC PRINCIPLES OF THE STUDY

### 1. Concept and structure of the study

This study comprises a theoretical and empirical review of implementation of Article 12 UNCRC in the six selected subject areas: *family law, juvenile criminal law, child protection, education, health, and cantonal youth parliaments*. The conclusions at the end of the study combine the results from both parts of the study.

The resulting recommendations for implementation of Article 12 UNCRC are aimed at both the federal government and the cantons.

### 2. Part 1: International and national legal foundations

The theoretical basis of this study comprises an evaluation of the various *international instruments and studies* on the implementation of children's right to participate, and an overview of the status of legal implementation of Article 12 UNCRC *in national law* in the six selected settings.

### 3. Part 2: Data collection in nine cantons

Empirical data on the way in which children participate in practice in the abovementioned settings were collected in the *cantons of Aargau (AG), Basel-Stadt (BS), Bern (BE), Fribourg (FR), Schwyz (SZ), St. Gallen (SG), Ticino (TI), Vaud (VD) and Zurich (ZH)*.

The data were collected in a two-stage process. The first stage was a questionnaire-based survey of the relevant departments (justice, social services, education, health) in the nine cantons, and among the respective cantonal youth parliaments. In a second stage, the results of the questionnaires were discussed directly with professionals from the cantons.

In the *first phase (March–June 2018)*, data were collected in nine cantons via a questionnaire on the status of implementation of the right to participate as set out under Article 12 UNCRC in the following settings: family law, juvenile criminal law, child protection, education, and health. An additional questionnaire was also sent out, asking cantons how the right of children and young people to participate is realised at a strategic level, in child and youth policy, and in the monitoring of implementation of children's rights at cantonal level.

The questionnaire response rate was high. A total of 63 questionnaires (seven per canton) were sent out, and some 60 questionnaires were returned by the cantons, in some cases with extensive supporting documents (regulations, directives, case law, examples of application).

In the *second phase (August–October 2018)*, the questionnaires were analysed and the initial results were prepared for discussions with representatives of the nine cantons and the cantonal youth parliaments. A total of six inter-cantonal exchanges on the topics of family law, juvenile criminal law, child protection, education, health and the youth parliaments were held between September and October 2018. The aim of these exchanges was to discuss the results of the survey with professionals from the relevant fields and from the administration, and to record the professionals' recommendations to improve implementation of Article 12 UNCRC. In addition, these results were discussed with members of the Federal Commission for Child and Youth Affairs and representatives of the Child Rights Network Switzerland.

A *first version of the study (June 2019)* in the form of thematically relevant excerpts was shared with the participating departments and personnel from the cantons so that they could run a fact checks. Thus, the SCHR study could be definitively completed by December 2019.

### 4. Connection to previous studies

The study builds on previous studies on child and youth policy in Switzerland, in particular the following reports by the Swiss Centre of Expertise in Human Rights (SCHR):

- *Une justice adaptée aux enfants*, 2017, on the implementation of Art. 12 UNCRC regarding the position of children in civil law and migration law.
- *Le droit de protection de l'enfant. Les premiers effets de la mise en œuvre dans les cantons de Genève, Vaud et Zurich*, 2014, on the initial effects of the revised child protection law on implementation of children's right to participate in the cantons of Geneva, Vaud and Zurich.
- *Umsetzung der Menschenrechte in der Schweiz*, in the volume "Children and Youth Politics", 2014, on the concept of child welfare and the implementation of the principle of child welfare in Switzerland.

### III. RESULTS OF THE STUDY

#### 1. The status of Art. 12 UNCRC in Swiss law is clear

Article 12 of the UNCRC was recognised as *self-executing* in the Federal Supreme Court's case law soon after the UNCRC entered into force in Switzerland in 1997. The right to be heard is deemed an extension of personal rights. Cases involving a violation of Article 12 UNCRC can therefore be brought directly before the Swiss courts by the child or by their legal representative.

#### 2. The child's right to participate should be interpreted broadly

The study shows major disparities between the subject areas and the cantons, both in terms of the various institutions' (public offices, schools, children's hospitals) understanding of the participation of children and young people in proceedings, but also in the way participation is implemented in practice. The responses reveal that participation in proceedings is usually equated with the right to be heard.

However, *under Article 12 UNCRC, the child's right to participate is broad*, comprising various forms of participation in proceedings or decision-making on matters affecting the child, including the right to information, the right to be present, the right to form their own views and to express those views freely, the right to be heard, and the right to representation. Participation is not linked to the child's capacity of judgement. Participation goes beyond being a party to judicial or administrative proceedings; it should be understood as a process and an attitude towards the child.

The right to participate under Article 12 para. 2 UNCRC thus comprises more forms of participation than merely the right to be heard. Being heard is more a means to an end than an end in itself. Additionally, the passive construction "to be heard" emphasizes the outcome and the goal: the child's expressed view should also actually be incorporated in adults' decision-making.

Contrary to this broad understanding of participation as set out under Article 12 UNCRC, various federal laws contain set age limits regarding a child being heard and granting consent in matters affecting them: for example, Article 270b Swiss Civil Code (SCC) stipulates that from the age of twelve, a child must consent to a change of surname, which raises questions in relation to Article 12 UNCRC, under which a younger child should also be consulted and listened to about a change of surname, if they so wish. For the same reason, the age limit under Article 201 Civil Procedure Code (CPC) on notice of a decision (only) once a child is 14 years old, is also questionable. Furthermore, Swiss personality rights law consciously refrains from linking legal capacity of judgement to fixed age limits (Article 11 et seq., Article 16. Article 19c SCC), instead making it dependent on the individual development and capacities of the child.

#### 3. Encouraging progress, major disparities in implementation

Since Article 12 UNCRC entered into force in 1997, Swiss lawmakers have successively transposed into law the corresponding provisions on the right to participate in proceedings: in juvenile criminal law, in administrative law (for example in cantonal legislation on schools and health), in asylum law (which falls outside the scope of this report), and in civil law, specifically in family law proceedings and child protection proceedings. In addition, the revision of the Federal Constitution in 1999 saw the addition of Article 11 on the protection of children and young people

(in force since 2000). The child also has fundamental procedural rights. Under Article 29 paragraph 2 Cst., provided they are recognised as a party to a case, children have a *constitutional right* to equal and fair treatment in judicial and administrative proceedings and the right to be heard.

The individual national legal foundations, federal and cantonal case law, and the results evaluated here from the survey of nine cantons and examples of good practice from the cantons in the various settings show encouraging progress on the whole. Nonetheless, implementation of Article 12 UNCRC in Switzerland is not yet complete at national or cantonal level.

Additionally, there are *significant discrepancies in legal implementation between the different settings and between cantons*. Children's participation is often not interpreted broadly enough and not as a process, but rather as isolated participatory elements, such as "being informed", "being heard" and "being represented".

One of the results of these discrepancies is *a certain inconsistency in children's legal status in the Swiss legal system*. For example, while an accused child or adolescent is unequivocally a party to juvenile criminal proceedings, their legal status in family law matters differs depending on the area of application. In child protection proceedings, party status is now recognised but not enshrined in law. In cantonal administrative proceedings on matters relating to a child's schooling, there are often no regulations in place on the child's party status, and the role of teachers and of parents – as those exercising parental authority and acting as the child's representatives – actually remains surprisingly dominant in this area.

#### 4. Paradigm shift in the child rights-based approach yet to fully materialise

Added to this overall picture is the fact that practice in Switzerland is still mostly rooted in consideration of a child's needs and wishes (welfare-driven approach), and a desire to protect, whereas the Convention on the Rights of the Child and Article 12 UNCRC as a whole are based on a child rights approach. For Switzerland this means it can and should *become a matter of course for children and young people to actually be involved in all matters concerning them*: in family law, in juvenile criminal law, in child protection, in education and health issues, and in the formulation of child and youth policy.

#### 5. Systematic improvements are possible

Children's rights *apply in all areas of a child's life and across all of Switzerland's administrative hierarchies* (federal government, cantons, communes). Only when all actors and children themselves are aware of this can systematic involvement of the child in administrative or court proceedings and decision-making processes be guaranteed.

#### **Strategies are needed at federal and cantonal level**

Comprehensive strategies that *cover all areas and actors are needed at federal and cantonal level* so that a paradigm shift can take place in Switzerland from a child welfare-driven approach to a child rights-based approach. International and national findings indicate that an important step in the implementation of Article 12 UNCRC is the establishment of *independent points of contact and complaints offices that can be easily accessed by children and young people*.

Child and youth policy is characterised by a federal division of responsibilities. Within their areas of responsibility, *only some cantons and communes have general and comprehensive child and youth*

*policies*. In addition, they exercise their legislative discretion to varying degrees. The various youth parliaments and councils, which are based on the relevant cantonal child and youth laws, are organised in a correspondingly heterogeneous fashion. A possible basis for the development of a future cantonal child and youth policy and a strategy to implement participation rights could be the recommendations of the Conference of Cantonal Directors of Social Services (CDSS) on the development of child and youth policy in the cantons (2016). However, it should ideally be clearly enshrined in the Federal Act on the Promotion of Extra-Curricular Activities for Children and Adolescents (ECAA), which entered into force in 2013. In the establishment and further development of a cantonal child and youth policy, the federal government's financial aid in accordance with Article 26 ECAA plays a crucial role. Twenty-one cantons made use of this financial aid between 2014 and 2020 (as at 30.11.2019), including eight of the nine cantons surveyed (BE, FR, SG, SZ, TI, VD, ZH).

None of the cantons examined has a comprehensive strategy in place, or plans to develop one, regarding implementation of children's rights in general and the right to participate specifically. As the positive examples from the cantons of Fribourg and Vaud clearly show, *a comprehensive and well-formulated child and youth policy plays a pivotal role in the participation of children and young people*. It is therefore important that the cantons work cooperatively and continue to be supported by the federal government in the development of a comprehensive child and youth policy, and the UNCRC forms a key foundation for this.

Children and young people, as well as bodies such as youth parliaments and other interest groups representing children and adolescents, should also be involved in formulating and implementing a child and youth policy on both the cantonal and federal levels.

### **Responsibility needs to be assigned**

Furthermore, responsibility needs to be assigned and defined in regard to *who should protect participation rights in which setting*. In proceedings, the court or authority (i.e. the person conducting the legal process) will routinely be responsible for ensuring that children are able to participate and that their views are incorporated. Additionally, children and young people should be systematically involved in matters that affect areas of their lives – in projects, on commissions and in legislative work at federal and cantonal level. For every decision-making process that affects child-related matters, the parents (or legal representatives) are responsible for ensuring the child's participation, and depending on the setting, the professionals involved from the fields of education or health are also responsible. Assigning responsibility ensures that the child's right to participate does not get lost between state institutions, parents, and other actors.

### **Resources are needed**

More resources are needed in order for a child to be able to actually participate in all subject areas and for the actors at all levels (federal, cantonal and communal) to acquire knowledge and introduce appropriate structures to implement the child's right to participate. The experts involved in the study agree on this.

## **6. Professionals would like to see more information and dialogue**

The professionals from the cantons who were surveyed as part of the study see a need for action regarding information and training on children's right to participate, and for dialogue and exchange between cantonal specialist authorities. They would also like to see more information and background on the concrete implementation of Article 12 UNCRC. For example, respondents

recognise a specific need for action regarding the systematic training of judges. The cantons – and thus the relevant supervisory authorities – are therefore called on *to define corresponding requirements and standards*.

At the same time, *there is a wealth of basic information and resources* already available nationally and internationally on children's right to participate, which could already be used today. For example, the experts who attended the inter-cantonal exchanges suggested that greater use could be made of the practical guide by the Conference on the Protection of Minors and Adults (COPMA) on child protection law in courts and that training on child participation could be integrated in the 'CAS Judiciary' programme at the University of Lucerne's Swiss Judicial Academy.

A *national information and coordination office* (e.g. a *federal children's office*) is therefore needed at federal level in the area of children's rights, which could support the cantons by providing practical resources (e.g. information materials, models for making age-appropriate decisions, checklists, standards), and which could showcase examples of good practice and surveys conducted in the cantons. This national information and coordination office could also be involved in legislative processes and provide specific expertise on international legal frameworks and remedies to children, such as the individual communications procedure, which entered into force in Switzerland in 2017 with the 3<sup>rd</sup> Optional Protocol to the UNCRC. This procedure allows children to bring complaints directly to the Committee on the Rights of the Child if they have exhausted national complaint mechanisms. Information may also be submitted in relation to the United Nations Convention on the Rights of Persons with Disabilities, which expands on children's right to participate under Article 12 UNCRC for children with a disability. There are also a number of directives at European level that can be consulted in Switzerland, namely the Council of Europe guidelines on child-friendly justice (2011) and the Council of Europe recommendation on the participation of children and young people under the age of 18 (2012), which extends beyond the justice sector.

## 7. Positive factors to promote participation

During the inter-cantonal exchanges to discuss the results of the questionnaire, it emerged that the following factors could have a positive effect on the development of consistent participation practice:

### *a) At national and cantonal level:*

- Collection of data on practice (including statistics)
- Awareness-raising programmes (parents, children, professionals)
- Information materials for children and young people, as well as their parents
- Information and exchange platforms for professionals

### *b) At legal level:*

- Legal foundations on participation
- Cantonal and Federal Supreme Court case law
- Cantonal foundations such as directives, fact sheets, templates and cooperation papers

### *c) At technical level:*

- Knowledge of international standards and how they are implemented in practice
- Instruments such as standards, process guidelines, checklists for practical use
- Integration of teaching and research into practice

*d) At cantonal level:*

- Networking and exchange between cantonal institutions
- Clarity on tasks and responsibilities of the various actors
- Bodies promoting exchange of expertise in the cantons
- Standards (guidelines, fact sheets etc.) at the court of first instance in proceedings

*e) In institutions (authorities, courts, schools, hospitals, etc.):*

- Developing a shared understanding of participation throughout proceedings, and integrating it in internal processes
- Information materials for children and young people and their parents
- Systematic education and training of experts

## 8. Specific shortcomings by subject areas

### **Family law**

In the field of family law, there are national legal bases on the right to be heard and the right to child representation in the Civil Procedure Code (CPC), which implement the child's right to participate in this regard. One of the points we note is that in practice, there is a *relatively narrow understanding of participation* and being heard: the Federal Supreme Court's case law primarily concerns child hearings in separation and divorce proceedings. In its directives, the Federal Supreme Court recommends a hearing for children ages six and older. The survey reveals, however, that in practice children are often only heard in person starting at age eight or ten, and usually in care and custody disputes. There is also a margin of discretion for courts to dispense with hearing for reasons other than age. The survey shows *significant differences in the understanding of being heard and being informed in the cantons*: for example, one third of cantons say they do not have information materials for children and parents, and in the other cantons, practice with regard to when information materials are supplied varies widely.

### **Juvenile criminal law**

Thanks to the Federal Juvenile Criminal Law Act and the Federal Juvenile Criminal Procedure Code, juvenile criminal law is the one part of the Swiss legal system that *has a comprehensive legal framework in place regarding the conduct of proceedings involving minors*. Minors who are defendants in proceedings have party status and as such get a legal hearing, have the right to inspect case documents, have the right of appeal, and are entitled to defence. However, improvements are still necessary regarding the international basic standards and the survey in terms of participation in summary penalty order procedures, the unconditional granting of legal representation, and regarding the provision of age-appropriate information at all times. In addition, juvenile criminal mediation should be specifically promoted as a promising and participatory element.

### **Child protection**

As in family law, there *are isolated national legal bases on the right to participate* with regard to child protection: hearing and child representation are regulated in the Swiss Civil Code (SCC), the Swiss Civil Procedure Code (CPC) and the Ordinance on the Placement of Children in Foster Care (FCAO). Furthermore, regarding care-related hospitalisation in child and adolescent psychiatry, there is a legal basis for a trusted person who can accompany the child. However, there are no comprehensive special provisions on the care-related hospitalisation of a child, which is



inconsistent with a child rights-based approach. The Federal Supreme Court's case law on hearings in the area of child protection corresponds by and large to that of family law proceedings, where the decisions are less about exceptions to hearing than unnecessary repetition of hearings, or delegation to third parties. In addition, *the role of child representatives* is not yet established according to case law, doctrine or the survey.

### **Education**

In the area of education, there are no specific legal bases at federal or inter-cantonal level regarding the implementation of children's right to participate in school settings. However, pupil participation is regulated at individual and institutional level (class, school) through the cantonal school acts, albeit to varying degrees, with the regulations *ranging from a general participation provision to detailed laws and ordinances* on pupils' rights. According to the cantons, a practice of participation has evolved in schools, although this practice (at commune level) needs to be examined in more detail. However, in cantonal administrative proceedings on matters related to a child's schooling, for example concerning transfer or exclusion of the child, there are hardly any regulations on the child's party status. Accordingly, there is a lack of case law on child participation. Instead, from the perspective of the law, it is the parents who are the main participants and who exercise parental authority and act as legal representatives of the child.

### **Health**

In health settings, participation is routinely interpreted as being involved in the process of medical information/explanation and *informed consent of the child or their parents*. But this does not go far enough, as other forms of participation – such as information before and after a stay in hospital, or support during treatment, and the participation of very young children and/or those who lack capacity of judgement – are often neglected. However, the survey showed that half of children's hospitals use the European Association for Children in Hospital's Charter and special information brochures, which is a positive development. In outpatient child and adolescent psychiatric settings, which face notable pressure on resources, and which are particularly shaped by the relationship dynamic between child, parents, authorities and medical professionals, there are – unlike in inpatient settings – no regulations to safeguard the affected child's participation rights.

### **Cantonal youth parliaments and cantonal child and youth policy**

As part of this study, the cantons were also asked about their child and youth policy, for which they are responsible *under the federal system*. As the survey showed, a cantonal child and youth policy plays a crucial role in the implementation of the UNCRC in general, and Article 12 UNCRC in particular. This is illustrated e.g. by the youth parliaments in cantons with a well-developed child and youth policy. In these cantons, the youth parliaments are systematically involved in issues relating to children and young people and exert influence. *The cantonal and regional child youth parliament structures should therefore be further strengthened and promoted*. The Extra-Curricular Activities Act of 2013 remains primarily a financial aid act, but it still allows the promotion of important national projects on participation.

## **IV. RECOMMENDATIONS**

The last part of this study presents the SCHR's general recommendations to the federal government and cantons. Three specific recommendations are formulated for each subject area (family law, juvenile criminal law, child protection, education, health, and youth parliaments). Each

recommendation is supplemented by one or more concrete suggestions. The recommendations are also aligned with the “*Mesures visant à combler les lacunes dans la mise en œuvre de la Convention relative aux droits de l’enfant*” drawn up by the Federal Council on 19 December 2018 to improve children’s rights in Switzerland, in response to the *Concluding observations (2015)*.

## 1. General recommendations to the federal government

### **1. Systematically involve children and young people at federal level**

The SCHR recommends that children and young people should be allowed to participate more intensively and more directly as a matter of course in all matters that affect them, at both the national and the international level. Children and young people should be systematically and directly involved in projects, commissions and legislative work.

**1.1.** Children and young people should be included e.g. in the Federal Commission for Child and Youth Affairs (FCCY). This can be done without amending the Federal Extra-Curricular Activities Act. In addition, or instead, the FCCY is already free to seek informal and regular input from a group of children and young people, e.g. in an institutionalised way through a new “Swiss child and youth council”, or through existing child and youth organisations. In the longer term, however, it would be preferable for such a “Swiss child and youth council” to be enshrined in law.

**1.2.** Children and young people should be actively involved in the existing monitoring process on implementation of the UN Convention on the Rights of the Child. This means that the federal government would be responsible for ensuring that they are able to participate regularly in monitoring and reporting activities to the Committee in accordance with the UNCRC (e.g. through a Federal Youth Session consultation).

### **2. Recognise participation as a binding key objective of Swiss child and youth policy**

The SCHR recommends to the federal government that binding key objectives of Swiss child and youth policy be established, and the participation of children and young people (Art. 12 UNCRC) should be explicitly stated as one of these.

**2.1.** The right to participate and the way it is implemented should be established as a binding key objective of the promotion of extra-curricular activities for children and adolescents in the Federal Extra-Curricular Activities Act.

**2.2.** The binding key objective on participation can be based on the recommendations of the Conference of Cantonal Directors of Social Services regarding the development of child and youth policy in the cantons dated 16 May 2016.

**2.3.** The federal government should support the cantons in pursuing this key objective by, among other things, helping promote data collection and thus ongoing evaluation, and by supporting the development of overarching standards and instruments to implement this key objective.

### **3. Set up a federal office for children's rights**

The SCHR recommends that a federal office for children's rights be set up. In particular, it should be given powers to participate in legislative processes and parliamentary business and to advise, coordinate, network and provide financial support, in a similar way to the Federal Office for Gender Equality and the Federal Bureau for the Equality of People with Disabilities.

**3.1.** Legally enshrining participation as a key objective of child and youth promotion and implementing it, among other things, through a federal office for children's rights should also be established in the Extra-Curricular Activities Act.

**3.2.** The federal government, or in future the Federal Office for Children's Rights, should support the cantons by providing training\* and information materials\*, as well as practical resources to implement Article 12 UNCRC, on the basis of the Extra-Curricular Activities Act.

\*Training: The current training offer on participation should be evaluated at all educational levels throughout Switzerland (e.g. using the Council of Europe's Child Participation Assessment Tool).

The "Training on the right to participate" should be offered at universities, secondary schools and primary schools.

\*\*Information materials

- International level: e.g. General Comment No. 12, Council of Europe recommendation on the participation of children and young people under the age of 18 including the Child Participation Assessment Tool; ongoing legislative projects from European countries
- National level: e.g. child's rights impact assessment
- Practical resources from professional organisations (e.g. UNICEF brochures on the right to be heard, checklists of Kinderanwaltschaft Schweiz (the Swiss child advocacy centre) etc.)
- Compiling examples of good practice
- Compiling and circulating international and national studies on participation

### **4. Run Switzerland-wide awareness campaigns on participation**

The SCHR recommends that the federal government launch awareness campaigns on the participation of children and young people *with* the cantons, or work with the cantons to develop a concept that can be applied in the cantons.

**4.1.** National awareness concepts can also be developed (in a phased manner) for each individual topic.

**4.2.** The target audience of an awareness campaign are children and young people, as well as parents, professionals and organisations.

**4.3.** Educational work for children and young people must incorporate social media (apps, videos, etc.).

## **5. Amend the Federal Constitution and Swiss Civil Code**

The SCHR recommends that the federal government consider amending the Federal Constitution and the Swiss Civil Code to improve implementation of Art. 12 UNCRC.

**5.1.** In terms of the Constitution, we recommend that the encouragement and protection of children and young people as set out under Article 11 Cst. should be recognised as a legally enforceable social right. The right to participate should be interpreted as one of the social rights of children and young people to encouragement and protection and should be directly enforceable (as per contemporary interpretation in the doctrine and certain cantonal constitutional provisions).

**5.2.** At the federal level, we recommend implementing and legally enshrining a children's right to participate according to Article 12 UNCRC, so that it is explicitly stipulated in every area and process (subject, type, with or without party status). Logically, such a provision should be introduced in personality rights law, as this defines what a legal person and the capacity to act are. (One proposal would be a new Article 19c<sup>bis</sup> SCC: "All persons lacking the capacity to act who are capable of judgement and persons who are incapable of judgement are entitled to participate in personal matters concerning them" with a new margin heading 5. Participation rights).

**5.3.** At the federal level, we also recommend introducing a new provision in the Swiss Civil Code on the care-related hospitalisation of children and young people as the general provisions on adult protection that are applicable by analogy do not take adequate account of the specific needs of children and children's rights.

## **2. General recommendations to the cantons**

### **6. Systematically involve children and young people at cantonal level**

The SCHR recommends that the cantons allow children and young people to participate more intensively and more directly as a matter of course at the cantonal level on all matters that concern them. They should be systematically involved in projects, commissions and legislative work.

**6.1.** The cantonal youth parliaments and councils in particular should be developed and strengthened.

**6.2.** However, easily accessible options for the participation of children and young people and groups should also be promoted and included.

### **7. Strengthen networking and the sharing of expertise on implementation of Art. 12 UNCRC**

The SCHR recommends that the cantons strengthen networking and the exchange of expertise on implementation of Art. 12 UNCRC with the support of the federal government and the inter-cantonal conferences.

**7.1.** Inter-cantonal conferences can help promote the exchange of expertise between cantons and draw up shared recommendations (comparable with those of the Conference of Cantonal Directors of Social Services on child and youth welfare, 2016) on the implementation of Article 12 UNCRC.

**7.2.** Exchange of expertise should also be organised and/or developed in the cantons for institutional actors in the fields of justice, child protection, education and health.

### **8. Include child participation as an evaluation criterion in regulatory activities**

The SCHR recommends that the specialist regulatory authorities (within the individual areas) establish and apply child participation as an evaluation and control criterion.

**8.1.** The regulatory authorities have the possibility of setting standards using various measures, such as recommendations, directives, regulations or ordinances.

**8.2.** As supervisory bodies, the regulatory authorities can highlight participation as a criterion at the technical level.

### **9. Collect data on participation practice at cantonal level**

The SCHR recommends that the cantons collect data on participation practice in all settings.

**9.1.** Data on participation practice should preferably be collected across entire settings (e.g. canton of St. Gallen), and not only on individual processes.

**9.2.** Data collection also serves to raise awareness among professionals, thereby contributing to the development of common practice.

### **10. Set up easily accessible cantonal agencies for children and young people**

The SCHR recommends that the cantons set up easily accessible agencies for children and young people that represent, support and promote their rights.

**10.1.** An easily accessible agency for children and young people should function as a sort of ombudsman. It should be legally and financially independent, have the authority to receive complaints from children and child and youth organisations, and propose draft legislation and other measures to strengthen children's rights. It should also compile and disseminate information.

**10.2.** The easily accessible agency should engage in institutionalised dialogue with children to get to know more about their living conditions, views and attitudes.

**10.3.** Another job of these agencies would be to inform and raise awareness among professionals who work with children and young people.

### 3. Thematic recommendations

The thematic recommendations are aimed at various actors (federal government, cantonal authorities and institutions).

#### Family law

##### **11. Systematically involve children and young people in family law proceedings**

The SCHR recommends that cantons systematically implement and thereby increase the participation of children and young people in family law proceedings in terms of legislation and judicial practice.

**11.1.** Under cantonal legislation, the requirements of participation in proceedings can be defined in detail (e.g. on hearing in the canton of Aargau § 21a Introductory Act to the Criminal Procedure Code). Directives can also be issued on the use of child representation.

**11.2.** The courts should draft common internal guidelines and templates on various procedural rights of children: invitation letter to children, hearing, child representation, inspection of case documents, notification of rulings etc.

**11.3.** The courts should maintain interdisciplinary cooperation and networking that goes beyond institutions (e.g. Berner Jura Seeland district court).

##### **12. Organise training of court staff on the concept of participation**

The SCHR recommends that cantons organise systematic training programmes on the concept of participation for court staff and to define the relevant guidelines.

**12.1.** Care should be taken to ensure that in training for court staff, participation is systematically interpreted as both an attitude and an individual and institutional right of children and young people. Besides interdisciplinary training on the hearing of the child, such training programmes should include training on the impact of child support through a trusted person and child representative.

**12.2.** With the goal of ensuring coherent participation practice, we recommend organising joint training programmes for professionals from the field of child protection and family law.

##### **13. Provide timely information on the concept of participation**

The SCHR recommends that the federal government and cantons inform children, young people and their parents as early as possible about the concept of participation in family law.

**13.1.** It is particularly important that the federal government provides easily accessible information and advice for children and young people on the topic of separation and divorce. For example, a federal platform could compile information materials by target group and provide child-friendly information. Information for children and young people must incorporate social media and digital formats (e.g. apps, videos).

**13.2.** An awareness campaign should primarily convey the fact that children have a right to participation in all family matters that goes beyond the right to be heard. It should also teach people that a child should always be listened to (and not only in contentious proceedings) and that a violation of this right to be heard also constitutes a denial of rights in family law proceedings.

## Juvenile Criminal Law

### **14. Develop information materials on criminal procedures for minors**

The SHCR recommends that cantons and offices of juvenile prosecutors develop and systematically provide age-appropriate and readily understandable information for children and young people and their parents on the criminal procedure for minors.

**14.1.** The Swiss Juvenile Justice Association (SVJ) could be commissioned to classify existing material and develop new material with the financial support of the federal government and in collaboration with other partners.

**14.2.** When it comes to information for children and young people, social media (e.g. apps, videos) must be promoted alongside written materials. In addition, the websites of juvenile law enforcement authorities should feature information geared to the target audience.

### **15. Make participation a standard element of criminal procedures for minors**

The SCHR recommends that the federal government and cantons make basic elements of participation – such as the child’s right to be heard and to legal representation – standard elements of the criminal procedure for minors.

**15.1.** Unconditional legal representation is required for all young people in criminal procedures for minors, not only in the statutory provisions. The prerequisite for this at federal level is the lifting of the reservation to Article 40 para. 2 let. b no. 2 UNCRC, and a corresponding amendment of the criminal procedure for minors.

**15.2.** The practice by which many summary penalty order procedures are conducted without a hearing for minors, should be reviewed and adapted.

**15.3.** All juvenile crime lawyers, social workers and legal representatives should be systematically trained in counselling techniques and children’s rights-compliant proceedings (example of the Office of the Juvenile Prosecutor of the canton of Aargau).

### **16. Promote mediation in criminal procedures for minors**

The SCHR recommends that cantons promote participatory measures such as mediation, particularly in criminal procedures for minors, and set up the relevant mediation facilities.

**16.1.** A number of cantons have longstanding experience in mediation. In order to promote participatory measures such as mediation, a transfer of knowledge and expertise needs to take place between the French-, German- and Italian-speaking parts of Switzerland.

**16.2.** The inter-cantonal exchange of expertise among mediation actors should be institutionalised (e.g. conference for child and youth policy).

## Child protection

### **17. Collect data on the participation of children and young people in child protection settings**

The SCHR recommends that cantons collect data on the participation of children and young people in outpatient voluntary child and youth welfare settings, in statutory child protection settings and in inpatient institutions.

**17.1.** The children and young people affected should be involved in such data collection activities.

**17.2.** On the basis of the results of this data collection, concepts and measures could be defined and implemented with the actors (e.g. Canton of St. Gallen).

### **18. Draw up comprehensive cantonal child protection concept**

The SCHR recommends that cantons develop a comprehensive cantonal child protection concept. This should promote the participation of children and young people throughout Switzerland and should be developed in collaboration with child protection actors and with the support of the federal government and the Conference of Cantonal Directors of Social Services.

**18.1.** It is recommended that the cantons examine special provisions on participation for children within the framework of child protection, namely in the area of protective placement (see recommendation 5).

**18.2.** In line with the results of the data collection (see recommendation 17), responsibilities need to be conceptually clarified and measures need to be coordinated in outpatient voluntary child and youth welfare settings, in statutory child protection settings and in inpatient institutions.

**18.3.** Joint commissions or similar bodies should be established to exchange expertise and clarify cooperation issues between the various child protection actors (e.g. child and adult protection authority (CAPA), voluntary child and youth welfare services and residential facilities). See the example of the Child Protection Commission in the canton of Zurich.

### **19. Provide easily understandable information on participation in the area of child protection**

The SCHR recommends that the cantons develop age-appropriate and easily understandable information materials on participation for children and young people and their parents for all



authorities and child protection institutions (child and adult protection authority, youth welfare services and institutions).

**19.1.** For this purpose, inter-cantonal projects should be launched in the area of child protection, backed by the federal government (e.g. information brochures in easily understandable language), as the CAPA in the cantons of Bern, Solothurn and Zurich have done in collaboration with the University of Applied Sciences and Arts Northwestern Switzerland.

**19.2.** All staff working in different residential child and youth welfare institutions should be trained on the information materials. The information should be systematically provided to children, young people and their parents.

## Education

### **20. Introduce cantonal regulations on participation in schools**

The SCHR recommends that cantons strengthen participation in schools as an individual and institutional child right through cantonal regulations.

**20.1.** The right of pupils to participate encompasses an individual right to be informed and to express opinions in school, and the right to justification of decisions that affect them.

**20.2.** To this end, pupils' individual rights should be incorporated in cantonal administrative proceedings.

**20.3.** However, it also concerns participation at school and class level, and the opportunity to participate in politics on a cross-school basis (e.g. Canton of Basel-Stadt Ordinance on the rights and obligations of pupils).

### **21. Ensure schools involve children and young people**

The SCHR recommends that cantons ensure that schools safeguard the involvement of children and young people.

**21.1.** Children and young people should be systematically included as legal persons with rights and obligations in school legislation.

**21.2.** Participatory cooperation between children, parents and schools should be defined, promoted and supported.

**21.3.** Responsibility should be assigned to schools (e.g. through annual reporting).

### **22. Include participation as an integral part of schools' quality management**

The SCHR recommends that cantons establish participatory elements in schools' quality management.

**22.1.** This could include, for example, the introduction of internal contact persons or trusted persons as a participatory element for pupils. The canton of Aargau already has such a system in place, where older pupils can also act as trusted persons.

**22.2.** The effective functioning of school councils at class and school level would be a second element that could play a part in quality management, e.g. in evaluation procedures.

## Health

### **23. Broaden interpretation of participation beyond informed consent**

The SCHR recommends that the federal government and cantons support health sector institutions in adopting a broader understanding of the concept of child and youth participation in accordance with Art. 12 UNCRC beyond the basic medical law principle of informed consent.

**23.1.** A comprehensively implemented right to participate includes, for example, private and public hospitals and clinics providing children and young people and their parents with appropriate information material which includes details on informed consent, as well as explains rights of admission and discharge and rights to inspect patient files (e.g. the Zurich Patient Act and the St. Gallen Patient Ordinance).

**23.2.** A comprehensively implemented right to participate also includes a child or young person being systematically supported by a trusted person in the hospital or clinic (this may be a parent or another person).

### **24. Promote the interdisciplinary exchange of expertise on participation in the field of health**

The SCHR recommends that the federal government and cantons promote through various means the interdisciplinary exchange of expertise in the area of health with regard to the participation of children and young people.

**24.1.** There are differing attitudes and different levels of knowledge between disciplines regarding the capacity of children and young people to judge and participate. This should be regularly discussed (e.g. informal meetings, training or conferences).

**24.2.** Interdisciplinary exchange should be included as a quality criterion in the field of health.

### **25. Introduce cantonal regulations on participation in health settings**

The SCHR recommends that the cantons clarify the regulations regarding the participation of children and young people in medical treatments and in relation to their capacity to judge in the context of informed consent and other participation rights.

**25.1.** The cantons could draw up specific guidelines relating to children's rights to participate in health settings, e.g. in collaboration with the Swiss Academy of Medical Sciences.

**25.2.** One of the aspects requiring clarification is that the capacity to participate is not the same as the capacity to judge, and that it cannot depend alone on the age or the form (child's signature). Children and young people who lack capacity of judgement should also be able to participate, by taking account of their wishes where possible.

## Youth parliaments

### **26. Strengthen youth parliaments**

The SCHR recommends that the cantons strengthen the youth parliaments in line with the models in the cantons of Fribourg and Vaud (see recommendation 2).

**26.1.** In order to strengthen youth parliaments, the relevant foundations (recognition under public law, ordinances) should be established, and the youth parliaments should be provided with appropriate resources (e.g. by cantonal youth officers).

**26.2.** Youth parliaments and, if necessary, other child and youth organisations should be involved by state actors (administration, authorities, parliaments) in all matters concerning children and young people.

### **27. Involve children and young people in reporting to the Committee on the Rights of the Child**

The SCHR recommends that the cantons involve child and youth parliaments and other child and youth organisations in reporting to the Committee on the Rights of the Child.

**27.1.** In conjunction with the reporting procedure, a concept should be drawn up that can be used by all the cantons with the backing of the federal government.

**27.2.** The youth parliaments could be supported and assisted in reporting e.g. by the Association of Swiss Youth Parliaments (DSJ).

### **28. Involve youth parliaments in the work of the cantonal parliaments**

The SCHR recommends that the cantonal parliaments (and municipal and town parliaments if necessary) involve cantonal and municipal child and youth parliaments in draft legislation, measures, and parliamentary questions related to children and young people.

**28.1.** To ensure child and youth parliaments can be involved in an age-appropriate way, documents in easily understandable language and, if necessary, support are needed, e.g. from cantonal child and youth officers.

**28.2.** For checking and implementation, the cantonal parliaments and the administration can consult the child rights impact assessment instrument (see general recommendation 3).