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Tesina

Swiss Local Child Protection and the Challenges of Immigration

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Introduction

The legal systems of the Western industrialised countries are nowadays confronted with the difficulty of coping with the challenges of immigration. Although since the end of the 19th century Switzerland has been an country of immigration, it has only recently been chosen as a destination by migrants from cultures that are perceived as being distant from the Swiss culture. One area where the law has to develop concepts to find an adequate position towards this cultural "Otherness", is the system of state intervention for the protection of the child. Criteria for ordering measures such as supervision, appointment of a guardian for the child or placement in a home or foster family, have to be adapted. The communicative problems due to language and cultural misunderstandings have to be confronted.

Besides these difficulties known in many legal systems comparable to the Swiss, the organisation of child protection in the majority of the Swiss cantons is –due to extreme decentralisation, the emphasis on lay participation for the sake of democracy, and thus a lack of professionalism- an additional hurdle for the achievement of a culturally sensitive child protection practice. The lack of procedural rights of both parents and children such as child advocacy and legal aid is an additional hinderness (cf. part one).

In international literature, the structural situation of foreign nationals that is mostly marked by economic disadvantages and discrimination, the political climate in a country when it comes to immigration issues, is often separated from the question of decision-making in individual child protection cases. One aim of this Tesina is to illustrate these connections through the analysis of the influence of Swiss popular xenophobia in the bargaining situation in the communal council, the body responsible for child protection, on one hand, and the demonstration of the "feed-in" of sociological knowledge concerning immigrants' problems caused by structural disadvantages and residence insecurity on the other hand (part two, chapters one and two).

After the examination of the structural level of the child protection system and Swiss immigration policy, the level of analysis is changed to the question of normative decisions on differing cultural values and norms. Cultural relativism and pluralism are the approaches and concepts put forward in human rights doctrine and legal anthropology as a way of coping with the problem of "incompatibility" or "conflicts" of values and norms due to cultural difference. Together with the principle of equal treatment, they give direction for the achieving of the goal of a culturally sensitive and anti-discriminatory child protection practice. As the analysis of Swiss child protection literature shows, these issues have up to now been debated on a theoretical and conceptual level only by human rights lawyers. The practice of child protection in the cantons and the specialised literature develop their solutions as cases arise (cf. part two, chapter three).

The insight that can be drawn from experiences in child protection internationally is that cultural sensitivity has to be a major goal of child protection in a country of immigration. This concept can be put into practice on the level of procedure mainly. Models tested in Swiss and French legal proceedings are cultural translation or intermediation as well as ethno-psychiatric expertise (cf. part two, chapter four).

The category of gender and its importance in local child protection is a cross section topic throughout the study. The gender-specific assignation of departments in local executive bodies (cf. part one), the two edged results of state child protection activities between protection against domestic violence and imposition of ideologies of motherhood, the special situation of second generation immigrant girls, and finally the pressure exerted on female child protection authority members to adapt to patriarchal gender role expectations (cf. part two) are examples of how child protection cannot be analysed without taking into account the importance of gender.

The Empirical study

Methods

This study is partly based on four interviews with members of local child protection authorities. My fieldwork was carried out in the canton of Baselland, in the North-western part of Switzerland. Four communes were chosen, representing different sized villages or small towns. Three of the interviewees were female, one male. The interviews took place between May and September 2000.

The material was collected with the help of qualitative semistandardised interviews, i.e. interview guidelines were used as a memory aid, but not strictly applied (cf. e.g. Berg 1998: 61). In the following, pseudonyms are used in order to distinguish the interviewed persons and at the same time to ensure their anonymity. Typical Swiss German names shall indicate the fact that all the persons interviewed are of a Swiss background. This is of course not surprising in the face of the condition of Swiss nationality for the eligibility into local authorities. The interviews all took place at the office or in the private home of the interviewees.

The interviewees were asked to answer questions concerning the organisation of child protection in their commune, the normal way cases were treated by their authority, typical cases and the most frequent situations where their intervention occurred, the relevance of and the relationship to other private or public social services (cf. the guidelines in the annexe). The guidelines were, as aforementioned, not strictly applied, as the aim was to receive an account of the interviewees' own priorities and patterns of interpretation.

The interviewees were informed about my background as a lawyer interested in the practice of child protection in the canton. The first interviewee, **Ms Fischer**, was privileged in a way, as she was the only one to be directly informed about my main area of interest, the handling of cases concerning immigrant families. The second and third interviewees, **Ms Huber** and **Ms Meier,** without knowing my research concern however both spontaneously referred to cases implicating foreign nationals and also put the issue to the centre of their concerns. This was maybe also enhanced by the special interest I showed when the topic was brought up. Only the forth interviewee, **Mr Kunz**, was very reluctant, even when asked directly about the practice of the authority concerning immigrant clients, to allow me any insight into his attitudes.

The number of cases treated by the respective authorities is not routinely documented statistically. The canton of Baselland is even one of the worst when it comes to the already quite rudimentary statistics established by the Swiss Conference of Cantonal Guardianship Authorities. The canton’s statistics are not comparable with the ones established in most of the other cantons and the legal measures ordered in Baselland are for this reason not included in the figures of the Swiss statistics.

The interviews were conducted in Swiss German, a German dialect. Swiss German isn't a written language. This is why, except for the first of them which I wasn't able to record, the interviews have all been transcribed into German. In a second step chosen passages have been translated into English. This of course has the effect of a certain, however unavoidable, loss of authenticity of the statements cited in the text. For the German-speaking readers I have therefore included the original text of the transcriptions in the footnotes.

Analysis

The very small sample of interviewees does of course restrict the possibility of comprehensive analysis of the situation of local authorities in charge of child protection confronted with immigrant families. In a rather explorative way, hypotheses about patterns of interpretation, attitudes, and contradictions expressed in the interviewees' accounts, but also structural problems of local child protection could be formulated on the basis of the interviews. The explanations given in the interviews were also used as a source of factual information. In this way, the interviews come close to what has been described in literature as the "problem-centred interview". Siegfried Lamnek (1995: 78) characterises the problem-centred interview as a type of interview where the researcher departs from a theoretical concept, but where the emphasis lies on the generation of concepts by the interviewee. The researcher's concepts are constantly modified, and in this way verified by the interview.

My work with the interview material was based both on the transcripts I reread many times and on the oral memory I kept of the whole interview situation and the most surprising quotes. The small number of interviews facilitated the work with the material: Although summaries of the devolution of the conversations, systematic recording of the topics referred to and detection of contradictions inside the interviews were necessary and helpful, it was still possible to remember most of the text without constantly relying on the transcriptions. Links between interviewees' statements and concepts referred to in the literature often became clear in unexpected moments, connections and patterns arouse seemingly spontaneously. Through this I experienced an exciting and rewarding process of constant spiralling between interview materials, literature and discussions with experts and fellow researchers.

PART ONE: THE LOCAL CHILD PROTECTION AUTHORITIES

I The Swiss Child Protection System: Decentralised, Democratic, Non-professional

Introduction

According to Swiss civil law, the application of child protection measures is one of several tasks assigned to the authorities called *Vormundschaftsbehörden (autorités tutélaires),* which can be translated into guardianship authorities. These authorities and their way of handling cases with immigrant clients is the main concern of the present study.

The *Vormundschaftsbehörden* are organised by each of the 26 Swiss cantons in a different way. This can be explained by the fact that the Civil Code contains only very few norms concerning procedure, and entrusts the organisation of the authorities and the execution of the substantive law to the Cantons (cf. Tuor and Schnyder, 1995: 376). The strongly developed Swiss federalism accounts for this delegation to the cantons. The Swiss system of division of power between the federation and the individual cantons shows a strong preference for extensive cantonal autonomy (Linder 1998: 40ff.). Namely the judicial organisation and procedural law in private (including family law)[1] and penal law lies in the power of the cantons.

The *Vormundschaftsbehörden* are mentioned as competent mainly in two parts of the Civil Code: guardianship and protective measures for adult persons (Art. 360ff. CC), and parts of the children's concerns in family law (child protection measures; children's property; parental responsibility after divorce and of unmarried parents). In the case of the canton in which the present study took place, the canton of Baselland, the *Vormundschaftsbehörden* have, in addition, some judicial power in juvenile penal law. In very few cantons is the same authority in charge of both child protection and the complete area of juvenile penal law (Hegnauer 1989: 18).

As the Swiss Civil Code does not prescribe a certain form for the organisation of the *Vormundschaftsbehörden*, there is – as in many other fields of administration- not a uniform structure for the organisation of child protection authorities in Switzerland. Generally speaking two systems can be distinguished, that of the German and the Italian speaking cantons on the one hand and the French speaking cantons on the other. Most of the latter usually install judicial authorities as *Vormundschaftsbehörden*. Judicial does not however mean professional, the Canton of Fribourg for example entrusted lay judges (*juges de paix*) with the measures concerning adult guardianship and child protection (cf. Werlen, 1996: 4). The main feature and

[1] Guardianship matters are considered as part of both cantonal administrative law and federal private, i.e. family law (cf. Tuor and Schnyder, 1995: 376)

peculiarity of the child protection system of the German speaking part is the organisation of the authorities on the local, communal level even in the case of very small communes (cf. the overview in Häfeli 1998: 238ff.). I will subsequently only refer to this type of structure, as my study has been conducted in a German speaking canton. The German speaking cantons together with the Italian speaking canton of Ticino are at any rate comprising the majority of the Swiss population, i.e. more than 5 out of 7 million inhabitants.

In the canton of Baselland, the statute concerning the communes states that the role of the *Vormundschaftsbehörde* is held by the local executive body, i.e. the communal council (*Gemeinderat*). The communes are however allowed to install a separate body for these tasks. In this case one member of the *Gemeinderat* must also be a member of the separate *Vormundschaftsbehörde* [2]. These two possible types of organisations are both represented in the sample of interviewees chosen for the empirical study.

The organisation of child protection on the local level leads us to another peculiarity of Swiss democracy, the so called *Milizverwaltung*. Translated into "a form of self-administration" (Linder 1998: 52) it means that – instead of employed civil servants – ordinary people fulfil public tasks for anything from a few hours to several days per week. This system is of most importance in local government. Since in the system in the Germanic cantons, the communal council is in charge of child protection, this means that lay persons are making decisions on the giving of compulsory educational assistance to families or to remove a child. This fact indeed raises the question of professional qualification, which will have to be examined further.

The Interviewees' Position Inside the Local Political Structures

As has already been mentioned in the methods part, four communes in the canton of Baselland in the North-West of Switzerland have been chosen for the interviews which constitute the basis of the analysis. The *Vormundschaftsbehörden* of the four communes are not all organised in the same way, which can be explained by the freedom the cantonal law concedes to the communes in this respect. Also the position my interviewees hold within the local authority varies.

My first interviewee, **Ms Fischer**, is a member of the communal council and responsible for the department of social affairs in her commune. She prepares the cases in guardianship matters (including child protection) decided on in the plenary sessions of the communal council. This executive body acts as *Vormundschaftsbehörde* and thus makes the decisions concerning child protection measures. Commune number one is one of the middle sized communes in the canton (between 10 000 and 15 000 inhabitants).

My second interviewee, **Ms Huber**, is President of the local *Vormundschaftsbehörde* and at the same time a member of the communal council, the executive body of the commune. The two bodies are organised separately. Commune number two is one of the larger communes in the canton (between 15 000 and 18 000 inhabitants).

My third interviewee, **Ms Meier**, has the same position as the first, Ms Fischer. She is member of the communal council and responsible for preparing the cases concerning guardianship matters. Commune number three is also of middle size (between 10 000 and 15 000 inhabitants).

My fourth interviewee, **Mr Kunz**, is himself president of the communal council, which as in commune number one and three acts as *Vormundschaftsbehörde* as well. He however does not prepare the cases himself. This task is completed by a female colleague in the communal council who is in charge of the social department. This may be one reason for his reluctance to give any indication about his practice in child protection matters. Commune number 4 is rather small with less than 7000 inhabitants. Mr Kunz works in addition to his political mandate as an independent attorney and is thus the only person in the sample with a professional background of direct use for his function as president of the local *Vormundschaftsbehörde*.

The whole canton of Baselland had 261'380 inhabitants in 1999 and comprises of no less than 86 communes. This means that some of these are very small: 15 communes counted less than 500 inhabitants in 1999, the smallest one only 109. All of these communes are themselves responsible for effective child protection as well as giving public assistance to the members of the local community. It would have been very interesting to be able to study the handling of child protection cases in these minuscule communes, as this extreme decentralisation is considered as one of the main weaknesses of the system (Expert Group Guardianship Law 1995: 60ff.). I however opted against interviewing a person responsible for guardianship matters in such a small context, as I concluded that their case basis and consequently their experience would be too small.

Women's representation in communal councils

The representation of women in communal councils has been a topic of sociologist research as well. The canton of Baselland has a comparatively high percentage of women in the communal executive bodies, on average 24,5 %[3], which makes it third in the 26 cantons. The average for the country as a whole is 18,5 %[4].

[2] § 93 Gemeindegesetz of 28 May 1970, SGS 180. Note: all the laws of the Canton can be found on www.baselland.ch (Gesetzessammlung).
[3] Figure from the year 1998.
[4] Meuli Urs and Ladner Andreas, *Frauen in den Gemeindeexekutiven. 1988 bis 1998*, Zurich, Soziologisches Institut der Universität Zürich.

Research on gender-specific assignation of departments inside the communal councils shows, that women are usually appointed as heads of traditionally female departments such as "social affairs" (45 % of the heads are women), "health" (32 %) and "school, youth, culture" (31%)[5].

The over-representation of women in social and welfare tasks is not a surprise if we bear in mind that the first political bodies women were allowed to participate in, were school and welfare committees. In the Canton of Zurich for example, this has been the case from the 1920ies on, long before women's political rights were introduced on a federal level in 1971. Women were also appointed as welfare officers very soon after the emergence of a specialised child welfare system at the beginning of the twentieth century. The idea was that men would conceive the welfare state, whereas women would be active in the individual welfare cases, for which they were gifted because of their supposed natural empathy. Even a part of the women's movement of the time used the argument of women's "social motherliness" to claim participation in the welfare authorities. Later on, professional social work developed from the function of the welfare worker, which was initially an unpaid occupation for unmarried women from the bourgeoisie (Ramsauer 2000: 99ff.).

Significantly, the only man interviewed during the empirical study is the most distant from the cases compared to the three other interviewees. The child protection cases in his commune are prepared by one of the two women who are members of the communal council (together with five men). The only woman in the sample who is herself responsible for the child protection decisions, **Ms Huber**, describes her experience in achieving the more prestigious position of a president of the separately organised *Vormundschaftsbehörde* as follows:

There was a period when, I think, they wanted me to be the vice-president, and a man would stay the president. He wouldn't have had any time, I would have had to do everything, and he would have been the president. Then I said, I won't do that.[6]

The importance of gender both of the intervening official and the clients was one dominant topic in the statements given by **Ms Huber** and **Ms Fischer**. They will be looked at more closely and linked to the topic of immigrant clients (cf. part two, chapter 3 and 4).

[5] Swiss Federal Statistical Office (1997), La représentation des femmes dans les exécutifs communaux en 1997, Berne, BFS.

[6] Es hat einmal eine Zeit gegeben, glaube, sie wollten einmal mich nur zur Vizepräsidentin machen und der Präsident bleibt der Mann. Aber er hat ja keine Zeit gehabt und ich hätte dann alles machen müssen aber er wäre der Präsident gewesen. Da habe ich gesagt, das mache ich dann nicht.

Democracy versus Professional Child Welfare

The contradiction between highly valued democracy in local administration and professionalism developed in child protection professions, social work and child psychiatry, is one central problem in the Swiss child protection system. The hierarchy which organises the different persons controlling child protection proceedings and their professional qualification does not correspond to their authority to make decisions.

In most communes in Switzerland, the communal social services have been expanding since the mid-seventies of the twentieth century. They do not only fulfil legal tasks related to public welfare such as child and adult protection and social assistance, but also give counselling services to families, adolescents, drug addicts etc. on a facultative basis (Geser 1999: 459f.). The social services are composed of social workers.

In the child protection practice, the social services are very much relied on. The lay authorities delegate the preparation of the cases, the clarification of the family situation and the application for the measures such as the placement of a child, which then have to be ordered by the authority itself.

The legal literature gives these services the name of "auxiliaries" (cf. Schnyder and Murer Art. 360 N 98ff.), which is logical from the viewpoint of the authority. According to the law, the authority is the one who carries the responsibility for the decision.

The tension created by this contradiction between professionalism and hierarchy becomes apparent in the following statement by **Ms Huber**:

There are social workers who do not allow interference into their cases, that is they come at a certain moment with their proposition and then they are not very happy if you say no. Or because perhaps you don't have certain information.[7]

The social workers **Ms Huber** is describing are the ones who are not willing to subordinate themselves to an authority they probably perceive as inferior when it comes to professional qualifications.

The contradiction between responsibility and decisive power and the real allocation of influence becomes apparent in certain difficulties described by **Ms Meier**. The social workers of the commune, at the beginning of Ms Meier's activity as communal councillor, used to write in letters to the clients, "the guardianship authority has" when in fact they were referring to their own, social workers' decisions.

The social workers in charge, they don't do this anymore, they don't write, "the guardianship authority has", and then I say, I don't know nothing about this, you spoke to that person on the telephone. The social worker in charge is not the guardianship authority, you know![8]

By not tolerating the usurpation of the legal authority of the *Vormundschaftsbehörde* by a social worker, **Ms Meier** tried to win recognition from the social workers, who acted as if they were themselves the authority in the communication with the clients. Probably the distribution of professional knowledge but also the fact that social workers deal directly with the clients, has led to this situation of rivalry between legal and professional authority.

The lack of professionalism in lay members of local child protection authorities could be alleviated by constant training, which has been offered for some years following a report presented in 1992, which strongly criticised the way the Swiss child protection system functioned (cf. below, chapter II). But the structures of local administration are a great hurdle to the aim of further training.

Both in the system of identity of the communal council and the system of having a separate body, the main responsible for child protection proceedings is always implicated in all the executive matters of the commune. In the first case this person is a member of the communal council and is responsible for the preparation of guardianship matters[9]. In the second case the president of the *Vormundschaftsbehörde* is also a member of the communal council. The burden this means for the individual councillor, is very well described by my interviewee **Ms Meier**, who is responsible for child protection as a member of the communal council:

When you are in the communal council, you are for all the areas that ever comes, an example, I am also in the penance committee concerning waste disposal delinquents. Yesterday at five p.m. we had to fine two people again, this is between five and six, at six o'clock we had a meeting of the communal council about the whole traffic situation in the X-valley. And every matter, all matters of construction, also, you also participate in.[10]

This overburdening is the main reason mentioned by the interviewees for not following specialised training, which would be essential for an improvement of the authority's quality of work both in the legally and psycho-socially, including the adequate handling of cases implicating immigrants. The lack of legal expertise in the commune is also a source of conflict with the requirements of the professional legal system.

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[7] Also es hat Sozialarbeiterinnen, die lassen sich nicht in die Fälle reinreden, also die kommen irgendwann einmal mit einem Antrag und sind dann nicht sehr glücklich wenn man Nein sagt. Oder weil man auch vielleicht gewisse Informationen nicht hat.

[8] Das machen jetzt die Sachbearbeiterinnen auch nicht mehr, sie schreiben auch nicht, also, *die Vormundschaftsbehörde hat*, und dann sage ich, ja ich weiss von dem nichts, du hast ja mit diesem telephoniert. Also der Sachbearbeiter ist nicht Vormundschaftsbehörde im Fall!

[9] In the sense of the Civil Code, i.e. comprising the plurality of tasks described below.

[10] Wenn man im Gemeinderat ist, ist man für sämtliche Bereiche die überhaupt kommt, ein Beispiel, ich bin noch im Bussenausschuss für da die Abfallentsorgungssünder. Wir mussten gestern um fünf Uhr wieder zwei Leute büssen, also von fünf bis sechs, um sechs Uhr hatten wir Gemeinderatssitzung über die ganze Verkehrssituation im Xtal. Und jedes Geschäft, jedes Baugeschä-, das auch noch, da ist man ja auch dabei.

Local Authorities, the Professional Legal System and the Child Welfare

In legal proceedings concerning matters of child welfare such as divorce proceedings and child protection, the communication between the legal system and "child welfare science", i.e. child psychiatry and psychology was found to be impossible, as the law is said to be "enslaving" the child welfare science and only using social science knowledge as long as it fits into the law's search for right and wrong (King and Piper 1995: 136f.).

It is difficult to place the Swiss *Vormundschaftsbehörden* within one of the two systems of law and child welfare science. The authorities are part of the legal system in that they are expected to apply the rules of legal procedure respecting the procedural rights of the parents and children. In relation to the cantonal child psychiatric services experts, they are considered as part of the legal system. The members of the authorities however feel at the same time excluded from the legal system as they lack the necessary knowledge. Also the strong position of local social services can mean, that the logic typical for social work has a strong presence in the preparation of the cases. Social workers again have training in both child welfare science and law and thus a strong sensitivity for procedural rights (cf. Gerber and Sieber 2000).

It is appropriate to first make clear how the local child protection procedure is regulated and which procedural rights the law guarantees to parents and children.

Procedure and Procedural Rights in Local Child Protection

The procedure before the *Vormundschaftsbehörden* is only regulated in very few questions by federal law, i.e. the civil code and the fundamental procedural rights following the Federal Constitution. Procedure is thus mainly cantonal (Art. 314 CC). It is considered as an administrative law procedure and is submitted to the inquisitorial system. This means that the authority has to initiate the procedure when it has knowledge of a situation that is dangerous to the welfare of a child. Then the authority has to make a decision about the investigation, this will usually be made by the social service of the commune (cf. Häfeli 1998: 178). The authority then decides which child protection measures are to be taken. There is the possibility to appeal to a judicial body against decisions ordering child protection measures following the Civil Code (Hegnauer 1999: 225). Every person who has an interest, i.e. the parents, the child or the grandparents, has the right to appeal (Art. 420 (1) CC).

The procedure before the local communal authorities in the canton of Baselland is very little formalised: the authorities have to write a protocol on the debates of the *Vormundschaftsbehörde*[11], i.e. there are no

[11] Cf. Art 39 Gesetz über die Einführung des Zivilgesetzbuches, SGS 211.

requirements for written documentation of the instruction of the case. This means that there is no obligation to keep records of the statements made by the parents, the children and the experts. The decision made by the authority has however to be disclosed to the parties in writing[12].

The UN Convention on the Rights of the Child has been in force since 1997 in Switzerland, and consequently the child's right to be heard was introduced into the Civil Code in divorce proceedings and at the same time in proceedings concerning civil law child protection (Art. 314 (1) CC as amended). However, procedural rights are less developed in the administrative proceedings before the *Vormundschaftsbehörden* than in the court proceedings. Most importantly, the child has no right to be represented by an independent person, as this is possible in child protection proceedings in most Western countries, for example by a so called *guardian ad litem* in the countries of the Anglo-American legal system[13]. The right of the child to have a legal representative was introduced by January 1, 2001 for divorce proceedings, but not for child protection. Whereas the doctrine considers that the child protection authority has an obligation to designate a special representative for the child in analogy to divorce law (Hegnauer 1999: 225), it is not known if this opinion has been implemented in the cantons.

Parents don't have the right to legal aid in the proceedings before the local *Vormundschaftsbehörden* [14]. This, of course, has the consequence that very few attorneys are present in these proceedings.

Lacking Legal Expertise and Its Consequences

Two of the interviewees, **Ms Huber** and **Ms Fischer**, appear to be uneasy with the requirements of legal procedure. Their statements are characterised by low self-confidence in legal concerns. **Ms Fischer** emphasises how important the advice of a legal expert in the communal administration is to her. When asked if court decisions were an important source for her practice, her uneasiness with the legal system became apparent and I sensed that she felt defensive.

Ms Huber dedicated a long statement to her relationship with the courts. She emphasised that in some cases she was very disappointed by the judge's decision. The judge appeared to be too removed from the clients needs. Also she felt offended when she had been trying to help change a difficult family situation for many years and then a judge decided in one day that she had acted wrongly from the beginning. She however does not want to change the system, as in some cases she was happy that her decision had been changed. She also reports having difficulties with the quite complicated distribution of tasks between local *Vormundschaftsbehörde*,

[12] § 171 i Gesetz über die Organisation und die Verwaltung der Gemeinden, SGS 180.
[13] Cf. the contributions in Salgo Ludwig (ed) (1995), Vom Umgang der Justiz mit Minderjährigen, Auf dem Weg zum Anwalt des Kindes, Berlin, Luchterhand.

supervisory authority (*Statthalteramt*) and courts. Sometimes she simply does not know which decision is valid at the moment. Finally, **Ms Huber** also perceives herself in a weaker situation before the court than the "experts" from the cantonal child psychiatric service. On one hand these experts are not ready to give her concrete recommendations for child protection measures and leave the decision up to her. On the other hand, the expert opinion is given more authority in court than her own opinion on the case.

To prevent court decisions overturning the orders of the local *Vormundschaftsbehörden*, the interviewees report that they consult the supervisory authorities before making decisions. **Ms Huber** however reports that sometimes the procedural flaws of a decision only come to her at the time of the trial. **Ms Meier** on the other hand is very happy to report that the decisions made under her authority are seldom overturned, as several lawyers work in the local administration.

Suggestions: Improvement of Procedural Rights

One way of improving the situation could be the introduction of the right to publicly funded legal representation for both parents and children as it is in the law for divorce proceedings. The interviewed members of the local authorities themselves emphasise the importance of the presence of lawyers representing the individual parties, normally the parents, in the proceedings. Not all the parents however are wealthy enough to pay for a lawyer themselves.

With a view to improving the procedural handling especially of cases implicating immigrant families, state-remunerated lawyers could perform the important function of translating the signification of the proceedings to their clients. Procedural failings could be prevented before an appeal to the supervisory authority and courts is necessary. Also the lack of confidence because of past negative experiences with the authorities both in their home country and in Switzerland could be alleviated by giving the concerned parents the feeling of not being completely powerless. Finally the presence of a legal representative for the child could give more weight to the child's voice.

Relationship Between Protective Measures and Public Welfare Funding Decisions

The integration of the child protection authorities directly into the local political organisation does also mean a very close connection between substantive decisions on protective measures and the decisions on their financing by public welfare. In some communes the very same authority, i.e. the communal council, is to decide

[14] BGE 111 Ia 5 and for the canton Baselland: § 171 m *Gemeindegesetz*.

about these two questions. In some, at least an institutionalised link exists between these authorities, i.e. one member of the social welfare authority is at the same time a member of the local executive body, who is acting among others as *Vormundschaftsbehörde* (cf. Häfeli 2000: 50). Christoph Häfeli[15] gives evidence about the problems of this link: Many times more expensive measures such as the reception of children in a specialised institution are replaced in favour of cheaper measures such as reception in private foster care. There are even cases where no measures are taken at all, as the problem is expected to "solve itself". This is the case when adolescents in need of educational measures are soon to come of age, or adolescents of foreign nationality are soon to leave the country (Häfeli, 2000: 51). This problem was also addressed by one of my interviewees, **Ms Fischer**, who herself is a member of both the local executive body (figuring as *Vormundschaftsbehörde*) and the separate welfare authority (*Fürsorgebehörde*). She stated that uniting the *Vormundschaftsbehörde* and the *Fürsorgebehörde* was not recommendable, as the danger that measures would not be taken, because of the financial consequences, was high. In her commune – according to her statements- about half of the child protection measures are financed by public welfare, which means that the measures are a direct burden on the commune's budget. Measures have to be funded, when the parents are living at the subsistence level.

There is a general unease with the system of social assistance in Switzerland. Despite the undisputed advantages of political control of social workers' activities[16], there are also many disadvantages: communal councillors decide against giving social assistance, because they only see the costs and not the future social and economic gains. Or they already anticipate necessary tax increases if social assistance is to be given to inhabitants of the village. Finally the claimants for social assistance in a small commune can expect no privacy. The communal councillors, who know everything about their private situation, are also their neighbours (cf. OECD 1999: 71).

Development towards Regional and Professional Child Protection Authorities?

The adequacy of lay administration in the field of child protection has been put into question by a report presented by an expert working group on child abuse and neglect in Switzerland appointed by the Federal Minister of the Interior (Working Group on Child Maltreatment, 1992). The report has revealed many defects of the legal, psychosocial and medical aid system in the prevention of child abuse and neglect and the adequate intervention in known cases. One of the main reasons found is the inadequate organisation of child protection,

[15] Häfeli is director of the school of social work in Lucerne and one of the Swiss specialists in issues of guardianship authorities.

i.e. *Vormundschaftsbehörden*. Other deficiencies named are the social resistance against the intervention in the private sphere and the lack of training in interdisciplinary co-operation. The legal instruments against child abuse and neglect existing both in private and penal law are however found to be sufficient. According to the working group, it is the implementation of the legal measures which has to be reformed. The main reproaches put forward concerning local authorities were the lack of professionalism of authority members both in legal and social work issues and the special problem of the lack of independence in small communes, where the communal councillors are very close to the inhabitants of the village.

The Swiss federal government, the Federal Council, subsequently published an official statement about the working group's report[17]. Basically the federal government admitted the failure in prevention of and adequate intervention in cases of child abuse and neglect, but did not see much necessity for action initiated by the federal authorities. The problem was located in the cantonal structures and the responsibility was thus delegated to the cantons.

A change in the situation could now be brought about by a reform of the entire legal regulation on adult guardianship. One main proposition made by the expert committee preparing a draft for the amendment of the Civil Code, is the introduction of the legal obligation of the cantons to install professional *Vormundschaftsbehörden*. The cantons should also be obliged to merge smaller communes into administrative districts (Federal Office of Justice 1998: 9). This new system of regional professional authorities would meet one part of the critiques of the 1992 expert report: the lack of experience and professional qualification of lay authorities as well as the closeness to the local population would be replaced by a regional authority's supposed competence.

The efforts made by the federal administration in favour of the introduction of a system of regionalized and professionalized child protection services is only one logical consequence drawn from the disquieting analysis made by the working group in their 1992 report. At the same time the federal administration could have developed additional and more innovative solutions initiated by means of federal programs and legislation. For example quality standards and minimal prescriptions concerning procedure could be introduced into federal law (namely the Civil Code) without interfering with the distribution of competencies between the federal and

[16] Literature reports a stricter application of the rules by the social workers and a better control of possible fraud by the clients (cf. OECD 1999: 70f.)
[17] BBl 1995 IV 1ff.

cantonal structures. The example of divorce proceedings shows that federal norms regulating procedure on the cantonal level are necessary for the adequate and equal handling of cases in the Cantons[18].

In a recent study conducted by two social workers, the lack of professionalism of local authorities was again the topic of concern. The members of *Vormundschaftsbehörden* they interviewed in communes of the canton of Berne were mostly very much aware of the lack of knowledge in social work and questions of procedure, especially the formal prescriptions of the law, whereas they felt safe in administrative concerns (Gerber and Sieber 2000: 84).

This self-awareness makes the results of a survey conducted in the canton of Baselland even more surprising: In 1991, the cantonal parliament asked the cantonal government to scrutinise the idea of the reorganisation of the system of *Vormundschaftsbehörden* in the canton. As a result a survey was conducted among the communal councils to ask them about their attitude toward a reorganisation of the system. Two thirds of the communes asked rejected any change to the system! Also the parliament, when debating the issue in January 2000, was divided on the question. It decided to repeat the survey in the year 2001, when the communal authorities would have some experience with the new tasks brought about by the reform of federal divorce law (cf. below)[19]. The results of the survey are not yet known.

In view of local authority resistance to touch the existing system, it is not at all sure that the proposition of a more professional child protection and guardianship system would be successful in federal parliament, even if the promoters of the idea of regional and professional authorities have been active lobbying for their cause (cf. Ciabuschi 1998; Häfeli 1997).

It is therefore perhaps necessary to search for a model integrating the desires of both local autonomy and of an increase in professionalism. Internationally, the opinion is expressed in literature that lay participation in the legal process is favourable for achieving a child-responsive legal system. According to King and Piper (1995: 151ff.) this is necessary "to prevent professionals adopting an inward-looking, cloistered perspective and developing values which are remote from those of 'ordinary people'". In the face of popular xenophobia (cf. part two), whether "ordinary people's" values are really the most adequate way of dealing with immigrant families is doubtful. However it may also be possible to develop structures for local child protection with participation of laypersons that are adequate and effective. One element of such a structure should be the respect of children's and parents' procedural rights.

[18] Federal Council in BBl 1996, 1ff.
[19] On the whole issue cf. Zwischenbericht der Justiz- und Polizeikommission an den Landrat, Bericht vom 7. Januar 2000 zur Vorlage 1999-182.

II The Local Child Protection Authorities' Tasks

Introduction

Initially I planned to concentrate on child protection measures in the sense of the Civil Code when interviewing the members of the local authorities. But my interview partners did of course not artificially reduce their observations only to one part of their activities. It will therefore not be possible to restrict the findings of my empirical study to child protection measures of private law. My interlocutors' fields of action where children are concerned, in addition to child protection, is comprised of juvenile penal law, divorce, adoption, fostering and since recently the joint parental responsibility of unmarried parents. Therefore, they could not avoid illustrating their remarks and observations with the help of examples from cases involving the above mentioned other legal fields, when answering my questions concerning child protection in the sense of the Civil Code.

Child Protection Measures in the Sense of the Civil Code

Development of the New Child Protection Measures Around 1900

The possibility of state authorities to intervene in families when the child rearing capacities of parents appear to be insufficient was a new idea in Switzerland and all over Europe at the beginning of the twentieth century. The responsibility of the state up to then was seen in ensuring the access to school for all children and the care for orphans and children born out of wedlock. New was the idea of intervening in families, whatever their situation or position, in order to ensure the children's "right to education" by their parents. At this time, the term "waywardness"[20] (*Verwahrlosung*) was introduced. The new Swiss child welfare movement, which was very much influenced by Germany, promoted intervention at an early stage, if parents were endangering their children (cf. Ramsauer 2000: 21ff.).

The danger, which had to be fought, was that children were not going to develop into useful members of society that were able to provide for themselves. The aim was the fight against pauperism by the means of education (Ramsauer 2000: 42).

In 1912, Switzerland and the creator of the Civil Code, Eugen Huber, were very much praised internationally for the legal implementation of the new ideas. The Civil Code fixed in Art. 283ff. the legal basis

[20] Translation following the translation of the classical work 'Wayward Youth' (Verwahrloste Jugend) by psychoanalyst August Aichhorn (1848-1949).

for intervention. Children could be removed from their parents, if they were not fulfilling their parental duties, if the children's physical or mental welfare were in danger or if the children were "wayward" ("*verwahrlost*"). One innovation was the introduction of "the best interests of the child" as the paramount principle for intervention, independent of the parents' behaviour (Ramsauer 2000: 42).

In parliament some social democrats tried to guide the policy more into the direction of improvement of the structural situation of working class families. They asked for the funding of childcare facilities where children could stay while their parents were working in the factories. These propositions were however not successful and the model based on the intervention in the case of individual failure of families to educate their children was adopted. The enforcement of the family structure following the bourgeois ideal was regarded as sufficient prevention against poverty (Ramsauer 2000: 42ff.).

The child protection law was amended by the law of June 25, 1976[21]. It was part of the reform of the whole child law, the main goal of which was the improvement of the position of children born out of wedlock (cf. Tuor and Schnyder 1995: 318). The amendment brought about a wider range of possible measures apart from the actual removal of children and termination of parental rights. Parental fault was completely removed from the text and the "best interests of the child" was introduced as an explicit legal criterion. Foster parents were added to the list of parents subject to the authority's control. Finally questions of the relationship between the *Vormundschaftsbehörden* and other public services such as juvenile justice were clarified (cf. Tuor and Schnyder 1995: 346). The parental right to corporal punishment of their children was removed from the text of the Civil Code.

The Implementation of the Measures Today

The current version of the Swiss Civil Code uses the term "child protection" for a series of different measures aimed at intervention if the best interests of the child are in danger and the (foster) parents are not preventing or are not capable of preventing the danger (Art. 307 CC). Child protection is thus still understood in the protective sense, and the logic of tutelage and rescue (McGillivray 1992: 223) underlies the measures available to the authorities.

The meaning of danger to the best interests of the child has very much changed throughout the twentieth century. Whereas it was based on bourgeois virtues in the beginning of the century, and the aim was the education of virtuous and industrious members of society, nowadays child protection law is focused on the

[21] AS 1977 237 264; BBl 1974 II 1.

child's healthy development and the threats of child abuse and neglect. Child battering, sexual abuse and neglect are seen as a threat to the child's personal development, and the state's interests in well-functioning members of society is less dominant. The fact that child abuse and neglect is a widespread phenomenon has been acknowledged only recently and is for example mirrored in an increasing rate of reported cases in hospital from the eighties on (cf. Working Group on Child Maltreatment 1992: 47). However, the lack of implementation of the legal measures has been criticised by the already mentioned expert group (Working Group on Child Maltreatment 1992). There is thus a gap between the claimed aims of the law and their implementation. As has already been explained, an important reason can be found in the organisation in decentralised lay authorities.

Private law (in contrast to penal law) authoritative child protection measures of the Civil Code, which are applied by the *Vormundschaftsbehörden*, concern children and adolescents until the age of maturity (18 years) and encompass the following possibilities:

(a) "protective measures" (Art. 307 CC): These measures may include instructions given to the parent(s), or the designation of a person who has to be informed regularly by the parent(s).

(b) designation of a guardian for the child, giving assistance to the parent(s) (Art. 308 CC)

(c) designation of a guardian for the child, giving assistance to the mother of a child born out of wedlock, in the cases where paternity is not established (Art. 309 CC).[22]

(d) placement of a child outside the family (Art. 310 CC)

(e) termination of the parental rights (Art. 311/312 CC)
This strongest measure cannot be decided on by the *Vormundschaftsbehörde* itself. The supervisory authority, which in the canton of Baselland is the district *Statthalteramt* (an authority mainly entrusted with criminal prosecution)[23] has to decide, upon request by the local *Vormundschaftsbehörde*.

Out of these measures, the guardian for the child, giving assistance to the parents or the unmarried mother is the most frequently ordered: four out of five of the newly ordered measures in 1999 in Switzerland were based on Art. 308 or 309 CC[24]. The placement of the child outside the family is only one measure in ten. No figures are available on the percentage of children placed with foster parents compared to placements in a home. The termination of parental rights makes 1,8 % of all measures, which means that in the whole country in

[22] Switzerland is one of the last countries in Europe to retain this decision, which is explicitly assuming the mother's inability to care for the child and his/her rights against the father.
[23] § 35 Gesetz über die Einführung des Zivilgesetzbuches.
[24] This calculation is restricted to the measures based on the Art. 307 to 312 CC. Art. 308: 3.393 measures, Art. 309: 1038 measures, total number of measures based on the Art. 307 to 312 CC: 5545 measures. Source: Statistics of the Swiss *Vormundschaftsbehörden* 1999.

the year 1999, parents were deprived of their parental rights in 99 cases. These figures have to be seen in relation to a total population of about 7.000.000 inhabitants.

Child protection measures in the wider sense are additionally:

(f) measures for the protection of a child's fortune (Art. 324, 325 CC)

(g) guardianship for the child under age (Art. 368 CC): In the case of death or legal incapacitation of the parents or in the case of the termination of parental rights, the child has to be given a guardian. This guardian has nearly the same rights and duties as parents have in the face of parental responsibility.

Literature interprets Art. 307 CC so that authoritative child protection should only occur if the danger for the child can't be removed by the facultative child welfare system such as social work or child psychiatry (principle of subsidiarity, cf. Hegnauer 1999: 206). The system is nonetheless based on the logic of the parents' individual responsibility and protected private sphere that should only be turned into a public matter in the case of individual failure. It depends of course also on the local social services and authorities if importance is attached to empowerment of parents or the improvement of the structural situation of families. This point is pertinent for immigrant families, who are, as will be shown below (part two), particularly disadvantaged economically and socially.

The second characteristic of the system of child protection measures is the dominance of the logic of child savers (cf. van Bueren 1998: 22) which emphasises the protection instead of the participation of children. Swiss child protection still follows the tradition initiated at the beginning of the twentieth century which created the image of the defenceless child. Competing with this image is also the construct of the dangerous child which links child protection with juvenile penal law (cf. below).

The paradigm shift brought about by the ratification of the UN Convention on the Rights of the Child (UNCRC) by Switzerland will have to be considered. The UNCRC gives much importance to the child's participation in all matters of interest to him or her (cf. particularly Art. 12ff.;). Child law will have to take into account the child's wishes by the means of the right to be heard and the right to have an independent representative. The definition of the best interests of the child will have to also increasingly integrate the child's capacity to be a "meaning-maker", i.e. to be taken seriously in his or her interests and opinions (cf. Verhellen 2001: 107ff.)[25].

Reporting to the Authority: Selectivity of Child Protection Clients

The Penal Code (PC) confers legal obligations or rights to report suspicions of child abuse and neglect to the authorities on several professional groups. The criminal prosecution is obliged to report cases to the *Vormundschaftsbehörden*, if further protective measures are necessary (Art. 358bis PC). Besides the private law protective measures, most behaviour that can be described as "child abuse and neglect" is also punishable according to the penal code. *Vormundschaftsbehörden* are however not obliged to report cases to the criminal prosecution authorities. Experts point out the importance of scrutiny in every case, if a penal law procedure is in the child's best interest (Working Group on Child Maltreatment 1992: 88).

Professions which are normally protected by professional secrecy, like paediatricians and lawyers, have the right to report to the *Vormundschaftsbehörden*, if they have knowledge of criminal offences against children (cf. 358ter PC).

In practice however, the main reporters seem to be communal social workers who are in contact with families because of financial problems or because they have themselves asked for social assistance; teachers; the children's hospitals; private people from the child's social surroundings. The interviewees mention a certain reluctance of paediatricians to report cases of child abuse and neglect.

Child protection authorities' clients are thus a selection: They are children who are reported by their teachers because of their disturbing behaviour in school. Or they are families who in one way or another attract attention in their neighbourhoods. Or they are already known to the social services because of other problems. Statistics are missing, but the hypothesis of the one-sidedness of selection by the authorities suggests itself.

The fact that foreign nationals are over-represented in child protection proceedings, as will be discussed in the second part, has therefore to be understood bearing in mind the crucial moment: the reporting of a child to the authorities. We will have to come back to this question in the second part.

Jurisdiction Concerning Immigrant Children

When talking about immigrants in Switzerland, there is of course the question of jurisdiction , which has to be clarified. Due to restrictive naturalisation policies (cf. below part two), most immigrants remain foreign nationals for many years or don't seek for naturalisation at all. This means that the question of conflict of norms and jurisdiction arises. In the area of child protection, the "Hague Convention concerning the powers of authorities and the law applicable in respect of the protection of infants" (concluded at The Hague 5 October

[25] The importance of the child's wishes will be discussed below in part two in what considers the autonomy of

1961) is applicable[26]. The Convention is applicable namely when a child of foreign nationality living in Switzerland is concerned. It is applicable *erga omnes*, i.e. it is valid also if the state of origin hasn't signed the Convention. According to the Convention, the State of habitual residence of the child has in principle jurisdiction for child protection measures, the habitual residence of a child being, according to a rule of thumb, established after around six months of residence (cf. Schwander 1998: 80). In cases of urgency, the State of mere presence of the child has jurisdiction (Art. 9). Even if the Convention states exceptions to the rule of habitual residence (Art. 4)[27], it is sufficient for our purposes to state, that the Swiss child protection authorities are in principle competent for the application of child protection measures also in the case of foreign nationals living in their jurisdiction. In the new Hague Child Protection Convention of October 1996, of which Switzerland is not yet signatory, the habitual residence (and concerning refugee children or children without residence mere presence) in a country is reinforced as the primary basis for jurisdiction (cf. Nygh 1997, Schwander 1998). According to Art. 2 of the Convention of 1961, Swiss authorities have to apply the measures provided by domestic law. Namely, the child protection measures of Art. 307ff. of the Swiss Civil Code are within the scope of the Convention[28].

Juvenile Penal Law

Child protection and juvenile penal law have up to now been two separate bodies of law in the Swiss legal system. The draft juvenile penal code which was presented to Swiss Parliament in 1999[29] modifies the measures of juvenile penal law to come into accordance with child protection law following the civil code, the two systems however remain separate. In a few cantons a system similar to the system which is practised for example in France with the *justice des mineurs* (cf. Garapon and Salas 1995) exists, where young offenders and children in need of protection are dealt with by the same body (Hegnauer 1989: 18). In the canton of Baselland, some minor offences of juvenile penal law are under the authority of the local *Vormundschaftsbehörden*[30].

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the girl child.

[26] The Convention came into force for Switzerland on February 4, 1969.

[27] Art. 4: "If the authorities of the State of the infant's nationality consider that the interests of the infant so require, they may, after having informed the authorities of the State of his habitual residence, take measures according to their own law for the protection of his person or property."

[28] For adoption cases and cases of child abduction, as well as for questions of child maintenance, special Conventions are applicable. It would be too far reaching to discuss them here.

[29] BBl 1999 1979ff.

[30] *Gesetz über die Jugendstrafrechtspflege* of 1 December 1980, SGS 242.

In legal literature, the main criticism of the interplay of child protection measures and educational measures following juvenile penal law is directly linked to the already observed problems of organisation of the guardianship authorities on the local level: According to these authors, the reporting system in child protection does not function sufficiently well. Additionally, because of the financial consequences for the communal budget, the communes are reluctant to order preventive child protection measures such as the placement in a specialised institution. The direct conclusion drawn from this fact is that in many cases juvenile delinquency could be prevented by child protection measures. In this logic the postulation of the unification of the two systems and the merging into one single authority (cf. Hochheuser 1997: 30) appears consequential.

The assertion of a chain of causation between non-intervention by child protection authorities and juvenile delinquency is more than questionable. Another question is the adequacy of the idea of a unified child and juvenile law system following the French model.

The close link between the child protection system and the juvenile penal system has been described by Donzelot as the preoccupation with the "predelinquent, the child in danger of becoming dangerous" (Donzelot, 1997 [1977]: 97). Indeed the structure of a unified system appears to concentrate more on the prevention of delinquency, the control of disturbing elements, than on the idea of the welfare of the child in the sense of protection of the healthy development. On the other hand, the logic of child welfare is becoming more and more that of juvenile penal law. The Federal Council in its presentation of the draft juvenile penal code states this paradigm:

More than the law in effect, the draft expresses the central idea of integration of juvenile delinquents by means of education. In order to implement this idea, measures are planned, which will in the future be very closely oriented towards the child protection measures of the Civil Code and therefore will also be called protective measures.[31]

Further Tasks According to Family Law

Besides the child protection measures of Art. 307ff. CC there are several areas of family law, where *Vormundschaftsbehörden* are entrusted with the application of the law. Divorce law, child law and adult guardianship are the main examples.

The reform of divorce law brought about a shift in responsibility from the cantonal divorce courts to the local *Vormundschaftsbehörden* on January 1, 2000 (cf. Freiburghaus 1999). These new tasks are considered by

[31] BBl 1999 1979ff., 2217; my translation.

one of my interviewees as an overburdening of local executive bodies. Most importantly, divorced parents are now referred to these authorities if they want to change custody and visitation rights for the children that were fixed by court or by convention in the divorce proceedings (Art. 134 CC). In the case of custody, the divorced parents must however go to court if they are not able to reach agreement. Concerning visitation rights the local authorities have a new demanding challenge as they now have to decide upon adversary proceedings where the two parents are opposed, (Freiburghaus 1999: 154) a new constellation for the *Vormundschaftsbehörden.*

A second new task for local *Vormundschaftsbehörden* is the new possibility for joint custody of unmarried parents. The parents have to present their request to the authorities together with a detailed convention fixing the share each parent will contribute to child rearing and costs (Art. 298a CC).

Child law outside child protection stated in Art. 307ff. of the Civil Code, also assigns the local *Vormundschaftsbehörden* tasks in the organisation and supervision of fostering (in the sense of the placement of a child in a family or with a private person)[32]. In domestic adoption proceedings, the local *Vormundschaftsbehörden* are the place where the birth-parents have to deliver their consent to the adoption (Art. 265a CC). In case of the absence of the consent of one parent the same authority has to decide on the admissibility of an adoption (Art. 265d CC).

Adult Protection in Contrast to Child Protection

Child related tasks of the *Vormundschaftsbehörden* stand in contrast to the adult-related tasks. When adults are to be assisted by guardians or even legally incapacitated, these authorities are the ones to make the decisions. In adult matters, the guardians are normally volunteers, in contrast to child protection, where assistance is given by professional social workers. Additionally, decisions concerning forced placement in a psychiatric clinic mainly in the case of mental illness, drug addiction or alcoholism are made by the *Vormundschaftsbehörde*. The legal foundation can be found in Art. 360ff. in the third part of the family law section of the Civil Code.

According to **Ms Huber**, there is an important difference between the pace of proceedings concerning measures for adults and the pace in child protection. In adult protection, in contrast to child protection, the measures can be prepared over a long time and no immediate action has to be taken. In child protection, the

[32] Fostering is regulated by a special statute about the reception of children into foster care (from the 19 October 1977). The lacking professionalism in the supervision of and assistance given to foster parents has been criticised by the expert commission about child abuse and neglect (Working Group on Child Maltreatment 1992: 121).

presidents of the authorities have to make decisions on weekends as well and are even solicited in their leisure time. **Ms Huber** opposes adult guardianship to child protection in a second way:

There [in adult guardianship] it is just a little bit, there is not the same pressure and it doesn't touch whole systems, which you are influencing with your decision. Such people who are alone. Yes, it is somehow not so, the involved apparatus is not that big. This means you haven't the teacher, the school psychologist, the family and so on. And this is probably the thing that makes child protection stick out.[33]

Summary Part One

The first chapter is dedicated to the description of the peculiarities of the Swiss child protection system. When focusing on the German and Italian speaking parts of Switzerland, the system can be portrayed as marked by decentralisation, the high value put on democracy, a lack of professionalism and a plurality of tasks assigned to the same authority.

The study took place in the canton of Baselland where the child protection authorities called *Vormundschaftsbehörden* (guardianship authorities) are organised on the local level. The local communal council (*Gemeinderat*) acts as the guardianship authority, or a separate body is installed for this purpose. Two of the four interviewees are regular communal councillors who are in charge of the department of social welfare. They prepare the cases before they are decided upon by the communal council. Two of the interviewees are the president of the local *Vormundschaftsbehörde*, which in one case is organised as a separate body and in one case corresponds to the communal council. The fact that women are over-represented in the sample, three out of four, is linked to the fact, that generally social welfare affairs are more often assigned to women than other communal tasks.

The fact that members of local *Vormundschaftsbehörden* are in most cases lay people elected by the local population brings about several difficulties. The first concerns the relationship with the professional social workers occupied in the social services of the commune. A certain rivalry is reported by the interviewees which may be caused by the contradiction between the authority members' lack of professional training and their power of decision. Specialised training could be undertaken by the lay members of the authority, a certain overburdening is however used to explain why they do not take this opportunity. The second difficulty can be found in the contact with the legal system: Local authorities often find it difficult to comply with the requirements of legal procedure and feel unsafe in contact with courts. My suggestion in order to improve this

[33] Dort ist einfach ein bisschen ein, es ist nicht so ein Druck und es trifft nicht so ganze Systeme, die man mit einem Beschluss tangiert. Solche Leute, die alleine sind. Ja, es ist irgendwie nicht so, der Apparat der involviert

situation is the introduction -through an amendment of the Civil Code- of a right to a publicly funded legal representative for both parents and children in child protection proceedings.

Organisation on a local level is closely linked to a very strong connection between decisions on child protection measures and their funding by public welfare. The Swiss system of social assistance has been criticised for its lack of protection of the private sphere and the dangers of economising in the short term for fear of increasing communal taxes.

Remedy for the lack of professionalism in local guardianship authorities is promised by a project by the Federal Council to amend guardianship law. It is planned to oblige the cantons to merge several communes into districts and then create regional professional guardianship authorities. As there has been great resistance to this kind of reform in the canton of Baselland, it is maybe necessary to think of possible solutions respecting the communes wish to preserve communal autonomy and democratic participation in guardianship and child protection issues.

A plurality of tasks is passed on to the communal *Vormundschaftsbehörden*. Besides child protection in the narrow sense, these tasks concern juvenile penal law, divorce, adoption, fostering and since recently the joint parental responsibility of unmarried parents.

Modern child protection is a creation of the beginning of 20th century and first aimed at the prevention of pauperism by means of education. Today the rationale given for child protection is the protection of the individual child. The parents' individual responsibility and protected private sphere as well as the ideas from "child savers" is the underlying logic behind the system. The most frequently ordered child protection measure is to give a guardian to the child who will give assistance to the parents or unmarried mother. Much less frequently, children are removed from their families or the parental rights are terminated. The crucial moment in the child protection proceedings, the reporting to the authority, is marked by selectivity of the child protection clients.

Juvenile penal law and child protection law are as yet two separate systems. There are however reforms planned on the federal level in order to modify measures of juvenile penal law to come into accordance with child protection law following the Civil Code.

Child protection is finally described by one interviewee as fast and involving a large system including parents, school and child welfare professions, whereas in adult protection no urgent decisions have to be made and less people are involved in the decisions.

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ist, ist nicht so gross. Also man hat nicht vom Lehrer, bis zum Schulpsychologen zur Familie und so weiter. Und

das ist wahrscheinlich das was die Kindesschutzmassnahmen irgendwie so ein bisschen hervornimmt

PART TWO: CHILD PROTECTION AND IMMIGRANTS

I Child Protection Law and Immigrants in Switzerland

Reflections of the Reality of Immigration in Swiss Child Protection Literature

The text of the Swiss Civil Code does not contain any reference to the reality of immigration, unlike other countries that have special legal norms obliging authorities to take into account religion, race or language of the children when taking protective measures[34]. The absence of immigrants' issues from child protection legislation corresponds to the lack of concern shown in legal literature. The topic of immigrants in child protection proceedings has up to now been brought to the fore in very few occasions and is not integrated into the specialised legal literature, as for example handbooks, textbooks, etc. In publications focusing on child protection law, the topic has only been selectively addressed. In the training courses organised for Swiss German *Vormundschaftsbehörden* no course has been offered addressing the topic of immigrants explicitly. When the issue of culture as a risk factor for child abuse and neglect was touched in the context of general information about child maltreatment, the course instructors were very prudent probably in order not to appear racist[35].

The most important event in the last few years was the congress of the Swiss Conference of Cantonal Guardianship Authorities (*Konferenz der kantonalen Vormundschaftsbehörden*) in September 1997, where the topic of immigrant families was chosen. The contributions to the congress were published in the official journal for guardianship authorities (*Zeitschrift für Vormundschaftswesen ZVW*). Topics from a legal perspective were treated: migrant children's rights according to international and Swiss law (Lücker-Babel 1998), measures of child and adult protection in the international context (conflicts law; Schwander 1998). Contributions from a social work and psychology perspective were published on the same occasion on the topic of the situation of immigrants in Switzerland (Lanfranchi 1997); the work of different social institutions receiving children when confronted with immigrant families (Togni 1997); experiences made by professional guardians (*Amtsvormund*) in giving assistance to children and adolescents of foreign nationalities (Felder 1997).

[34] For example England: S. 22(5)(c) Children Act 1989 states that local authorities in reaching decisions relating to children looked after by them are required to give due consideration 'to the child's religious persuasion, racial origin and cultural and linguistic background''. Cf. also Sched. 2, para. 11 Children Act 1989 (cf. Bainham 1995: 239ff.). France: Art. 1200 of the New Code on Civil Procedure states that the religious and philosophical convictions of parents and child have to be taken into account when taking child protection measures (*mesures d'assistance éducative*).

[35] Cf. Häfeli, Christoph (2000) 'Phänomen Kindesmisshandlung und sexuelle Ausbeutung, Begriffe – Formen und Auswirkungen – Ausmass – Hintergründe', Fortbildung Kindesmisshandlung Zentralstelle für Familienfragen BSV/Hochschule für Soziale Arbeit HSA (Paper for the further education of child protection authorities).

According to the expert in questions of *Vormundschaftsbehörden*, Christoph Häfeli[36], there has been further on a lively debate inside the expert bodies about the question of child protection measures for under age non-accompanied asylum seekers. There has been a tendency towards not accepting jurisdiction of Swiss authorities when it comes to protective measures in favour of these young migrants. The debate is again reflected in the journal *ZVW* (Government of the Canton of Berne 1996, Department of Justice and Police of the Canton of St. Gall 1997).

Further contributions in the *ZVW* concern the question of the legal possibilities in order to provide protection for teenagers whose parents intend to send them back to their home country (Hegnauer 1997); the question of jurisdiction and costs for translation of documents for the establishment of a child's parentage where the mother is an unmarried asylum seeker (Obergericht des Kantons Aargau 2000). Finally the services provided by the Swiss section of the international social service (*service social international*) in Geneva were presented by a member of the staff (Kasme-Knoch 1998)[37].

These publications can be seen as a reflection of the actual relevance of migration in the experience of authorities and social services. However, there is a lack of systematic development and conceptualisation of the topic.

A reason for the absence of immigrants from legal literature concerning the private law child protection measures is certainly among others the fact that there is clearly the tendency to consider the situation of immigrants in the welfare system as a question of social work and not of legal reasoning[38].

Some internationally very debated topics are not mentioned in Swiss child protection literature. Most prominently, the question of prevention of female genital mutilation (FGM) has not yet reached the private law child protection debate. This is surprising, when looking at the important place this practice is given in international human rights literature (cf. Green and Lim 1998) and in child protection literature in other Western countries[39]. A recent study has however shown, that 20 % of all Swiss gynaecologists have already been

[36] Telephone conversation with Christoph Häfeli on 10 January 2001.

[37] The international social service provides transnational services in the area of child and adult protection and in the collection of alimony. With the help of a network of correspondents in more than 120 countries, the service establishes contacts with the persons concerned, the relatives and the authorities, provides information concerning the legislation and organisation of justice in the country of interest and establishes social reports for Swiss authorities and courts (Kasme-Knoch 1998).

[38] Cf. as examples for the field of social work: Béday-Hauser and Bolzmann (1997), Felder (1997).

[39] The topic has been very prominent in France due to several criminal convictions of excisors found guilty for having performed FGM on children. (Cf. the accounts of the proceedings in *Droit et Cultures* no. 21, 1991 and no. 25, 1995; cf. also Winter, Bronwyn (1994), 'Women, the Law, and Cultural Relativism in France : The Case of Excision', *Signs, Journal of Women in Culture and Society*, 19, 939-974). The UK (Prohibition of Female Circumcision Act 1985) and the US have passed legislation prohibiting FGM and made provision for prevention programmes (cf. Center for Reproductive Law & Policy - International Program (2000) 'Legislation on Female Circumcision/Female Genital Mutilation in the United States', available on http://www.crlp.org/pub_art_fgmuslaws.html).

confronted with FGM in their practice, in a few cases they have even been asked to perform the surgery themselves[40].

Over-Representation of the Ethnically Distant?

To better understand the handling of cases involving families of foreign origin by local authorities, it would be of great interest to have detailed statistical information on the proportion of children of foreign nationality in Swiss child protection proceedings. Such statistics are however not available. Statistics presented in the *Zeitschrift für Vormundschaftswesen* for the city of Zurich show (and this can probably be generalised) that foreign nationals are more likely to be subject to child protection measures (Felder 1997: 197): according to the information from 1997 two thirds of the 750 children assisted by the Zurich authorities had at least one parent of foreign origin. And among this group two thirds are of an origin from a country outside the EU/EFTA region. Compared to the 28% percent of foreigners in the overall population of Zurich and taking into account that in Switzerland the average number of people from outside the EU/EFTA region amounts to only 44% of the total foreign population, these figures indicate an over-representation of foreign nationals in child protection proceedings, especially from outside the EU/EFTA region.

In contemporary Switzerland no criticism of possible discriminatory practices against certain nationalities or ethnic groups has been formulated, as it has in Great Britain for the removal of black children from their families and the over-representation of black children in care (cf. Channer and Parton 1990)[41]. The existence of detailed and reliable statistics about child protection measures in the whole country, distinguishing nationality and legal status of the families subject to them, would be the necessary basis for a reflection on a possible bias in the child protection practice. Over-representation doesn't necessarily mean discrimination and the disadvantaging of immigrant families, but it would show the necessity of having a critical look at the authorities' practice.

Reasons for the probable over-representation of Non-European foreigners may on the one hand be actual higher incidents of problems with child rearing, on the other hand the already higher contact with social services because of the higher poverty rate of this population and the very specific situation of asylum seekers. Finally prejudice towards certain population groups may contribute to a bias in reporting by teachers or hospitals, and the opening of child protection proceedings by the authorities.

[40] Cf. *Neue Zürcher Zeitung*, 21 May 2001, 'Mädchenbeschneidung in der Schweiz'.

It is possible that actual higher rates of child abuse and neglect occur in immigrant families. This could be explained by the accumulation of risk factors due to migration. Cross-cultural literature studying risk factors for child maltreatment which are valid across cultures states the problems that immigrant families face and that enhance the potential for maltreatment. Such problems may result from the conflicts arising from the fact that children acquire more knowledge than their parents through formal schooling (Korbin 1991: 74), or the experience of discrimination, isolation and frustration resulting from the minority status. Also the loss of social networks by migration has a negative effect: When child rearing is a shared concern within a supportive network, the consequences for children of having an inadequate or aggressive parent are diminished (Korbin 1991: 72). Finally it is generally acknowledged that stress created by unemployment, bad housing conditions or financial difficulty constitutes a risk factor for maltreatment (cf. Working Group on Child Maltreatment 1992: 60). It will be demonstrated below (chapter II), that immigrants are disproportionally touched by these difficulties.

As the system of child protection is closely linked to other social welfare activities of the communes, families which are already clients of welfare authorities due to their financial difficulties are more likely to be chosen for intervention[42]. These families are in the words of McGillivray (1992: 216) "open-textured". She notes: "The system only penetrates open-textured families: open because of obvious malfunction, usually poverty, or complete dysfunction in the case of abandoned or severely neglected children: sometimes opened by the victims themselves." The thesis that enhanced readiness for intervention and financial problems are linked is confirmed by **Ms Meier**'s following account:

But I can't just go and tell them, hello, my name is Meier and you are, you are beating your children. That is, I can, I must have something in my hands, in order to do this. But behold, they have such financial problems... Now we have got the, family, but because of the financial problems.[43]

In this example no reference was made to a migration background, but as will be shown below, foreign nationals are in Switzerland more likely to have financial problems. The people who are in most contact with welfare authorities are asylum seekers: This group of foreigners are, at least at the beginning of their stay, not

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[41] Cf, for the debate on a historical example below, chapter III, on the *'Hilfswerk für die Kinder der Landstrasse'*, an organisation that removed many children from gypsy families on the basis of discriminatory assumptions concerning this minority's lifestyle.

[42] Cf. for the comparable situation in England: Diduck and Kaganas 1999: 518, referring to the results of a research by Farmer and Owen.

[43] [...] ich kann doch nicht einfach gehen und sagen, guten Tag ich heisse Meier und Sie sind, Sie schlagen die Kinder. Also, so, ich kann doch, irgendwo muss ich schon etwas eine Handhabe haben, dass ich das kann. Und siehe da, die haben derart finanzielle Probleme... **Jetzt haben wir die**, Familie, aber wegen den finanziellen Problemen.

allowed to work. Therefore public welfare is providing for their cost of living. This fact determines their position vis-à-vis the authorities as "open-textured".

The last reason for the possible over-representation of foreign nationals, especially from non-European countries is the actual discrimination of immigrants. This will be touched on in many of the following explanations, and will therefore be left as a hypothesis for the moment.

The Experience of Local Authorities With Immigrant Clients

Methodological Remarks

The lack of conceptualisation in questions related to immigration in Swiss literature treating private law child protection measures, collides with the evidently great importance of the difficulties that intercultural encounters have on the everyday practice of local authorities. In the following, these encounters, as they are mirrored in the statements by local authorities that I collected in my fieldwork, shall be analysed and put into the broader context of the child protection system, the political system of the commune and the public discourse concerning immigrants in Switzerland.

I understand my interpretation of the interviewees statements as one possible way of reading them. As Kaufmann (1996: 26) notes, every interview is of "bottomless richness and of boundless complexity"[44]. At the same time, I consider my report as a contribution to the dialogue I initiated with the persons I interviewed.

The interviews are not only used as the basis for an analysis of attitudes towards foreign nationals as expressed by members of the local authorities. I was also very much dependant on whether my interviewees allowed me access to information on the actual implication of immigrants in child protection proceedings. This information is of course presented in a very one-sided way. Many times I wished I could have participated as an observer in the proceedings described by my interviewees. But using the necessary caution, the information provided by the research subjects is a very valuable basis for my analysis, especially where no literature is available and I was able to discover new facts and situations. However, in view of the small number of interviews, the analysis has to limit its pretensions to the explorative stage and the formulation of hypotheses rather than their verification.

[44] My translation.

Examples from the Local Authorities' Practice

Several situations were mentioned in the course of the interviews, where migrants were involved as parents in proceedings led by the *Vormundschaftsbehörde*. An overview shall be given in what follows, in order to give an impression of the factual background to the opinions and attitudes expressed by the interviewees. Some of the examples shall be taken up again in the detailed discussion.

One of the examples mentioned by **Ms Meier** was mixed marriages between a Swiss and a foreign national. She says that she has observed that these marriages "never work". But she also describes the racism shown by the parents of a Swiss husband against the foreign wife. An example stated by both **Ms Huber** and **Ms Fischer** is the high incidence of cases of teenage girls from Turkey or former Yugoslavia desiring to leave their parents home because of the restrictions to their freedom, or because the father wants to marry them to a man in the country of origin. **Ms Fischer** and **Mr Kunz** mention the formation of "gangs" among young immigrants, especially Albanians from Kosova who are implicated in criminal activities. **Ms Fischer** mentions the conflicts which arise between families when it comes to determining whose children are the initiators. In regards to asylum seekers, **Ms Meier** mentions the problems linked to the fact, that most of them stay for a short period in the jurisdiction of the commune. **Ms Fischer** reports a case, which she designates as the most difficult of her whole career, of a 17 year old asylum seeker from former Yugoslavia who started to demolish cars and ended up in a psychiatric clinic, where it became clear that before coming to Switzerland he had participated in war crimes in Bosnia. Another case of war trauma was reported by **Ms Meier**, she mentions a little boy who started to display disturbing behaviour in school because of his experience in an African civil war. Other situations concern lone mothers whose husband is a political prisoner or has returned to his home country. **Ms Fisher** also talks about Muslim parents who do not accept their children participating in swimming lessons or school camps.

II Structural Disadvantages of Foreigners and the Political Context

Introduction

Both the child protection authorities and their immigrant clients act in the context of the general socio-political climate concerning immigration. The lives of immigrant clients are moreover definitively determined by public policies that decide on the legal status and treatment of foreigners. Before going to the micro level of what happens in the everyday practice of the local authorities, it is appropriate to render a description of the macro level, which is determined by Swiss immigration policy and the population's attitudes towards foreigners. It will

then be possible to show where the macro-context interacts with the reality of child protection by the local government.

The Political and Societal Context: Swiss Immigration and Integration Policy

Swiss immigration policy is the result of a compromise between different competing interest groups, of which two in particular determine the shape of the regulations: the economy and popular xenophobia (Mahnig, 1998: 177; Bonvin, 1996: 450).

The xenophobic movement reappeared in the 1960ies and introduced the term "foreign overpopulation" or "overforeignisation" (*Überfremdung*), expressing a feeling that there are too many foreigners in Switzerland and therefore immigration should be restricted.

Popular xenophobia was able to influence legislation and the federal government by means of instruments of direct democracy, i.e. the popular initiative and the referendum. So for example in 1970 the Federal Council, the Swiss government, had to introduce the system of a global ceiling to the number of newly admitted foreign workers, to prevent a majority of the people voting in favour of the popular initiative against "overforeignisation" (Mahnig, 1998: 179)[45]. The term "overforeignisation" has even been introduced in the text of the Federal Law of Abode and Settlement of Foreigners (*Bundesgesetz über Aufenthalt und Niederlassung der Ausländer*, ANAG)[46].

The system of immigration regulation is however based on the needs of the labour market. The economy, especially in economically underprivileged regions of the country, has a need for a cheap labour force in sectors such as the hotel industry, construction, agriculture and health. Each year the Federal Council carries out negotiations between the different "interested circles": employers, trade unions, political parties and the representatives of the cantonal and federal administrations. Contingents of foreign workers that will be allowed to each canton are then fixed in a decree (Mahnig, 1998: 179).

The logic of the system is based on the "theory of rotation", which states that workers are not supposed to settle in Switzerland, but to return to their home countries after a period of work in Switzerland. The theory obviously serves the Swiss economy, as foreigners can be used as an economic buffer in times of economic crisis. This has been particularly the case in the years between 1974 and 1977, when Swiss economy lost 10% of

[45] The overforeignization initiative stated the limitation of migrants to 10% of the population of each canton. It was rejected, but did nevertheless achieve a very good result: with a participation of 74% of the Swiss voters (by this time, before the introduction of women's suffrage on the federal level in 1971, only male Swiss nationals), the votes in favour of the initiative made 46% (Mahnig, 1998: 178).
[46] Art. 16 ANAG.

its jobs and 35% of foreign workers had to leave the country, thus reducing the level of unemployment in the country (Mahnig, 1998:180).

With the increasing migration pressure from countries whose population is regarded as belonging to a different ethnic background, the Swiss system has actually become ethnically orientated. In 1991 the Federal Council introduced the "model of three circles" (cf. Mahnig, 1998: 180). It was in force until October 1998. The model installed a system of priorities in the issuing of permits, which appears as immigrant selection based on ethnic criteria (Mahnig, 1998: 180):

First priority was given to foreigners from the European Union (EU) and the European Free Trade Association (EFTA), i.e. the "first circle"[47]. A more restrictive admission policy was practised for mostly highly qualified work force from countries like the US and Canada, constituting the "second circle". The borders were practically closed down for work force from all the other countries, constituting the "third circle", i.e. most of the countries in Africa, Asia and Latin America. A permit allowing someone to work in Switzerland was and still is only issued for this group in very exceptional cases.

The "model of the three circles" was given up in 1998 because it was criticised as racist, for example by the Federal Commission against Racism, which is an official expert commission (cf. Caroni, 1999). It has been changed into the "model of two circles", joining the former second and third circle.

The rationale behind this policy is that people coming to Switzerland for the first time have to be primarily recruited "from the countries where this is done traditionally" (Art. 8 ANAG), meaning Italy, Spain, Portugal and historically former Yugoslavia[48]. The Federal Council explains in a report from 1991 the reasons for this policy as follows:

This practice had to permit, on the one hand, the preservation of the Swiss identity and, on the other, the stimulation of the foreigners' ability to integrate, an ability which directly influences the attitude of the Swiss towards the foreigners[49].

With reference to the Swiss identity, the Federal Council clearly takes up xenophobic discourse. In addition, allusion is made to the politics of integration which has gained more and more importance over the last few years[50].

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[47] Switzerland is member of the EFTA but not of the EU.

[48] Yugoslavia used to be a traditional country of recruitment of Swiss labour force, today –subsequent to the war of 1992- the countries of former Yugoslavia belong to the 'third circle' of priorities.

[49] translation following Mahnig, 1998: 182.

[50] cf. the recent initiatives taken for example by the Canton of Basel-Stadt (Leitbild und Handlungskonzept des Regierungsrates zur Integrationspolitik Basel-Stadt 1999) and on the federal level (Verordnung vom 13. September 2000 über die Integration von Ausländerinnen und Ausländern (VIntA) SR 142.205, available on http://www.admin.ch/ch/d/sr/c142_205.html)

The system following the "theory of rotation" described above does not take into account that migration nowadays aims at permanence of emigration from parts of the world where living conditions have become very precarious and unstable as in Eastern European countries (cf. Bonvin, 1996: 462). These people seeking a safe place for permanent residence find themselves confronted with a system which only allows them security of residence after a very long time, if it allows them to enter the country at all.

Not being allowed to enter the country as workers, more and more immigrants try to "get in" with the help of political asylum (Mahnig 1998: 183). This is however not a successful strategy for most of them, as nearly 91,5% of their demands are rejected (figures from the year 1998, Heiniger et al. 1999: 20), because they do not fit into the definition of a political refugee. They "only" fled from a war (e.g. Tamils from Sri Lanka), a general climate of violence or a difficult economic situation.

But also people enjoying the privilege of a residence permit are faced with a precarious situation. Once allowed into the country, a permanent residence permit can only be achieved after 5 to 10 years of residence[51]. Reasons for expulsion from the country are dependence on public assistance, a conviction for a crime or offence, resisting integration, dangerousness for the public security because of a mental illness.[52] The conditions for family reunion are very tough, especially with respect to the financial means that have to be proved. Persons with a permit allowing a short stay only, cannot have their family members come to the country at all[53]. Persons who come to Switzerland by the way of family reunion with their spouse can be expulsed in cases of a separation[54]. In spite of these restrictions, family reunion is the most important reason for immigration.

The ethnic orientation of Swiss immigration policy has made a new turn with the passing of bilateral agreements between Switzerland and the European Union, that will introduce free movement for EU citizens[55]. Swiss legislation on foreigners will have to change in order to implement the improvement for Europeans. In the year 2000 a draft for a new law regulating the legal status of foreigners was submitted to a public consultation procedure. It has been presented in the same way as in 1970 as an "indirect counterproposal" to a popular initiative that wanted to restrict the number of foreigners in Switzerland to 18 % of the population (today about 20 %). By the opponents the initiative was designated the eighth initiative against "overforeignisation". The official draft law -due to the improvement of the status of EU-citizens- only touches the legal status of immigrants from countries outside the EU/EFTA region and restricts labour immigration for these non-

[51] depending on bilateral agreements with the home country (cf. Bonvin 1996: 455)
[52] Art. 10 ANAG
[53] Cf. *Grant, Philip*, La protection de la vie familiale et de la vie privée en droit des étrangers, Helbing & Lichtenhahn, Bâle 2000, p. 100ff.
[54] Art. 7 ANAG.
[55] Cf. http://www.europa.admin.ch/

Europeans more than the existing law. The argument was that the initiative would have no success in the popular vote because of the concessions made in the draft law to xenophobic movements in the Swiss population[56].

In addition to an immigration regulation that – through the wide range of reasons for expulsion described above - aims at the perpetuation of insecurity, the law pertaining to the acquirement of Swiss nationality is restrictive as well. The high percentage of foreigners in the overall population can be explained by this fact. Naturalisation can be asked for after twelve years of residence in Switzerland[57] and the law states a very complicated and expensive procedure, even for second generation foreigners. The communes are responsible for the naturalisation procedure and most of them ask for tests in language and knowledge of the political system. Some communes even organise a referendum where the candidates are presented to the voting (Swiss) population with photographs and curriculum vitae. In this communal system, people from former Yugoslavia have practically no chance of becoming Swiss citizens. A recent initiative of the canton of Geneva to introduce a prescription on the federal level that would make referendums for naturalisation in the communes impossible, has not been successful in Parliament.

The Characteristics of the Immigration Country Switzerland

The combination of economically oriented immigration control measures and restrictive naturalisation policy leads to Switzerland being characterised in the following way (Wicker 1998: 331):

(1) a fairly high percentage of foreigners (2) a layered labour market in which the foreign population dominates the low-income sector (3) a multiculturalism debate based on the division between citizens and aliens. Nationals represent the indigenous culture, while aliens stand for foreign cultures and ethnicity.

The main argument of popular xenophobia: "we don't have any space anymore", is based on the comparatively high percentage of foreigners in the permanent resident population. In 1998 this figure was at 20,7 % (Heiniger et al. 1999: 13). In Europe, only Luxembourg and Liechtenstein have higher quotas of foreign population. This high percentage is directly linked to the restrictive naturalisation policy.

The situation of immigrants in the labour market is one of structural discrimination. In 1998, foreigners earned on average 20 % less (men compared with Swiss men) and 15 % less (women compared with Swiss women) than the Swiss working population. Foreigners are more likely to do unskilled work than Swiss and run a higher risk of becoming unemployed (Heiniger et al. 1999: 37, 40).

[56] In the popular vote of 24 September 2000, this last xenophobic initiative made 36 % of the votes, with a participation of 45% of the Swiss voters.
[57] Art. 15 *Bürgerrechtsgesetz*, SR 141.0.

It is important to emphasise the third point made by Wicker: the debate about multicultural society and the integration of different ethnic groups, is conditioned by the fact that due to the high requirements for naturalisation, many immigrants remain foreign nationals for several generations. The debate about cultural difference is thus entirely based on the question of nationality. In other words: very few Swiss nationals belong to ethnic minorities. The primary requirement for naturalisation is "assimilation" into the Swiss culture, which implies that whoever is Swiss cannot possibly belong to a different culture.

This is the background I had in mind when discussing issues related to immigrant families with members of local authorities. The word I used to name the clients I had in mind was: "foreigners" (*Ausländerinnen/ Ausländer*). Implicitly, the word "foreigners" has the connotation of people perceived as culturally different. This idea does not distinguish between immigration from countries inside Europe and other continents, nor between short-term and long-term residents. A person can come under the category of "foreigner" even if he or she was born and raised in Switzerland. However the debate about the integration of the foreign population in Switzerland implicitly refers to population segments which are perceived as culturally distant only.

The groups referred to in the public debate are in a "situation of strong ethnicity". According to Machado (1997: 308) a "situation of strong ethnicity" exists, when there are strong social and cultural contrasts between this minority and the majority of the population or other minorities. When talking about integration of the foreign resident population, the images used are: women wearing a veil, Muslim fundamentalists closing in their women, Turkish people making a lot of noise[58], Serbs killing each other with the mentality of blood feuds etc.

The connotation of the word "foreigner" as being the ethnically different has been proved by a recent study. As the study was a replication of a study done in 1969, the shift in the meaning of the word "foreigner" could be observed. In 1969, the foreigners were the Italian and the Spanish "guest workers", whereas in 1995 they were non-Westerners and especially refugees (Stolz 2001: 39).

In an opinion poll from the year 1997 (Suter 2000: 82), 800 persons were asked to give their opinion about twelve selected nationalities represented in the Swiss population. The five countries of origin with the most negative rating ("They sometimes cause worries" or "They are at the wrong place") were Serbia, Bosnia, Turkey, Zaire and Sri Lanka. The population segments which cause the most problems to Swiss people are thus the Non-European minorities and minorities with an origin in former Yugoslavia. These groups make up half the

[58] Not even academia is immune to this imagery. Warning against the dangers for the equal application of the law in a plural society, the socio-legal scholar Manfred Rehbinder of Zurich University (1995: 250) notes: "It is not admissible to leave an impoverished old age pensioner, living in Berlin Kreuzberg as the last German in her block of flats, without protection from the Turkish music which sounds day and night in Turkish sound intensity, even if this loudness is common in Turkey." (my translation)

foreign population. The largest group of foreigners comes from former Yugoslavia with 24, 4 % (cf. Heiniger et al. 1999: 15). A prevailingly positive assessment was made of people coming from neighbouring countries and traditional countries of labour force recruitment: France, Austria, Germany, Italy, Spain and Portugal. These are the people who are going to benefit from the bilateral agreements with the European Union. The opinions about people from Chile, as an example for Latin America, were divided. In a similar way the already mentioned replicate study showed that the people from former Yugoslavia, Arabs and Turks were the people looked at with the most negative feelings (Stolz 2001: 57).

As the examples brought up in the interviews conducted for the present study will show, these general attitudes of the Swiss population, together with a political climate of popular xenophobia, have their direct and indirect impact on the work of local child protection authorities.

Implications of the Immigration Policy on Immigrants' Family Life

Before achieving the more secure status of a permanent residence permit, and the absolute security of Swiss nationality, foreign nationals living in Switzerland are never sure, if their permit is going to be renewed. Many people even live illegally in Switzerland, without any permit at all. The legally precarious situation produces multiple insecurities on a financial and employment level (Chaudet et al. 2000: 128). Legal norms concerning the status of foreign nationals have direct influence on family relations: The restrictions concerning family reunion cause the separation of families, because workers must often wait a long time until they have the financial means to be eligible for family reunion. The legal prescriptions force couples to stay together in order not to loose their right to stay: Art. 17 ANAG states that during the first five years, the right to remain in Switzerland for spouses of foreign nationals with a work permit depends on them actually living together. The regulation for foreign spouses of Swiss nationals is better: here the right to stay is lost only in case of divorce (Art. 7 ANAG). Many authors and politicians have pointed expressly to the constraint this means for victims of domestic violence: because of the fear of losing their permit, they stay together with their violent men (cf. Caroni 1999). There has been political action in this question, a modification of the law has however not as yet been passed (cf. Spescha 1999: 152). The connection with child protection has not been taken into account by politics and literature. But if a woman leaves the common home in order to protect her children against an abusive or violent husband, this also constitutes a risk for her security of residence in Switzerland. Cantonal authorities have the possibility to allow for humanitarian reasons for residence in Switzerland in such cases. The woman and her children do however not have any legal claim and are dependent on the authority's discretion. A similar

situation results in case of the death of the person who has asked for family reunion. Here as well the renewal of the permit is not assured. The grief caused by the loss of a close person is aggravated by the fear of losing the right to stay and subsequently the economical base for survival (Chaudet et al. 2000: 142).

A supplementary factor leading to existential problems of foreigners in Switzerland is their disadvantage on the labour market. Consequently foreigners, compared to Swiss people, are worse affected by poverty: in 1992, the poverty quotas[59] were 10% for Swiss and 13% for foreigners. Inside the heterogeneous population segment without a Swiss passport there are however considerable differences: In the group of foreigners of an origin outside the European Union, the poverty quota is as high as 22,7 %, whereas the poverty quota of immigrants from Western and Northern Europe (EU) is smaller than the poverty quota of Swiss (3,9% compared to 9,9 % in 1998, Heiniger et al. 1999: 45). Not surprisingly, this economical situation translates into the higher proportion of foreigners facing problems such as overcrowded accommodation, poor quality accommodation, unemployment and bad health (Branger 1998: 314; Heiniger et al. 1999: 45).

Strategies for Coping with Xenophobia in the Communal Council

If Swiss immigration policy is influenced by popular xenophobia, it is most probable that local politics is also touched in one way or the other by this debate. The xenophobic segments of the population are also a reality in communal politics. Three of the interviewees reported more or less directly on their difficulties with xenophobic ideas and strategies for coping with them.

Ms Meier is the most clear about the question. She describes a case of a refugee boy who showed "abnormal behaviour" in school. She reported his story in detail, the atrocities he and his mother had to live through during their flight from a civil war. Then she explains how she managed to convince the other members of the communal council of the funding of a placement of the child in a home.

Not simply come on, leave them, they are just Africans, and they come anyway and that if one, you have to [tell] the political authorities **again and again** a little bit. […] I get my tough politicians, one from the SVP [Swiss Popular Party, right wing party which is one of the promoters of the discourse of over-foreignisation], to understand why, that these actually are people who are having a hard time of it, and not such damn *asylants* [pejorative but very common expression for asylum seekers], you see, I

[59] For a definition of the poverty lines used in Switzerland cf. Branger 1998: 314 n.31.

say it this way now, you see, yes, [imitating her fellow councillors] why should we spend such a big amount of money for such Somalis, who do not belong here and will disappear anyway.[60]

The strategy of confronting fellow councillors who are racist with the tragedy of individual cases, appears to be successful in the bargaining situation in the communal council.

Another instance of the reaction to racist ideologies can be seen in the strategic emphasising of positive examples used by Ms Fischer and Ms Huber. **Ms Fischer** is very conscious about the fact that the "cases" she has to judge as a child protection official are the more difficult ones. She only gets to see families with difficulties. She emphasises how many adolescents are able to cope with the situation in between the culture of their parents and the Swiss culture. As an example she mentions young women from the second generation who are apprentices in the communal administration. She describes them as beautiful, sexy and clever. She is most impressed by young women who are able to emancipate themselves although this means incredible ruptures within the family.

In a similar way, **Ms Huber** refuses to generalise about negative examples. After having explained that many Turkish fathers consider the Swiss school system as not disciplinary enough, she emphasises the fact that many parents of foreign nationality don't have any problems at all with the Swiss system. As a positive example she describes a series of meetings with adolescents and their parents in order to explain the authority's decision concerning a criminal offence committed by the adolescents, three of them with Swiss families, one of them with a Turkish family. The most pleasant interlocution was the one with the Turkish parents. She describes the conversation as having been on a "top level".

The emphasising of positive examples could be a reflex trained by constant xenophobic attacks in local politics. On the other hand it can also be seen as an expression of the awareness of one's own negative feelings towards the "Other", which have to be neutralised constantly by being reminded of the positive examples.

Local Immigration Policy and the Individual Case

The fact that members of the local *Vormundschaftsbehörden* are politically elected party members has a certain influence on their attitudes towards immigrant clients. The experience in the individual cases and their own position in the public political debate on immigration policy are in a state of constant mutual influence.

[60] Nicht einfach ja komm, lass doch die, die sind ja sowieso Afrikaner, und die kommen sowieso und dass wenn man, oder das muss man den politischen Behörden eben **immer wieder** ein bisschen. [...] und das gelingt mir dann, dass ich meine harten Politiker, einer von der SVP, eben auch dazu bringe, dass er versteht warum, dass das arme Leute sind eigentlich, und nicht so huren Asylanten, oder, ich sage es jetzt so, oder, ja, was sollen wir

Additionally, the tight organisational link between local government and the tasks related to child and adult protection has the effect that there is a certain intertwining of local integration policy and aspects of individual foreigners difficulties. Members of local authorities are confronted with both immigrants as a logistical problem for their commune and immigrants with their individual situation.

This dynamic can be observed most impressively in the statements given by **Mr Kunz.** When asked about his experience with foreign nationals, there seemed to be a misunderstanding: I was thinking of individual cases in child protection proceedings, referring to the "social worker's standpoint". **Mr Kunz's** answer was surprising: He first mentioned that there have not been any violent attacks on foreigners especially asylum seekers as had been the case in other communes. Then he referred to the logistical problems of housing asylum seekers. He then explained the outsourcing of the social work for immigrant clients which is now performed by a private organisation mandated by the commune. After my asking the question again more precisely, considering child protection, he answered that the proceedings are executed in the very same way as in the other cases. This referral to the principle of equal treatment, also used by other interviewees, will have to be analysed in more detail below. What is interesting for the moment, is that **Mr Kunz's** statements which were initiated by the keyword "immigration" disclosed the "politician". This type of child protection official does not function using the logic of sensitivity to the individual case. His major interest is local immigration policy and the logistical problems linked to it.

Interpretations in Light of the Foreigners' Structural Disadvantages

The discussion of the interviewees' attitudes towards perceived cultural difference and strategies for coping with it, will be the topic of the following chapter. It is however interesting and surprising to note that not all the reflections about immigrant clients described by the local child protection officials focused on cultural difference.

The following statement by **Ms Huber** points to sociological studies describing the structural disadvantage foreigners have in Swiss society.

But it is also because of the stratum of society the people are part of, that is they often have very bad starting points. To live with the lowest salaries, this also often means, that two have to work, this

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da jetzt einen Haufen Geld brauchen für so Somalier, die sowieso nicht hierher gehören und wieder verschwinden.

means again overtaxed mothers, and more, more conflicts, because you can't take anymore. And then additionally serve the men. [61]

In a similar way, **Ms Fischer** notes that the social stratum often plays an important role.

The explanation of immigrants' problems putting emphasis on their structural situation, as it is given by Chaudet, Regamey, Rosende and Tabin (2000) in their recently published study about the social problems of foreigners in Switzerland, is a sociological explanatory pattern. As Giddens[62] notes: " Sociological knowledge spirals in and out of the universe of social life, reconstructing both itself and the universe as an integral part of that process." Here such a "feed-in" of sociological knowledge into the practice of child protection can be observed. Probably it entered the discourse of child protection officials through the political discourse of the left-wing political parties, which took up the analysis developed by sociologists in order to promote the economic and social integration of foreigners into Swiss society.

III Finding an Adequate Position towards the "Other"

Introduction

An encounter with immigrants from a foreign country asks for a reflection on how we position ourselves in relation to the "Other". The fact that a distinction is made between insiders and outsiders can be observed in the statements given by the interviewed authorities. The otherness of foreigners is often referred to as "foreign culture". It will therefore be necessary to clarify what is hidden behind this notion of "culture", both in literature and in the interviewees statements.

"Foreign culture" is made visible in ideas on adequate child rearing, family life, the relationship between the state and the individual and the role of children. Immigrant clients may not accept the authority's definition of good child rearing or ideas about adequate forms of state intervention in the case of family problems. The possible cultural variation in the definition of optimal child rearing and of child abuse and neglect, has been shown in research done by anthropologists.

The common theme in both child protection in practice (local child protection officials) and in theory (social scientists and legal theorists) appears to be the quest for an adequate position and attitude in the intercultural encounter. Both members of authorities, social science and legal scholars have to reflect the status

[61] Aber ist halt auch durch die Schicht, wo die Leute sind, also die haben oft ganz schlechte Ausgangsbasen. Oder mit den tiefsten Löhnen leben, heisst ja auch oft dass zwei arbeiten müssen, das bedeutet wieder überlastete Mütter, und mehr, mehr Lämpe ((Schwierigkeiten, Konflikte)), weil man nichts verträgt. Und dann noch den Männern auch noch den Service bieten.

[62] Giddens Anthony (1990), *The Consequences of Modernity*, Cambridge (UK) Polity Press, p. 15ff.

of their own norms and values in relation to the "Others". In the legal field, the language of rights, in the shape of parents' rights and the rights of the child as well as minority rights, is the starting point for finding this position. This language has also been taken up by legal anthropologists. The various approaches that will be debated in the following are: the prohibition of assimilation pressure, the approach of equal treatment and anti-discrimination and cultural relativism/cultural pluralism versus universality of human rights.

The "Own" and the "Other"

The distinction between the "Own" and the "Other", the dynamics of inclusion and exclusion from the local community are topics inherent to local child protection[63]. **Ms Fischer**, one of the interviewees, always referred to "us" when speaking about the Swiss population and "them" when she is referring to foreigners. She even sticks to this language of inclusion and exclusion when explaining that Swiss religious minorities sometimes have exactly the same resistance to school activities such as camps as the Muslim minority has. The Swiss independent Christians who are afraid for the moral integrity of their daughters are – in spite of all differences- regarded as insiders.

This construction of a local community (which does implicitly not include foreigners), is also very often used as an argument against reforms in the Swiss child protection system. When asked about the reform projects aiming at a more regional instead of communal organisation of child and adult protection, **Mr Kunz** emphasises the advantage of being familiar with the local population. He puts it like this:

If you know the people or you know this is this family, or this is the social environment, then a guardianship authority can in one or the other case, seek contact with the relatives of the family one knows and can say, hey you, your sister has a problem, or some relative has a problem, whom you know well, and with whom you entertain relations, do you want to speak with this person. [64]

At a second glance, the social proximity to the clients is however not an easy thing. When insiders from the official's own community are subject to intervention, there is clear uneasiness expressed in the following statement by **Ms Meier:**

[63] These reflections concerning the inclusion and exclusion from the community are inspired by Yngvesson's research reported in Yngvesson Barbara (1994), 'Making Law at the Doorway, The Clerk, the Court and the Construction of Community in a New England Town', in Greenhouse, Yngvesson and Engel (1994) *Law and Community in Three American Towns*, Ithaca and London, Cornell University Press..

[64] Wenn man die Leute kennt oder weiss das ist aus dieser Familie, oder das ist das Umfeld, dann kann auch eine Vormundschaftsbehörde, im einen oder anderen Fall mit Angehörigen der Familie, die man kennt halt ins Gespräch kommen und sagen, du, deine Schwester hat ein Problem, oder irgend jemand deiner Verwandtschaft hat ein Problem, die du gut kennst, und Beziehungen hast, willst du mit dieser Person reden? Und das ist natürlich dann auch eine Hilfe die man hat, und das gibt sich, wenn man es regionalisiert, nicht mehr.

This has, you know, it is sometimes extremely difficult, if you know the people very well in the village and then you have to attack them because of. Somebody, whom, whom I know very well, where we have to say, listen, you, it seems you are beating up your boy.[65]

In this statement there is an implicit acknowledgement of the fact, that it is easier to submit outsiders to child protection proceedings. In another situation, where a Roma family (probably refugees from Eastern Europe) is the subject of intervention, Ms Meier doesn't show the same reluctance:

The woman really beats her child each, she is overstrained, the young, young woman. She literally beats her child, she will beat him to death one day. I have also seen it once. Then people told us about it and then we said, now we will summon them with their husbands. They are a whole clan. Now we have to tell them, this does not work like this, otherwise we will remove the child from them. You have really got to menace them. [66]

The interventionist tone used in this statement compared to the previous, reluctant statement, suggests the conclusion that the threshold for intervention is different concerning insiders and outsiders.[67] This might be one explanation for the already mentioned over-representation of foreigners in child protection.

Culture and Cultural Differences

During the interviews, culture was a word that unfailingly appeared when the conversation touched the issue of immigrant families. But what lies behind this notion of culture, what do these local politicians understand by culture? And what role do social sciences play in the shaping of this notion ?

The Notion of Culture in Social Sciences

Social scientists, namely in the field of anthropology, use different concepts of "culture". An early definition was given by E.B. Tylor when he wrote in 1871[68] about culture as:"... the complex whole which included knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society." This notion of culture is very broad in that it includes manifestations of human intellectual

[65] Also, das hat, wissen Sie, es ist schon noch wahnsinnig schwierig, wenn man Leute ganz verrückt gut kennt im Dorf und dann muss man diesen an den Karren fahren wegen. Oder jemand, den eben, den ich sehr gut kenne, wo wir sagen müssen, hör mal, du, du schlägst deinen Jungen scheinbar immer ab.

[66] die Frau schlägt jetzt wirklich ihr Kind jeden-, sie ist überfordert, die junge, junge Frau. Sie schlägt ihr Kind buchstäblich, sie schlägt es noch einmal zu Tode. Also ich habe es auch schon einmal gesehen. Dann haben uns die Leute das gesagt, dann haben wir natürlich gesagt, so und jetzt zitieren wir die wieder, mit den Ehemännern. Also es ist eine ganze Familiensippe. Jetzt müssen wir das ihnen sagen, also so geht das nicht, sonst nehmen wir ihnen noch das Kind weg. Man muss ihnen einfach drohen.

[67] In parenthesis it is interesting to note how representations of collective family organisation are conveyed in this statement.

activity that is considered by post-enlightenment science as universal: knowledge, in particular natural sciences knowledge. Additionally, it not only includes the capability for the intentional intellectual and material shaping of world, but also the particular outcome of this, i.e. the territorially specific ways of life, which are understood as "cultures" (Bormann 1997: 287).

The dangers of this classical anthropological concept of culture have been discussed in newer theoretical approaches. Bormann points at the specific representations that underlie the classical concept of culture: culture was substantialised (appeared as an objectifiable matter), essentialised (appeared as a force essential to human beings that is able to shape reasoning and behaviour) and totalised (appeared as a whole that can be determined structurally and functionally, and in which all social phenomena can be inserted). In the sense of Gidden's "circulating of social knowledge" the effects of these representations on social reality are: Processes of ethnicisation, new nationalisms and racisms which are performed referring to cultural specificities (Bormann 1997: 286f.).

Today "culture" and all its terminological variations such as cultural difference, cultural translation, cultural conflict, intercultural communication, intercultural pedagogy, foreign cultures etc. are part of the everyday language in the immigration societies of the West (cf. Wicker 1996: 120). Also Western legal theory uses the concept of culture as it was developed in classical anthropological theory (cf. for example Kälin 2000: 21). The dangers of substantialisation, essentialisation and totalisation exist. Many have also warned about the over-estimation of the influence of culture on individual action and the exaggeration of cultural difference (for example Wicker 1996: 122). At the same time there is also the danger of thinking of culture as something static, which cannot be transformed (cf. for an alternative vision An-na'im 1994).

In the following, "culture" will be used in spite of all the provisos. I particularly agree on the observation that value systems, representations of the various roles in society and the significance of certain behaviour may vary from one group of people to the other. I also agree that it may be of great use to know where a person comes from so as to understand why he or she (re)acts in a certain way. However, I regard cultures as not being homogenous and am aware of the existence of subcultures and thus pluralism inside one cultural group.

Migration implies a process in which values and beliefs are questioned when in the contact with the "foreign". This is a process between the host society and the immigrants. It is more common however to focus on the situation of immigrants and their children than on the interaction and transformation of both sides. The construction of an identity between two cultures by immigrants of the second generation and problems of

[68] Tylor E.B. ([1871]1958) *Primitive Culture (1): The Origin of Culture*, New York, Harper & Row, 1.

"cultural conflicts" have been described in literature especially. These children of immigrants create their own type of culture that can't be understood when simply looking at the habits and values usually upheld in the home country of their parents.

In this sense, it is possible to use the notion of cultural difference in order to designate what is perceived as differences especially in forms of communication, life style, values, norms, representations, attitudes etc. which can be explained by a person's belonging to a certain group. I, however, wish to emphasise that culture is only one element determining an immigrant's difficulties and resources in his or her new surrounding. In order to understand the individual migrant's attitudes and actions structural elements such as a restrictive immigration and naturalisation policy or discrimination on the labour market and in the educational system mustn't be forgotten. Explanations on cultural difference are often all too ready at hand. The result can be the culturalisation of the individual or even the pathological (cf. Rude-Antoine 1997: 264), or the interpretation of the consequences of structural discrimination as individual failure.

Culture in Child Protection Practice

All the interviewees implicitly referred to a certain content of culture. What is included in culture and what not, and what significance culture has in the contact with foreigners, differs from one to the other.

One example of a very narrow definition of culture shall be mentioned at this place, it is a statement given by **Mr Kunz**:

You have to also be very aware that, if somebody comes to our country, then you can primarily expect also, that the people, who come here, in principle have to conform to our customs. You shouldn't interdict their culture, they should have the possibility to maintain it, the religion and everything, this is very clear to be me, but in everyday life primarily our customs apply.[69]

Mr Kunz not only wants to allow protection of the religious but probably also other manifestations as music, festivities, etc. The broad definition of classical anthropology, including social and legal norms, is outside such a respect for cultural difference for him. He is not ready to allow an exception from the application of norms such as the pupil's obligation to give the hand to her teacher. As will become clear in the following discussion of different concepts of coping with "cultural difference", none of the other interviewees has such a narrow understanding of what the notion of culture encompasses.

[69] Man muss sich aber auch bewusst sein, auch wenn jemand zu uns kommt, dann darf man primär auch erwarten, dass die Leute, welche zu uns kommen, grundsätzlich schon auch sich nach unseren Usanzen richten.

Cultural Differences in the Definition of Child Abuse and Neglect

Anthropological research under the direction of Jill Korbin, has focused on the differences in definition of child abuse and neglect in different parts of the world. Korbin departed from the insight that there is no universal standard for optimal child rearing or for child abuse and neglect (Korbin 1981: 3). She thus asserts that there is such a thing as cultural difference in the definition of optimal child rearing or of abusive and neglectful behaviours.

As examples for non-Western practices which appear as abusive or neglectful to the Westerner, but which are acceptable to the culture of origin, Korbin names: extremely hot baths, designed to inculcate culturally valued traits; punishments, such as severe beatings, to impress the child with the necessity of adherence to cultural rules; and harsh initiation rites that include genital operations, deprivation of food and sleep, and induced bleeding and vomiting. But also Non-Westerners are shocked by certain Western child-rearing practices: Isolating infants and small children in rooms or beds of their own at night; making them wait for readily available food until a schedule dictates that they can satisfy their hunger; or allowing them to cry without immediately attending to their needs or desires (Korbin 1983: 4f.).

Korbin does not restrict herself to the description of cultural variation. Her aim is also to find a position with regard to cultural values and practices that differ from "the own" Western ones, and to formulate cross-culturally valid definitions of child abuse and neglect (Korbin 1981: 3; 1991: 68). The idea is to find the middle-way between the extremes: exaggerated cultural sensitivity (what Korbin calls extreme cultural relativism), in which no judgement of human treatment of children is allowed, and the definition of the Western set of values as superior to any other normative system. This middle-way is also the aim of the debate concerning cultural relativism or cultural pluralism in child protection. I will return to this issue later on.

For the moment I would however like to retain the statement that there is no such thing as universal standards concerning optimal child rearing. This fact certainly is very evident when taking into account the examples given by Korbin. The experience of the child protection officials does however also show, that the question of child rearing just is a small part of a wider spectrum of perceived cultural differences.

Ihre Kultur soll man nicht verbieten, die sollen sie pflegen können, die Religion und alles, das ist für mich ganz klar, aber *im Alltag* gelten primär unsere Usanzen.

The State's Obligation to Protect and Its Limits

The State's Obligation to Protect

The human rights doctrine looks for legal criteria for the state's obligation to protect children and also asks for the limitation of intervention. In this framework, the discussion on minority rights in connection with child protection authorities can take place.

A recent study by the Swiss human rights scholar Walter Kälin (2000)[70] has also advanced the theory of child protection law although it does not place the protective measures of Art. 307ff. of the Civil Code at the centre of interest. Under the title of "Fundamental Rights and Cultural Conflict", Kälin develops criteria for the treatment of conflicts in the field of fundamental rights for cultural minorities.

Following Hannah Arendt's Sphere Theory, he distinguishes between the sphere of the state, the public sphere and the private sphere. Limitations on and criteria for the state's intervention into families is considered as a topic of the private sphere.

Kälin departs from the principle that the state has to exercise strict restraint when intervening in private matters. He then develops criteria which allow a limitation of fundamental rights such as parents' rights. The "limits of tolerance" is the slogan used for this theoretical enterprise (Kälin, 2000: 181). The theoretical foundation is based on the theory of the obligations to protect, developed among others by the European Court of Human Rights. Following the cases Osman[71] and A v. UK[72], states have in certain circumstances a positive obligation to protect individuals against violations of their right to life (Art. 2 of the Convention) or against inhuman treatment and punishment (Art. 3 of the Convention) by other individuals. This protection also demands under certain circumstances measures protecting children against parents. The obligation to protect is now also stated explicitly in the New Swiss Constitution of December 18, 1998. Article 11 says now in its first paragraph "Children and young people have the right to special protection of their integrity and to the encouragement of their development." Legal doctrine is still reluctant to admit the direct justiceability of the norm (Biaggini 2001: 25, 51.). The obligation to protect against severe harm as the European Court of Human Rights states it, is however binding as supranational law.

[70] Cf. for a review Cottier, Michelle, FamPra.ch 2001, 86-87.
[71] Case of Osman v. the United Kingdom, 28 October 1998. In this case a mother and her son alleged that the authorities could have saved the life of their husband and father, who was shot by the son's mentally ill former teacher.
[72] Case of A. v. the United Kingdom, 23 September 1998.

Prohibition of Assimilation Pressure

The obligation to protect finds one of its limits in the prohibition of assimilation of cultural minorities against their will (Art. 27 of the U.N. Covenant on Civil an Political Rights)[73]. This means that state authorities are not allowed to impose their ideas about what a "good life" is, on families who want to maintain their distance to the dominant culture. In my view, an example for this kind of forbidden assimilation would be the removal of gypsy children by local *Vormundschaftsbehörden* from the 1920ies until the 1970ies in Switzerland. The aim was not the protection of children in need, but the imposition of a sedentary life style which was regarded as superior to the migrant life style (Leimgruber, Meier and Sablonier, 1998: 27). This dark chapter in Swiss history and its implication for today's child protection practice shall be treated in detail below.

A Lesson From Recent History: The Prosecution of "Vagrants" with the Help of the Child Protection System

In 1972 a series of articles in the magazine "*Der Schweizerische Beobachter"* brought terrifying stories of the victims of a "welfare organisation" called "*Hilfswerk für die Kinder der Landstrasse"* (welfare organisation for the children of the road) that had been functioning already since 1926 in the whole country, to the public's attention. The following public debate finally led to the dissolution of the "*Hilfswerk"* in 1973. After a difficult political process, a historical study on the basis of the files of the "*Hilfswerk"*, was finally commissioned by the Swiss government and published in 1998 (Leimgruber, Meier and Sablonier, 1998). It shows that during the period between 1926 and 1973 about 600 children had been affected by the activities of the "*Hilfswerk"*.

The "*Hilfswerk"* was private, but part of the children's welfare organisation "*Pro Juventute*", which until today is strongly supported by the Swiss public authorities, both financially and morally/politically. The targets of the organisation were members of the people of the "*Jenische"*, a people of "gypsies". Their children were taken away systematically with the justification that it was necessary for the "welfare of the child". Entire families were torn apart and the children were in most cases moved around many times, from foster parents to institutions and sometimes to prisons. Not surprisingly many of the victims have been submitted to abuse by the people who were supposed to take care of them better than their parents. Often the parents had to face legal incapacitation if they tried to fight for their rights to child custody (Leimgruber, Meier and Sablonier, 1998: 34ff.).

[73] cf. Nowak, Manfred (1993), *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, Kehl/Strasbourg /Arlington, N.P. Engel, Art. 27, N 42.

The authors of the historical study have also brought more light on the question of the motives behind the removal of so many children from their families. In this question the founder and primarily responsible for the activities of the organisation, Dr. Alfred Siegfried played a primordial role. The documents show that his aim was not to give the children the opportunity of a better life. The intention which was repeatedly stated was to make the children of "vagrants" sedentary, through appropriate measures of placement and education, in order to overcome the evil of "vagrancy". The best interests of the child were not at the centre, instead the fact that an inconvenient way of life ought to be destroyed (Leimgruber, Meier and Sablonier, 1998: 27). The discriminatory character of the whole action is illustrated by the fact that the organisation tried systematically to register all the members of the nomadic community. Then, systematically the *"Hilfswerk"* arranged for the removal of the children from their parents. The "vagrancy" practised by the parents and the ensuing "dangers for the morality" were looked at as sufficient justification for child protection measures. The consequences of these actions have not only been the destruction of many lives through the traumatising separations. The report also comes to the conclusion that the culture of the "*Jenische"* in Switzerland has been successfully stigmatised and moreover to a great extent destroyed. Not only the families affected directly be the removal of children were forced into sedentary life, many also chose to become sedentary in order to escape the intervention of the *"Hilfswerk"* and the authorities.

Obviously the "*Hilfswerk*" could not work without the authorities' co-operation. Only the *Vormundschaftsbehörden* of the home municipality of the targeted family was competent for the legal removal of the children. As already explained previously, the people entrusted with child protection, especially in smaller municipalities, are lay persons and didn't and don't have particular professional qualifications for the handling of these cases. This fact has made the child protection authorities particularly vulnerable to manipulation by the *"Hilfswerk für die Kinder der Landstrasse"*.

The lesson to be learned from this dark chapter of Swiss history is that particular caution has to be taken when families belonging to a group that is deviating from the bourgeois norm are subject to child protection measures. As Leimgruber, Meier and Sablonier (1998: 181) put it: in these cases the private and public organisations' lack of knowledge of principles of the rule of law ("*Rechtsstaat*") seem to be particularly pronounced. It could be added that the atrocities which were allowed to happen until only thirty years ago suggest that the danger of bias in child protection decisions against culturally "different" lifestyles of parents still exists. The prevention of assimilationist and discriminatory practices demands particularly strong measures of control in such cases.

Feminist Criticism of Intervention in the Name of Child Protection

Criticism of the state's intervention on behalf of children has not only been formulated in view of the idea of anti-assimilation of immigrants, but also by feminist theorists[74] .

Feminism, with its claim that the private became the political, has on the one hand claimed the state's duty to intervene in the private realm for the protection of women but also children against abusive or violent husbands and fathers (cf. Diduck and Kaganas 1999: 283). On the other hand, feminist writing has also criticised the way the state in child protection practice has forced a certain ideology of motherhood upon women. Both elements of feminist theory, the claim to state protection against "private" patriarchal oppression, and the denouncing of the state oppressing women, are of interest in the discussion on child protection and immigrants.

The first element, protection against private oppression, is particularly important in the discussion on minorities rights. The protection against forced assimilation is problematic there, where culture is invoked to maintain oppressive relationships inside families. This is why feminist authors have criticised a minority rights policy which restrains intervention in view of minority rights and thus omitting the protection of women against oppressive practices inside the community and thus strengthen internal power relations (cf. Kälin 2000: 50f.). Kälin consequently suggests that the state ought to intervene in order to prevent severe injuries of physical and mental health by oppressive internal practices also where this means the restriction of minority rights, or more precisely the rights of the dominant members of a minority group (Kälin 2000: 186). This result is similar to Renteln's criteria for intervention derived from cultural relativism ("irreparable harm or irreversible changes", cf. below).

Feminist authors have also pointed at how the child protection system is imposing a particular, dominant ideology of motherhood on women. According to Kline (1995:119ff.) there are several core expectations that constitute the dominant ideology of motherhood. First motherhood is understood as "the natural, desired and ultimate goal of all 'normal' women." Second it is expected that "the individual mother should have total responsibility for her own children at all times" ("primary care requirement"). Third, a mother is expected to "operate within the context of the ideologically dominant family, one that is heterosexual and nuclear in form, patriarchal in content and based on assumptions of privatised female dependence and domesticity". On of the ways this ideology is imposed is through the control by child protection law of women who are not complying to the ideal. A good example is Art. 309 of the Swiss Civil Code (cf. above part one, chapter II): In case of a birth out of wedlock, a guardian is given to the child in every case. The task of this

[74] For an overview of different feminist approaches to children's rights cf. Olsen (1992).

person is not only to make sure that paternity is established but also to assist the mother in the way necessary. An assumption of a danger to the child's best interests is implied when being born to an unmarried mother.

The dominant ideology of motherhood in a Western country being oriented towards the image of the white middle-class woman, it can serve to devaluate child rearing practices of minority women and construct an individual responsibility where in fact racism and poverty are decisive factors for a child's bad situation. Kline (1995) studied Canadian child welfare cases concerning First Nation mothers and discovered that for example children were removed only for the reason that First Nation women did not comply with the expectation of the "proper home environment", i.e. when they were leading "nomadic" or "transient" lives or when there home was not clean and tidy (Kline 1995: 126ff.). Another example concerns the expectation of the mother being the primary caretaker. In many cases the help from extended family members given to the First Nation woman was not recognised in the courts' decisions and the focus was only on the mother's individual abilities.

A feminist analysis of the above described practice of removing children from Roma and Sinti families in Switzerland would undoubtedly also reveal the use of a similar ideology of motherhood.

Anti-Discrimination and Equal Treatment

Immigrants' Strategies: Denouncing Racism and Inequality

In literature the use of culture by parents as a defence against reproaches of child abuse and neglect has been reported. One (unpublished) case mentioned by Renteln (1994: 39) is of interest. It concerns a Swiss father who was judged before a juvenile court in Quebec. His allegation was that in Switzerland the beating of children with a fishing rod was common. His cultural explanation was not admitted by the court. Anthropologists working as experts especially in penal law recommend keeping in mind, that "culture" may become an immigrant's strategic resource against the legal system, and that the expert may be used as an instrumental for this purpose (Giordano 1999: 41).

As Kälin (2000: 24) has convincingly argued: To the question whether a cultural conflict is the content of a legal controversy, decisive is if one of the parties declares it as a matter of culture. This would mean that the cultural defence would have to be brought forward by the child protection clients.

The interviewees do not explicitly report the use of the cultural defence as an argument against allegations of child abuse and neglect. However an often heard argument seems to be the accusation of the authority's racism. This use of racism as a strategy in the defence against authority's intrusion into what is

perceived as private decisions, is possibly a reflection of the importance of the principle of equality becoming apparent in the statements of the authorities.

Treating everyone the same?

When asked directly if a special approach was used in child protection proceedings implicating foreign nationals, the interviewees answered very quickly and without hesitation: No, we treat them exactly the same. The principle of equality is the standard applied to cases implicating immigrants.

This "treating everyone the same" has been criticised by Channer and Parton (1990: 109) in reference to the English child protection system. According to them, the over-representation of black children in care can be associated with "an approach characterized as liberal, assimilationist and colour blind". By using the principle of equal treatment, the same standard of the "British way of life" is used in assessing black families. This of course has the result of treating black families differently, because they won't comply with the "objective" dominant norm. Positive, but different elements in black family life are not taken into account. Consequently, anti-racist social work has been concerned with the development of a child protection practice avoiding such devaluating stereotypes (cf. Singh 1999).

The observation of the importance of the principle of equal treatment in the practice of child protection was also made by Edvige Rude-Antoine (1997: 162) regarding French judges. Rude-Antoine distinguishes this equal treatment approach from an attitude that adapts the mode of intervention to the culture of the families concerned or at least the judge's representations of this culture.

The statements made by my interviewees however point at the complexity of the question of equal treatment.

First of all, the principle of equal treatment seems to be a fundamental principle by which the authorities feel themselves bound. The spontaneousness of their answers corresponds to the idea they have of a good practice. When having a close look at the explanations given by the interviewees, the equality of treatment is not simply understood as treating everybody exactly the same.

Ms Huber's idea of equal treatment for example is mainly linked to the question of which basic norms and standards parents have to comply with. In a long statement about general questions of policies for the integration of foreigners she says:

What I can not agree with, is that we twist our law in order to make it fit for them. When they say, though I live here, the law like we have it at home applies to me. This already went as far as blood

feud. And that somebody says, yes it is okay that you have a law here, but to me our rules we have at home apply. This cannot work.[75]

Ms Huber is very clear in her intention not to make any concessions in favour of standards deviating from the ones she upholds. In a similar way, the situation in which she is most clear about this attitude is in gender issues. **Ms Huber** and **Ms Fischer** are both very clear in their intentions to apply their own norms concerning girls and women. This point will have to be studied more profoundly.

This insistence on the equal application of Swiss law to foreigners is however confined to substantive law. Where procedure is concerned, some of the interviewed members of authorities are completely ready to give foreigners special treatment.

Ms Huber again puts it like this:

And we try also primarily, as a basic principle, to treat all in the very same way, this means it is all the same to us if they are Swiss, Turkish or Spanish, they all are entitled to the same and they are all assisted in the same way, with the same means. And if it doesn't work, we look at what we must do further on. With these restrictions, I talked about before, or this extension, that an interpreter is added, or a man is added. We do the same thing also with the Swiss, when we have the impression, this is a person who doesn't want to speak with women, then we send men, you see. This means simply client-related, person-related[76].

Some of the officials interviewed show a readiness to adapt to the special needs of foreign "clients" by taking special procedural measures. However there seems to be a unanimous attitude that Swiss standards concerning child rearing should apply to everybody.

The ideal of equal treatment can thus bring about the disrespect of differences in the authorities practice. Procedural adaptations are however more easily adopted. I will return to this interesting point below.

[75] Was ich nicht akzeptieren kann, ist dass wir unser Gesetz so zurechtbiegen, dass es für die stimmt. Also wenn die sagen, ich wohne zwar da, aber für mich gilt das Gesetz wie wir das daheim haben. Also das kann, ist schon gegangen bis zur Blutrache. Und dass jemand sagt, ja das ist schon gut, dass ihr hier ein Gesetz habt, aber für mich gelten unsere Regeln, wie wir sie bei uns zu Hause haben. Das kann nicht funktionieren.

[76] Und wir versuchen auch primär einmal einfach alle genau gleich zu behandeln, also uns ist es gleich ob Schweizer, Türke, Spanier, da haben alle den gleichen Anspruch oder es werden alle gleich betreut, mit den gleichen Mitteln. Und wenn es nicht geht, dann schauen wir weiter, was wir machen müssten. Mit dann diesen Einschränkungen, die ich vorher gesagt habe, oder eben dieser Erweiterung, dass ein Dolmetscher dazu kommt, oder dass man einen Mann dazu nimmt, oder. Das machen wir bei Schweizern auch, wenn wir das Gefühl haben, das ist jetzt eine Person, die nicht will nicht mit Frauen reden, dass wir dann einmal Männer schicken, oder. Also einfach klientenbezogen. Personenbezogen.

Common sense as tool for assessment and the ideal of equal treatment

The ideal of equality of treatment does not impede **Ms Meier** from giving a critical self reflection about a possible bias in her own practice:

Maybe it is true that one has more understanding if, when I, this means I, at the moment I think, this is a Swiss, she is kindergarten teacher, she had a profession and he is a gypsy, you see. [77]

Ms Meier admits that there may be a bias in favour of a Swiss mother, when the father is a foreigner. The mitigation follows instantly, however, it does not seem to be given wholeheartedly:

But this does really not mean he isn't even, **instinctively** maybe the better pedagogue or father, than the trained kindergarten teacher, who maybe ,who maybe doesn't give this warmness to the children, like the father. This, this can also be possible. But, but, it isn't like this...[78]

Interestingly, in the first passage, **Ms Meier** even intensifies the contrast between the images of the bad father and the good mother, using the description of a "gypsy", although the man in question is of North African origin and has nothing to do with the peoples of Roma or Sinti. In order to describe this person who seems to be a sort of Bohemian, i.e. has a non-conforming life style, she already uses in a preceding passage of the interview the stereotype of a wild and lazy gypsy.

Ms Meier appears throughout the interview to be a very open person, talking about her experiences in a way that could be termed unprofessional in a different context but is of course of great value to my study. She puts her finger on a problem many child protection officials probably face: the conflict between the ideal of equal treatment and the own prejudices.

Cultural Relativism, Cultural Pluralism and Universality of Human Rights

Introduction

In the intercultural encounter between child protection authorities and immigrant families, tensions between differing attitudes, representations or values often become apparent. An example from the interview with **Ms Huber** shall serve as an illustration:

[77] Vielleicht hat man schon ein bisschen mehr Verständnis, wenn ich ,also ich, oder im Moment denke ich jetzt, das ist eine Schweizerin, sie ist Kindergärtnerin, sie hatte einen Beruf und er ist ein Zigeuner, oder.

The foreign families simply have a different cultural background, there is a different influence on the whole family if you make a placement, or it, or give some assistance, or this interference is not well seen... But that the father tells me, yes, I am the father, and I am allowed to beat, I mean, I can't accept this, no matter where, this is not linked to culture for me. And that they should have the possibilities, their, I mean that they have the premises for their cultural events, this seems right to me. And good. But you can't, just because you have difficulties with the law here, say, we want our own law.[79]

This very rich statement addresses several issues: The cultural signification of state intervention into families and its effects on the family system.; the question of the cultural defence against the application of norms such as the prohibition of physical punishment of children; and finally culture in a much narrower sense than the definition by Tylor, reduced to the celebration of cultural events in the sense of mere folklore.

With this statement, **Ms Huber** exposes a certain contradiction: On the one hand she is ready to accept cultural differences. But as soon as they challenge –in her view- non-negotiable values such as the prohibition of beating of children, she denies the importance of culture in this issue at all. She seems to lack criteria that permit the respect for culture and at the same time allow the non-negotiable norms of the value system she embraces to be maintained. Are such criteria imaginable?

In human rights literature, the contributions on conflicting standards concerning child rearing practices often use cultural relativism and cultural pluralism to challenge the dominant idea of the universal validity of human rights and especially children's rights.

Cultural Relativism and Cultural Pluralism

The differences in the definition of optimal child rearing described by Korbin (cf. above) is a major difficulty for the international implementation of children's rights. The UN-Convention on the Rights of the Child (CRC) states for example in Art. 3 that in all decisions concerning children "the best interests of the child shall be a primary consideration". The definition of "the best interests of the child" is an open concept that needs to be clarified. Differences in the contents attributed to the best interests principle vary both throughout history

[78] Aber das heisst wirklich nicht, dass er nicht sogar, vom Bauch her viel der bessere Pädagoge ist, oder Vater ist, als die gelernte Kindergärtnerin die vielleicht, die vielleicht diese Wärme den Kindern so nicht gibt, wie der Vater. Oder das, das kann ja auch sein. Aber, aber, es ist nicht so...

[79] Bei den ausländischen Familien ist einfach der kulturelle Hintergrund ein anderer, es hat einen anderen Einfluss auf die ganze Familie wenn man eine Platzierung macht oder es, oder irgendwelche Beistandschaften, oder diese Einmischung dort wird weniger goutiert. ....Aber dass ein Vater mir sagt, ja, ich bin der Vater und ich darf schlagen, ich finde, das akzeptiere ich nicht, egal wo, das ist für mich auch nicht mit Kultur verbunden. Und dass sie sollen die Möglichkeiten haben, ihre, ja eben dass sie Räumlichkeiten haben für ihre kulturellen Anlässe, das finde ich richtig. Und gut. Aber man kann nicht, einfach weil man Mühe hat mit dem Gesetz hier, sagen ,wir wollen unser eigenes Gesetz.

and between cultures. Human rights theories underlining the universal validity of human rights principles do not resolve the problem that a specific content has to be given to the principle when they simply assume that there is general consensus on the principle itself (cf. Alston 1994). As we have seen, the same is true for the definition of "child abuse and neglect" (Art. 9 CRC).

Cultural relativism in contrast is a theoretical stance which wants to put Western ideals of universal human rights into perspective, introducing the concept of enculturation. Unlimited universalism is in this view considered as negating differences and thus not adequate.

A scholar who has done this in a very profound and careful way is Alison Dundes Renteln (1990, 1994). What makes Renteln's work especially interesting, is the fact that she has applied her approach to cultural practices harming children (in our Western view) and child protection. In Renteln's definition cultural relativism in the sense of ethical relativism is a stance where the own ethical judgements are seen as "relative" in the sense that the power of enculturation is admitted. A relativist will admit that his or her own ethical standards are not universal but that they are created by a process called enculturation. Enculturation is the idea that people unconsciously acquire the categories and standards of their culture (Renteln 1988: 62). Once this is admitted, cultural relativists are still free to be ethnocentric. They can criticise actions or norms that are perceived as violating their own ethical norms. But relativists will acknowledge that the criticism is based on their own ethnocentric standards and realise that the condemnation may be a form of cultural imperialism (Renteln 1998: 64). Renteln then distinguishes three types of possible "moral challenges": "First, where the act in question is contrary to the norms of the society in which it occurs, it can be criticised. Second, where the act not only violates the internal standard of the society but a universal standard as well, it can be questioned." Renteln admits the existence of universals that would have to be detected by intercultural research.[80] "Third, where the act is in accordance with the society's internal standard, but violates the critic's own standard (an external one), criticism of an ethnocentric sort is possible." With this third point, Renteln obviously addresses the situation of colonialism and post-colonial relations between Western democracies criticising violations of human rights in countries of the "third world".

Renteln distinguishes between external and internal standards. But is it that easy to determine which standards are valid in a society? Is there always only one society in one territory? Probably it would be appropriate to assert her third situation of ethnocentric criticism also in the case of the dominant population group's criticism of immigrant's standards. The co-existence of several societies in one territory would be admitted. Criticism of an act which violates Western standards but not the immigrant group's standards would

[80] For an example cf. Renteln 1990.

thus appear to be ethnocentric. Renteln's application of the relativist stance to the question of cultural practices harming children in the situation of immigrant minorities in Western countries, suggests that this interpretation is correct.

Renteln analyses the situation of criminal law cases where parents belonging to a minority are judged for harming their children by conforming to their own cultural imperatives. In her analysis, she clearly distinguishes the colonial situation "when outsiders invade another society and then try to outlaw many aspects of the indigenous way of life" from the minority situation, "where a group migrates and wants to preserve its traditions despite the fact that they violate the law of the new country" (Renteln 1994: 53ff.). For the first situation, she agrees with Korbin, who does not want to criticise customs in foreign jurisdictions as long as there is no domestic dissent. For the second, the immigration situation, she however wants to take into account the special situation of the immigrant children who find themselves between two systems.

Renteln's central thought is that there must be respect for the child's own choice in all that concerns her cultural identity (Renteln 1994: 54). Renteln implicitly admits that an immigrant child has to decide between two cultures. One of the cultures, the culture of her parents asks for instance for a certain physical change. The other culture, the one of the host country, regards the change as a mutilation. Renteln now wants to preserve this situation of choice until the age where the child has the capability to consent. This is why irreversible changes such as facial scarification (a practice described for Yoruba in Nigeria)[81] or female genital surgeries should be prevented in her view. In cases where no irreparable harm is caused, such as some practices of folk medicine, intervention would not be necessary (Renteln 1994: 57).

An approach explicitly opposed to cultural relativism (but also to cultural universalism) is exposed by Michael Freeman (1998). He uses the term "cultural pluralism" when he describes the fact that there may be conflicts of values and in particular an incompatibility of values. As an example for incompatibility of values he uses the belief in equality of sexes opposed to the belief that men are superior. The answer of the pluralist to this incompatibility of values is the search for a ranking of the values in question (Freeman 1998: 295). Like many authors, Freeman uses the example of female genital mutilation (FGM) in order to test his approach.[82] His result is that the value of physical integrity has to prevail over the many cultural arguments given for the practice (preservation of virginity, prevention of the clitoris growing to the size of a penis etc.). How he arrives at this result is to subject the practice to internal criticism, by deconstructing the arguments that are used to support it. It is not surprising that with his Western background, Freeman easily finds objective arguments to deconstruct beliefs around FGM, which appear to be irrational. He also mentions the fact, that the norm demanding FGM is

[81] Cf. the English case R. v. Adesanya (1974) discussed in Renteln 1994: 29.

"directed at a group at best devalued but more likely excluded" from the community imposing the norm (Freeman 1998: 303), and thus takes up feminist arguments.

Freeman's choice, to search for a ranking of values, is legitimate as it is necessary for an authority deciding on legal intervention for the protection of the child to clarify the own moral position. From my point of view, Freeman however ignores many questions. First he does not admit that it is perceived as a situation of post-colonial imposition, if a Western court applies the own ranking of values to an immigrant's child rearing methods. The advantage of the relativist approach as it is used by Renteln is to admit that the own moral decisions are ethnocentric and that external criticism of a society's values must be done carefully because of the history of colonialism.

Second Freeman, as well as Renteln, do not consider cultures to have the ability to transform. The legal system could have other aims than just simply to decide on moral standards. The legal system is one forum where the interaction between immigrants and autochthonous people takes place, where values can be mutually discussed and compared. Neither Freeman nor Renteln admit that there is also the possibility to transform Western standards of what good child rearing is in the face of standards upheld by immigrants. From my point of view, a culturally sensitive child protection practice should facilitate such a cultural transformation on both sides.

The theoretical discussion on cultural relativism and cultural pluralism leaves many additional questions open: If we allow a certain recognition of standards that differ from the standards our national law aspires to enforce, what are the standards we are comparing? Is the national law regarded as a homogeneous body of norms which can be deduced directly from the law books? Already the four members of child protection authorities portrayed presently may have four different standards in what concerns for example "alternative" living arrangements such as solo mothers or same-sex partnerships. This means that their practice will differ as well, and the homogeneity is nothing but an illusion. The standard deduced from the "law in the books" may differ from the standards enforced in the "law in action". Finally groups of people supposedly belonging to the dominant group of in our case Swiss people may also have a "culture" deviating from the one represented in the legal system. Cultural pluralism is also a reality inside the ethnic group of Europeans.

When we talk about the immigrants' standards, are we talking about their national law or the norms of their social group? If we take the example of child beating, this may be prohibited by the law of the country of origin, but an immigrant father will still assert that in his society, child beating is generally accepted. A stronger

[82] For a criticism cf. Green and Hilary 1998.

example is the one of female genital surgeries, which in many countries where it is generally practised, is forbidden by the law.[83]

The relationship between the law in books and the law in action, between the normative aspirations of a (dominant) society incorporated in the law (the "ought") and the reality of compliance with the law (the "is") are addressed. If the authorities searching for an adequate position in the intercultural encounter are aware of the relativity of their standards due to enculturation but also of the fact that reality cannot be read from the law books, the dialogue with immigrants will be made easier. The reflection on how the own standards are created and if they actually correspond to a generally accepted body of norms in the own society, is the pre-condition for a culturally sensitive child protection practice.

Cultural Relativism in Swiss Child Protection Practice?

What would the relativism approach as developed by Renteln mean for the situation described by **Ms Huber**, when a father asserts that his own culture allows him to beat his children? **Ms Huber** would have to find out whether the father she is referring to, is really acting according to his own cultural standards. If he is already violating his own internal standards, an intervention to enforce these standards is possible, if they correspond to Swiss standards. If the own internal standards are respected, in a second step she will have to find out if he is beating his children in such a severe way that the punishment is threatening the child's life or is inflicting irreparable harm. This standard is not as broad as a danger to the child's best interests used in Swiss child protection doctrine, as it is not the Swiss standard of good child rearing which will be applied. Intervention would be possible in fewer cases. This restriction of intervention is difficult to accept and would probably have no success if propagated in Swiss child protection. One correction, drawn from the recent developments in children's rights, is possible, the enhanced respect for children's own wishes.

Renteln's approach does not take into account the situation where children themselves ask for intervention by the authorities. Renteln makes clear why she favours state intervention on behalf of children (however with the mentioned limits): "There is a particular need to enforce the law when children's rights are implicated because children are vulnerable and unable to act as their own advocates" (Renteln 1994: 67). She thus assumes a view of the child as not able to protect herself against her/his parents, but also not able to make decisions. The child has to be protected until the day she/he is be capable of consent to a physical change such as genital surgeries (Renteln 1994: 35). But what if the child herself asks for intervention although neither

[83] cf. Dorkenoo, Efua (1994) *Cutting the rose: Female genital mutilation, The practice and its prevention*,

"irreparable harm" nor "irreversible changes" are impending? Renteln has based her analysis on cases where actual potentially life-threatening practices were at stake. The example of teenage girls wanting to leave their families is very common in Swiss child protection practice, this shows the limits of her approach. It will thus be necessary to add the criterion of a child's wishes to the criteria developed by Renteln (cf. below).

In spite of the limits of the criteria developed by Renteln which appear to be too strict and allow intervention in only really severe cases, and which do not take into account the child's own wishes, the relativism approach is valuable in that it puts into perspective the criteria developed in the Western child protection discussion under the title of the "child's best interests". Authorities have to reflect their own standards and norms and learn to recognise their own enculturation. The competing standards have to be made transparent. Then the relativism approach also brings an awareness of situations of imposition of the own cultural standards in a post-colonial manner and in this way is an approach sensitive to power imbalance. This quality will be shown especially in the discussion about cultural sensitivity in child protection practice (cf. below).

The admitting of the usefulness of the relativist approach in local child protection is in my view one element in attaining a child-responsive protective system. Immigrants' children are better protected if a culturally sensitive treatment of their parents is sought.

The Logic of Assimilation versus Cultural Pluralism in the Authorities' Practice

In Swiss local child protection practice, two types of logic seem to be competing against each other: On the one side there is the logic of assimilation which demands the acculturation of immigrants and their adoption of Swiss values and behaviours (cf. Kälin 2000: 226). On the other side the logic of cultural pluralism can be found, that allows the maintaining of certain immigrant cultural values and behaviour as equivalent to the own Swiss attitudes.

An example of a clear assimilationist attitude can be seen in the following passage from the interview with **Mr Kunz**:

What for example is still often our custom, is that in the first school years, when children enter the classroom, they have to give the teacher their hand. If then of course they say, no, this is a stranger, you are not allowed to give him your hand, then I must say, this is for me personally something I cannot feel the same way... I mean for us this is a question of decency, that you give someone your hand and look him into the eyes and so on, there is nothing else to do with it, I would mean, if we went

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London, Minority Rights Publications.

to a culturally different region, we would have to open up a little bit, too. I do not say adopt, but open up, or make certain adaptations, it's like that.[84]

When asked if this kind of example has already happened in his child protection practice, he however answered in the negative.

In contrast to **Mr Kunz'** clear assimilationist attitude, **Ms Meier** appears to tolerate more cultural difference. The following statement can be understood as proof of cultural pluralism. The situation **Ms Meier** describes is part of a conflict over custody and visitation rights of a divorced bi-national couple. He is Swiss, she is from the Philippines:

Or in the case of the Philippine, that we tell the man... let him eat with his hands. And let him speak English with his mother. This is all the same... It's only essential that he is fine. This is **all the same**. And anyway, that's the way one eats there, isn't it. And he is going to learn it here as well, that is, that. But these are no manners ((with disguised voice)). Leave those manners to one side, your son will be eating with fork and knife one day. We try to tell them don't act so silly, you have married a foreign woman. Now you have to assume this part, too.[85]

Ms Meier demands the man to be tolerant towards his ex-wife's child-rearing methods and the behaviour she is teaching their common son. The image of coexistence of two cultural codes is evoked: on the one hand the code of good Swiss manners that means eating with a knife and fork, on the other hand Philippine manners. The codes are regarded as of equal validity. The attitude expressed by **Ms Meier** in this situation is one I would designate as cultural pluralism, not as far reaching as Freeman's approach, but an attitude admitting that different child rearing methods can coexist if they are not incompatible. A different question, not possible to answer on the basis of the interview materials, is what **Ms Meier's** position would be in the case of incompatible cultural standards.

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[84] Also was zum Beispiel bei uns häufig noch der Brauch ist, dass in einer unteren Schulklasse, wenn die Kinder in ein Schulzimmer hineinkommen, dass sie dem Lehrer die Hand geben. Wenn es dann natürlich heisst, nein das ist ein fremder Mann, dem darf man die Hand nicht geben, dann muss ich sagen, das ist jetzt für mich persönlich etwas das ich nicht ganz nachempfinden kann. ... Ich meine bei uns ist es *eine Frage des Anstandes*, dass man jemandem die Hand gibt und in die Augen schauen kann und so weiter, es hat nichts anderes damit zu tun, ich meinte, dass, wenn wir in einen anderen Kulturkreis gehen, werden wir uns auch dem ein bisschen öffnen müssen. Ich sage nicht, das übernehmen, aber dem öffnen, oder gewisse Anpassungen vornehmen, das ist so.

[85] Oder im Fall der Philippinin, dass wir dem Mann sagen... lassen Sie ihn mit den Händen essen. Und lassen Sie ihn doch jetzt Englisch sprechen mit der Mutter. Das ist doch egal. ...Die Hauptsache ist, es ist ihm wohl. Das ist doch **gleichgültig**. Und überhaupt, dort isst man halt so, oder. Und das lernt er dann auch noch hier, das ist, das. Ja aber das seien keine Manieren ((Stimme verstellt)). ... Ja lassen Sie doch diese Manieren auf der Seite, ihr Sohn wird eines Tages normal mit Gabel und Messer auch essen. Also wir versuchen dann diesen auch zu sagen, tun Sie doch jetzt nicht so blöd, Sie haben jetzt eine Ausländerin geheiratet. Jetzt müssen Sie halt die, diesen Teil auch übernehmen.

The Raising of the Girl Child and the Respect of the Child's Wishes

One important issue arising from the interviews is the question of the raising of girls. Here important differences in the culturally determined definition of good child rearing (Korbin 1981: 3) become apparent.

Both **Ms Huber** and **Ms Fischer** give accounts of many cases of teenage girls desiring to leave their families because of the strict rules inflicted upon them by their fathers. The nationalities mentioned in this context are Turkish and Yugoslavian. **Ms Huber** mentions these situations already at the start of the interview, when asked the question "which kind of cases she considers to be most frequent in her practice", and states that these cases are "relatively frequent". The girls are about 14 years old, they want to leave their home, because they have a boyfriend, and their fathers won't tolerate this. Or the boyfriend belongs to the wrong ethnic group. Another important reason why the girls want to leave their parent's home is domestic violence. The girls ask the *Vormundschaftsbehörde* to be placed in a home. **Ms Huber** reports that in these cases, many times the girls are really placed in a home, according to their own and against their father's will. The placements often end after about half a year and the reason given by the girls is that they want to return home for the sake of their mothers. Another reason imagined by **Ms Huber** is the fact that the regime in a home isn't that liberal as fancied by the girls. According to **Ms Fischer**, such placements are easier to order, if violence has occurred.

The placement of girls is also envisaged as a protection against the repatriation of girls by fathers. **Ms Huber** explains that sometimes when fathers do not accept the authority's intervention, they menaced the authority with repatriation:

Then of course these, these menaces come, then I'll send her to Turkey, or in this case she has to go to Yugoslavia, you see, where **I** have got some problems. Or I ask, but how long is this child here in Switzerland. Well she was born here. Then I get very angry. The fact that you can take a child after twelve years, to grab her and take her to Turkey. Then I often get into the situation where I have to say, if you do this, I place her into a home, inconsiderately.[86]

In this situation, it is not the girl asking for protection, but the authority threatening to impose its view of the best interests of the child. This threat of imposition is somehow inconsistent with the logic of co-operation the authorities claim to adhere to (cf. below chapter IV). **Ms Huber** explains that she considers it as against the child's best interests to be taken back to the parent's home country, if she was born in Switzerland.

[86] dann kommt natürlich auch diese diese Drohungen, dann tu ich es in die Türkei, oder dann muss es zurück nach Jugoslawien, oder, wo **ich** dann Mühe habe. Oder wenn ich frage, ja wie lange ist denn dieses Kind hier in der Schweiz. Ja das ist da geboren. Und dann kommt, dann werde ich "gruusig hässig". Dass man dann nach zwölf Jahren ein solches Kind nehmen kann, packen und dann in die Türkei tun. Dann komme ich so oft in die Situation, wo ich sage, also wenn Sie das machen, dann platziere ich rücksichtslos.

The situation of forced repatriation by the father has already been treated in Swiss child protection literature. The case examined by Hegnauer (1997) in a short article in the *Zeitschrift für Vormundschaftswesen* is however, in contrast to the situation described by **Ms Huber,** a case where two girls ask the authority for help against their father's plans to send them home to Turkey. The children's will is clearly to stay in Switzerland. Hegnauer argues that there is a danger for the best interests of the child, inasmuch the impossibility of resistance against a father's decisions is a violation of the child's right to personal freedom. He however does not argue that it is in any case against the best interests of the child to be sent back to the home country. The child's wish appears to be a practicable criterion. As soon as parents disrespect the will of the child, legal intervention should be possible.

The criterion of the child's wishes should be added to the criteria of "irreparable harm or irreversible change" developed by Renteln. It should also be possible to use legal measures of intervention such as placement in a home in a way, that gives more agency to the child.

One interpretation of the expert opinion given by Hegnauer could be that today the Swiss child protection system, has up until now been based on the logic of child-savers and child protection criticised in modern children's rights literature (van Bueren 1998: 22), is making the move towards enhanced respect for the wishes of the child. Swiss children's rights literature actually underlines the new understanding of children as own legal subjects instead of mere objects of protection (Biaggini 2001: 25, 30). In Hegnauer's construction the criteria of the best interests of the child and the child's wishes are brought together as one: the disrespect of the children's wishes by the father is against the child's best interests (a more "objective" criterion), and at the same time a violation of the child's right to express its wishes and to be heard (a more "subjective" criterion).

But the fact that this case concerns an immigrant family appears somehow suspicious: Are these children given more agency by the authorities because they try to break out of a family of a different cultural background and because they have somehow changed sides? Is more attention given to the child's own wishes if the educational standards the parents try to enforce deviate from the authority's standards? It would be necessary to compare the cases implicating Swiss girls wanting to leave their families to these cases of protection against repatriation in order to find out a possible bias.

Other situations where a conflict of norms in relation to the raising of the girl child become apparent are concerning school: Parents mainly with a Muslim background refuse to let their daughters participate in swimming classes or school camps. In these cases, the school authority only have recourse to child protection authorities, if their own endeavours do not lead to the convincing of the parents. **Ms Fisher** says that in some

cases she gives orders to the parents with menace of a penance in case of non-respect. But she tries to convince the parents by showing them the consequences of their actions.

Interestingly, **Ms Fisher** is seemingly not aware of the fact, that Switzerland's highest court, the Federal Court, has decided that parents have the right to ask for an exemption for their daughter to participate in school activities such as swimming lessons for religious reasons (in this case prescribed by the Koran), if this does not restrict the equality of chances because basic faculties cannot be acquired by the child. [87] Although the decision has been highly contested in the media and in legal literature, as being too tolerant for cultural practices discriminating against girls and women (cf. Kälin 2000: 15ff.[88]), it is still a binding decision of superordinate law. However, the introduction of the right to be heard in all legal proceedings by the UN Convention on the Rights of the Child (Art. 12), has changed the legal situation in Switzerland. A decision such as the Federal Court's "swimming lessons-decision" would no longer be possible without taking into account the wishes of the child.

Toward Cultural Sensitivity in Child Protection

Two approaches, cultural relativism and cultural pluralism, have been examined and tested in this chapter. The limitations of both theoretical stances have led already to the mentioning of several additional elements leading to an ideal, culturally sensitive child protection practice.

Renteln's above described criterion for "irreparable harm or irreversible change" that should be prevented by state-intervention is a standard used to decide on intrusion into a family or not. Once the existence of a reason for intrusion is asserted, also if lower limits are used, as it is done today with the criterion of danger to the child's best interests, the question remains of what an adequate intervention for the prevention of harm might be.

Renteln addresses the fact that in most cases, the prevention of irreparable harm and physical changes is not possible, because the practices do not come to the attention of the authorities in time (Renteln 1994: 57). Once the child has been injured or operated on, the question of criminal prosecution remains. The question of the role of culture as a possible excuse in penal law will not be analysed here. What is of interest is which strategies can be found for preventive intervention on behalf of the child where the parents are immigrants.

[87] BGE 119 Ia 178.
[88] The critics are interestingly all men and do not embrace a feminist perspective.

The magic formula seems to be "cultural sensitivity". Renteln mentions that the state must be culturally sensitive. She however contrasts cultural sensitivity with the enforcement of children's rights (Renteln 1994: 67). It seems that she considers non-intervention as the only way of being culturally sensitive. Other authors however convincingly show that cultural sensitivity can also make the transformation of the non-acceptance of intrusion into a family into parental co-operation possible. A case history which is often referred to as a successful one (cf. Akers 1994: 29), is the one of an English social worker who convinced a family not to circumcise their daughters. An advantage in her discussion with the family seems to have been the fact that the social worker was herself Asian and could argue with her own cultural values without seeming to be imposing the dominant culture. This story makes clear that one of the main problems is not the conflict of values in itself, but the situation of the threat of imposition, in which the parents know exactly that their point of view can easily be disregarded because of the unequal distribution of power.

Cultural sensitivity would thus mean the acknowledgment of the fact of enculturation, to put the authority's own child rearing standards into perspective, in admitting that there may be cultural differences and admitting the imbalance of power. This openness can be communicated in the child protection procedure, the hearings and talks between authority, parents and children. The implementation of cultural sensitivity is consequently in the first place a question of procedural accommodation of immigrants' needs. This will be the topic of chapter IV.

Cultural sensitivity emphasises the possibility of the transformation of values if an appropriate procedural direction is taken. As Abdullahi An-na'im (1994) explained for the search of genuine international normative consensus on the definition of the principle of the best interests of the child, the transformation of values is possible. However An-na'im stipulates that this transformation has to take place through the process of cross-cultural dialogue[89]. This would mean for Swiss child protection that there has to be a certain readiness of the Swiss legislator and authorities to transform the own values. A first step would however be the disclosure of the normative decisions made by the authorities and the reflection on the origin of these decisions in enculturation. Both sides, parents and authority, must have the opportunity to formulate their standards and norms, in order to make a transformation of values on either side possible.

[89] A proposal of how this dialogue could take place can be found in de Sousa Santos, Boaventura, Toward a Multicultural Conception of Human Rights, *Zeitschrift für Rechtssoziologie*, 1997, 1-15. De Sousa Santos proposes a "diatopical hermeneutics" which could take place between the Western topos of human rights and for example the topos of dharma in Hindu culture.

IV. Procedural Adjustments to Immigrant Clients

Is There a Need for Procedural Adjustments?

The child protection proceedings before the local *Vormundschaftsbehörden* in the Swiss canton of Baselland were described in part one as not very formalised and mostly taking place orally. The parents and children are in most cases first invited by the social workers in order to establish the facts needed for a decision made by the authority itself. The social worker then makes a request for a certain type of intervention. The lay authority subsequently decides in absence of the considered family. Then the decision is communicated to the parent(s) and the child. In more complex and difficult cases the parent(s) and the child are also examined by psychiatrists who then give their expert opinion to the authority.

The proceedings are thus the place where communication between on the one side the authority and in legal terms its "auxiliaries" (the social workers and the child psychiatrists) and on the other side the parent(s) and the child takes place. In legal literature it is not common to question the actual possibility of understanding between authority and legal subject. The right to be heard is a fundamental right which is guaranteed in Art. 29 (2) of the New Swiss Constitution. The right to be heard includes the right to be informed about the ongoing procedure, to have access to records, to express one's own point of view, and to be present during the investigation. It also means it is the authority's duty to take into account the point of view expressed by the legal subject and to integrate it into the decision-making process. The right to a translation into and from the own mother tongue is part of the right to be heard (cf. Albertini 2000).

In legal literature, the understanding between authority and legal subject is implicitly asserted. The exchange of words seems to be sufficient. The possibility that there may be a dysfunction in the communication due to cultural misunderstandings, has not yet been considered. Anthropology has developed the concept of the (inter)cultural misunderstanding. A definition is given by Giordano (1992: 199)[90]: Intercultural misunderstandings emerge when two people of different cultural origin interpret the situation of contact and interaction in which they are implicated, in a different or even contradictory way and act accordingly. Or in different words: Misunderstandings are intercultural dissonances created by diverging "cultural grammars". At this place it is also important to remember that there is a danger of culturalising misunderstandings, in supposing that the cause of a misunderstanding is cultural difference instead of searching for a dysfunction in the

[90] For an application in the legal context cf. Menzel, Peter (1996) 'Ausländer vor Gericht, Missverständnisse in Gerichtsverhandlungen zwischen Ausländern und Experten (Richter, Anwälte, Gutachter), Eine ethnopsychologische Studie zu interkulturellen Kommunikation', in Roth, Klaus (Hrsg.) *Mit der Differenz leben, Europäische Ethnologie und Interkulturelle Kommunikation*, Münster et al., Waxmann, 165-179.

relationship between the interlocutors (cf. Abdallah-Pretceille 1997: 385), which in the case of child protection may be the lack of confidence in the authority because of bad experiences.

The following example taken from the interviews shows that cultural misunderstandings are part of the authorities' everyday experience:

Ms Fischer states that when explaining to the parents of a boy that their son was "terrorising" other children, a misunderstanding became apparent. While Fischer was using the expression in the figurative sense, the parents understood terror in the sense of "torture and hand grenades". Here the cultural signification and background of a single word was at stake, questioning the success of the communication between authority and parents.

The danger of cultural misunderstandings is one reason why procedural adjustments such as cultural translation, mediation and ethno-psychiatric expertise have been developed. A second reason is the fact that an imbalance of power exists in child protection proceedings which has already been mentioned before. Finally the clarification of both the authority's and the clients standards concerning child rearing and the role of state intervention can be facilitated.

Imposition by the Authority and the Myth of Co-operation

The interviewees all emphasise the importance of co-operation with the parents. According to their statements, effective child protection is nearly impossible without the parents agreeing to the measures and namely not obstructing them. This stands in contrast to the spirit of intervention underlying the law. Co-operation isn't mentioned as a principle of child protection, neither in the law[91], nor in legal literature. Law insists on the principles of complementarity, subsidiarity and proportionality of child protection measures (cf. Hegnauer 1999: 206). Complementarity means that parents' abilities must be complemented, not replaced. Child protection measures must be subsidiary to the assistance parents seek on a voluntary basis. Child protection measures should be proportionate, i.e. not more restrictive to parental responsibility than necessary for the protection of the child. All these principles aim at restricting state intervention into parenting. The basis is, however, the idea of intervention. The contradiction between the logic of intervention and the logic of co-operation is however only feigned. In analogy of what Mnookin and Kornhauser (1979) described concerning

[91] This in contrast to French child protection law. The French Civil Code states in its article 375-1: Il (le juge) doit toujours s'efforcer de recueillir l'adhésion de la famille à la mesure envisagée. (The judge must always make an effort to receive the family's agreement to the planned measure.) cf. Jouan 1999: 158.

divorce law in their famous essay, the authorities find themselves in a bargaining process "in the shadow of the law". Even if the members of the authorities, influenced by what could be termed "social work discourse"[92] used by the social services in their commune, insist on the paramount importance of co-operation with the parents, they are still in the possession of the better bargaining position. The law gives them the power to impose measures on families, which go as far as the removal of children from their parents.

Viewed from the perspective of immigrants, the strong position of the authorities also means that they impose the conditions of intercultural communication. The mode of intercultural dialogue and the openness for intercultural understanding depends on their decisions.

Cultural Translation, Cultural (Inter-)Mediation and Ethno-Psychiatric Expertise

A New Model of Adjustment to Immigrants' Needs

Recently, in the framework of immigration policy, the model of "cultural mediation" has also been tested in some Swiss cantons. "Cultural mediators" or "inter-mediators" are especially asked for in the further education of immigrant parents. The canton of Baselland has arranged contacts between "cultural mediators" and different types of authorities or schools. Two of my interviewees, **Ms Fischer** and **Ms Huber** have made use of the services of a "cultural mediator". Their experiences have been mainly positive.

Ms Huber has used a "cultural mediator" twice. She states that compared to a normal translator she appreciated that these mediators, in one case a social worker, was not only able to translate the language, but they also had additional professional skills. She explains one case, where a girl was placed in a home and the mediator had regular discussions with the family where he explained what was happening to the girl. He was on the other hand, able to give a prognosis concerning the expectable result of an intervention planned by the authority.

From this example, the function of the "cultural mediator" or translator can be more or less deduced: This person, who is of the same cultural or national background as the immigrants implicated in a legal proceeding, explains to both sides, i.e. the authority and the immigrants, the cultural significance of what the two sides say or do. The immigrants may not exactly understand the questions they are asked and, in a wider context,

[92] "Social work discourse" is qualified by system theorists King and Piper (1995: 49) as a discourse that "will inevitably include incompatible and even contradictory forms of knowledge. What we have is the sort of 'interference' which characterizes Teubner's hybrid or bastard discourse – an untidy bundle of concepts cobbled together for 'practical' purposes which, when subjected to critical scrutiny, disintegrate into their constituent parts."

how the law in the host country works. The authority or judge may not understand why the immigrants react in a certain way and cannot foresee what the reaction of the family system will be in case of intervention. The function is that of a double cultural translation (Kuyu 1997: 5; cf. also Rude-Antoine 1997: 253ff.).

A note on the term "mediation" is necessary. The model of mediation is now very widespread in Western family law practice. Especially in divorce proceedings, many legal systems have integrated the person of the mediator into legal practice. In Switzerland, the help of mediators is mainly sought by the divorcing couple for the elaboration of arrangements found out of court [93]. Mediation is defined in this context as "a process in which an impartial third part – a mediator – facilitates the resolution of a dispute by promoting voluntary agreement (or "self-determination") by the parties to the dispute"[94]. Cultural mediation can also have the function of alternative dispute resolution, when it is used in order to resolve conflicts due to intercultural encounters between private persons. This for example is the case in neighbourhood disputes, which are in the Swiss public opinion one of the important problems linked with immigration. Where "cultural mediators" are however used as cultural translators between authority and immigrants as it is the case in child protection, and where the mediator basically takes over the role of social worker and takes part in the intervention for the protection of the child, the usual definition of mediation appears to be inappropriate. This led some French authors to prefer the expression "cultural intermediary" or "cultural inter-mediator". In fact it is much more honest to use the term cultural inter-mediator and consider it as a person who is an intermediary between authority and immigrants. The mediator's role is to make a "double cultural translation", as it has been described above. The aim is not conflict resolution between the authority and the parents subject to intervention, but the search for intercultural understanding and adequate intervention. The authority stays the stronger side and has the power of intervention. In any case, the problem of the lack of a clear definition of cultural mediation or inter-mediation remains (cf. Rude-Antoine 1997: 260ff.) and will have to be clarified in Switzerland as everywhere.

Besides cultural (inter)mediation and translation, there is also the possibility of ethno-psychiatric expertise. In France this method has been used in a project in the *Tribunal des enfants* of Paris, a specialised children's court which handles both matters of child protection and juvenile penal law (cf. Kuyu 1997; Bruel 1995; Rude-Antoine 1997: 257). The ethno-psychiatric group which was a partner of the *Tribunal des enfants*, works in a very special way: the sessions are led by two psychiatrists, one from France, the other from the

[93] Cf. Liatowitsch, Peter (2000), 'Annexe Mediation', in Schwenzer Ingeborg, *Praxiskommentar Scheidungsrecht*, Basel/Geneva/Munich, Helbing & Lichtenhahn

[94] American Arbitration Association, Society of Professionals in Dispute Resolution and The American Bar Association, The Standards of Counduct for Mediators I (1996), quoted in Moore Loretta W. (1996) 'Lawyer Mediators: Meeting the Ethical Challenges', 30 *Family Law Quarterly* 1996, 679.

cultural area where the patients come from (Rude-Antoine 1997: 257). The group was experienced in ethno-psychiatric therapy which also created some tensions with the legal system, which will have to be described below.

For Switzerland, Wicker (1996) described his experience with a form of expertise which is different from the one described in French literature. Wicker himself, as an anthropologist, is mainly called in penal law cases, sometimes in cases of requests for political asylum to write "anthropogical expert opinions"[95]. He however often demands that a psychiatrist works together with him. He even sees the priority of psychiatric before anthropological expertise, as anthropology according to his experience is only able to complete the findings of a psychiatrist. Anthropological knowledge is needed where the immigrant's actions or statements can only be understood knowing the cultural background inducing them. Culture should only be of interest to the law if it has an importance for the actions of a legal subject who has for example committed an infraction to Swiss penal law (Wicker 1996: 122).

Procedural Measure or Intervention?

As has been shown above, the interviewed members of child protection authorities have used cultural mediators for the improvement of the communicative situation between authority and migrants. It is thus a mere procedural improvement. The experience in France at the *Tribunal des enfants* of Paris has however shown that cultural translation, cultural mediation and the mandating of ethno-psychiatric experts also questions the adequacy of protective orders available to the authorities. The French experiment has also made clear that the three methods, mediation, translation, ethno-psychiatric expertise, cannot be clearly distinguished and are often merged.

In Paris, initially it was planned to consider ethno-psychiatric expertise and cultural mediation just as a help for the investigations which had to be made by the judge before making decisions about protective measures[96]. But experience showed that cultural mediation and ethno-psychiatric expertise often became an intervention in itself, in that the analysis of the family system was transformed into psycho-therapeutic intervention that aimed at correcting the established dysfunctions (Bruel 1995: 86). This transformation can be read as a conflict of interests between the mandate given to the psychiatric experts by the court (investigation) and the methods of psychiatry itself (therapy). This is what has been described as the welfare/justice clash, or in the language of systems theory, as the co-existence of two different discourses, the legal discourse and the child

[95] In Switzerland, expertise given in child protection proceedings is not documented in the literature.

welfare discourse, which have two distinct constructions of reality and thus are not able to communicate (King and Piper 1995: 58). In the face of this discrepancy between mandate and actual activity of the mediator, a judge of the mentioned court makes the suggestion to order cultural mediation as a protective measure, rather than as a procedural provision. Cultural mediation would thus no longer be an aid to finding the adequate solution in a child protection proceeding, but be a solution available to the judge (Bruel 1995: 86).

Implementation in Swiss Child Protection Practice?

The experiences described in the French literature could be used for the improvement of the Swiss child protection system. Procedural considerateness for the needs of migrants who are not familiar with the language and the Swiss welfare system would in many cases be made possible if cultural (inter)mediators were called in. The use of (inter)mediators however depends today on the initiative of the authorities, there is no institutionalisation of this function. Especially the fact that the commune itself has to fund the (inter)mediators is an important obstacle and in many cases they are not called in for financial reasons. Again, the problems of the close linkage between the communal executive body and the child protection authority, as described in part one, become apparent[97]. These limitations could be overcome by funding the (inter)mediators on the cantonal or federal level. There could be a pool of (inter)mediators and the communes could call them in without being charged.

Considering the question of the legal nature of cultural (inter)mediation, translation or expertise (investigative measure or protective measure), the experience made in France should also be kept in mind. (Inter)mediation can be used both as a procedural aid in the investigation which has to establish the facts necessary to make a decision concerning adequate protective measures, and as a protective measure in itself. The legal basis for the second can be found in Art. 308 CC (guardian for the child, assisting the parent(s)). The appointment of an intercultural expert as guardian would however mean that more immigrants would have to be trained as psycho-social professionals eligible for the position of guardian.

The appointment of a cultural mediator or translator can be considered as part of the fundamental right to be heard. Additionally, the improvement of the procedural situation of immigrant parents and children is dependent on the introduction of a state funded legal representative both for parents and children as it has been promoted in part one above.

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[96] Legal base: Art. 256 Nouveau Code de Procédure Civile

[97] In France for example, the financial consequences are less of an obstacle, as the mediators can be funded as "investigative measures" under Art. 256 Nouveau Code de Procédure Civile.

Coping with Gender Role Expectations

Two of the interviewees, **Ms Fischer** and **Ms Huber** mention a particular type of procedural adjustment to their clients. Let's recall the statement given by Ms Huber:

...or a man is added. We do the same thing also with the Swiss, when we have the impression, this is a person who doesn't want to speak with women, then we send men, you see. This means simply client-related, person-related. [98]

At another time **Huber** notes that because of the fact that all the social workers of her commune are women, she herself as the president of the authority is a woman and sometimes the interpreter is female as well, a Turkish father can be confronted with a group of women in a meeting aimed at communicating the planned intervention for the child's protection. In the endeavour to accommodate the Turkish father's gender role expectations, she then invites a man who is member of the *Vormundschaftsbehörde* as well. She however quickly adds the following:

But it is not the case that the man would be talking. I am still the president and I disclose the decisions. Then, if it does not work, the man comes in. We do not flatten [the hierarchy], you know. [99]

Ms Fischer's strategy is different. The situation she describes is the following: Two families of asylum seekers living in the same house started a quarrel with each others. In order to make herself heard Ms Fischer took along a police officer. Now according to her statement her strategy was to give orders to the officer in order to show her official position. She ordered him to sit down or to get up: a little play was put up with the aim of impressing the family heads who signalised non-respect of a female official. She also told about the importance of underlining her official position by wearing very formal clothes.

The methods **Ms Fischer** and **Ms Huber** describe to cope with patriarchal immigrant and Swiss men are also an informal element of procedure. They decided to adapt their play to the father's. This is a very flexible way of coping with the problems, even if it's against their principles. Ms Fischer and Ms Huber however describe two different strategies in coping with the sometimes overt misogyny they encounter when having to impose child protection measures on fathers. The strategy chosen by Ms Fischer could be described as enforcing

[98] oder dass man einen Mann dazu nimmt, oder. Das machen wir bei Schweizern auch, wenn wir das Gefühl haben, das ist jetzt eine Person, die nicht will nicht mit Frauen reden, dass wir dann einmal Männer schicken, oder. Also einfach klientenbezogen. Personenbezogen.

[99] Aber es ist nicht so, dass dann dieser Mann redet. Ich bin immer noch die Präsidentin und ich eröffne eigentlich immer noch die Beschlüsse. Dann wann es nicht geht, dann hängt der Mann ein. Also wir verflachen es dann nicht.

the effect of her official position. Ms Huber on the other hand, the person who was very clear in her refusal to be content with the position of the vice-president of the authority (cf. above in part one), has in some cases chosen to give in to the patriarchal pressure exerted on her and to adapt to the men's gender role expectations. She describes her observations when she was sitting outside of the office having to cope with the situation of two men replacing her, because a father refused to talk to a woman:

The men basically couldn't come to terms with all the emotional things, you know, the things women are better at coping with, I find. It was pretty amusing then.[100]

The humiliation of not being respected as an official person is not visible from this statement as it is transcribed, however, from the way it was said.

Summary Part Two

The first chapter is concerned with the fact that the reality of immigration is not very visible in Swiss child protection law. The text of the Civil Code doesn't contain any reference to the respect for minority rights. In legal literature, immigrant-related topics have only been addressed selectively. This lack of systematic development and conceptualisation collides with the experience of members of local *Vormundschaftsbehörden*. The interviewees report a wide range of situations where immigrants' special situation, and difficulties in the intercultural encounter play a role. Moreover, statistics available for the city of Zurich suggest an over-representation of the group of non-European nationals in child protection proceedings. This may be explained by actual higher rates of child abuse and neglect due to the accumulation of risk factors in the migration situation. But also the fact that foreigners are economically disadvantaged and thus more likely to be public welfare clients, enhances the probability of child protection authorities' intervention.

The Swiss immigration policy and the structural disadvantage the foreign nationals face when living in Switzerland is depicted in the second chapter. Swiss immigration policy is portrayed as being strongly influenced by popular xenophobia on one hand and the interests of economy on the other hand. Popular xenophobia led to a ethnicisation of Swiss immigration regulations, making legal entry into the country more difficult for non-Westerners. The interests of the labour market are met by the implementation of the "theory of rotation", which means that foreign nationals are held in a precarious residential situation for a very long period of time and with the fear of expulsion when the labour market has no use for them. The same goal is also aimed

[100] Die Männer sind dann im Grunde nicht zu Schlag gekommen mit allem dem was so emotional war, oder, das was Frauen besser auffangen können finde ich. Das war dann auch amüsant.

at by the restrictive naturalisation law. The legally precarious situation created by Swiss immigration policy produces multiple insecurities at the financial level and the level of employment. Family life but also the possibility to leave a situation of domestic violence is made more difficult by the restrictive law concerning family reunion.

By "foreigners", the majority of Swiss people understand non-Westerners, i.e. mainly people from former Yugoslavia, Turkey, Africa or Asia. Thus, the debate on the integration of foreign nationals into the Swiss society only refers to half the foreign population, and this is the group for which Swiss people have the most negative feelings.

Both popular xenophobia and the structural situation of foreign nationals are mirrored in the interviewees' statements. Popular xenophobia in local politics is met by child protection officials using the strategy of confronting fellow councillors with the tragedy of the individual case or the strategy of emphasising positive examples. The fact that the commune also has to cope with the logistical problems caused by new inhabitants, leads to a certain intertwining of logistical problems and questions pertaining to the individual case. Finally a certain "feed-in" of sociological knowledge about structural disadvantages that foreigners face in Switzerland, can be observed in the account given by two interviewees.

The third chapter takes a step away from the structural level of the organisation of the Swiss child protection system and the situation of foreign nationals conditioned by immigration and integration policy, to the question of how the encounter between members of child protection authorities and clients of foreign nationality is handled. This encounter, from the viewpoint of the local authority, is an encounter with the ”Other”, which is not included in the local community, the ”Own”. The ”Other” is distinct from the ”Own” for the reason of what is perceived as cultural difference. Cultural differences have been studied by anthropology and can be used to designate differences from one group to the other especially in forms of communication, life style, values, norms or representations. I however stress that cultures are nor homogeneous, nor static systems. In discussions on the situation of immigrants in Western countries, the importance of cultural difference and cultural conflict has also often been overstated thus disregarding structural disadvantages linked to the status of an immigrant. The interviewees give different contents to culture, the narrowest being a definition of culture, comprising only of religion and arts. Important for our discussion on child protection practice is cross-cultural anthropological research which found that definitions of good child rearing and of child abuse and neglect vary strongly from one culture to the other.

Human rights doctrine looks at the child protection situation in terms of legal criteria for intervention in the ”private sphere” and the limitations of intervention posed by minority rights. From the viewpoint of

international human rights instruments, the state has in certain circumstances the obligation to protect the individual against harm inflicted by other individuals. This obligation finds its limitations in the prohibition of assimilation pressure against minorities stated in Art. 27 of the U.N. Covenant on Civil and Political Rights. The example of the activities of Swiss *Vormundschaftsbehörden* from the 1920's to the 1970's in removing gypsy children from their families in order to impose a sedentary life style upon them, would be an example of such a forbidden assimilation pressure. Criticism of the human rights doctrine is formulated by feminist scholars who question the state's reluctance to intervene in the oppression of women and children inside cultural minority groups in the name of the protection of cultural values. The state's child protection activities have also been found to impose a certain ideology of motherhood on women.

As a strategy to defend themselves against the authorities decisions, the interviewees' clients seem to argue with racism and unequal treatment. The authorities themselves emphasise their practice of equal treatment of foreign nationals compared to Swiss clients, what they view as a positive value. The fact that they don't take differences between immigrant and Swiss families into account, in the name of "treating everyone the same" can however be criticised. One interviewee's statements indicate that there is no readiness to allow for a deviation from Swiss standards and values, but that in procedure there is a certain inclination to make adjustments in favour of immigrant clients. Another interviewee reflects upon own prejudices hidden behind "common sense" and the bias that may result in the disadvantaging of foreign clients.

For the resolution of tensions between child protection authorities' standards concerning optimal child rearing, and the standards upheld by immigrants, the theories of cultural relativism and cultural pluralism are discussed in the literature. Cultural relativism is a useful concept in that it puts moral judgements on child rearing practices in the view of enculturation into perspective. Child protection practice can become more culturally sensitive if authorities are aware of the fact, that the own moral judgements are ethnocentric, but also if they take into account that the own standards as mirrored in the "law in the books" do not always correspond to the "law in action". Finally child protection can also be viewed as a forum for the interaction between immigrants and autochthonous people that can lead to a transformation of values and norms on both sides.

The limitations to intervention in child protection developed by Renteln are based on the relativist approach. Her criterion is that intervention should only be possible for the prevention of "irreparable harm" and "irreversible changes to the child's body". This limitation allows intervention only in severe cases of child maltreatment. Another element should thus be added: the child's own wishes. Also where no harsh practices are at stake, the authority should be able to intervene if a child wishes so. The child's wishes as a criterion for intervention is in accordance with the principles of the U.N. Convention on the Rights of the Child. Its

usefulness is illustrated by the question of the placement in a home as a protective measure in the case of forced repatriation to the home country by the father, where intervention is then appropriate when the child wishes it.

The operationalisation of cultural sensitivity which I believe is a condition for a child-responsive child protection system, is first and foremost a question of procedural adjustment to immigrants' needs. Special measures are needed, in order to prevent intercultural misunderstandings, to diminish the imbalance of power between authority and families, and finally facilitate the clarification of the positions of either side in what concerns child rearing standards and the expectations towards state intervention. Methods of procedural adjustment described for example for the French child protection system are cultural translation, cultural inter-mediation and ethno-psychiatric exercise. Two of the interviewees have also had some experience with "cultural mediators", a function which can be described as cultural intermediation in the sense of a double translation. The introduction of a publicly funded pool of cultural inter-mediators available to communes without direct costs on the local level, could improve the communicative situation in child protection proceedings. At the same time, in addition to the procedural level, cultural inter-mediators could be appointed as guardians for the child and thus be part of the actual intervention.

Linked to procedure, the question of adaptation to gender role expectations of patriarchally oriented fathers is addressed in the last section. Two of the interviewed women report their strategies of letting themselves be replaced by male fellow councillors and of giving more weight to their official position in order to counter the attacks on their authority.

Final Remarks

The analysis of local child protection in Switzerland has shown that several obstacles impede the implementation of a practice that would meet the challenges of immigration in an appropriate way.

In the first place the extreme decentralisation of the child protection system in particular in the German speaking part of the country, and the conferring of the decision-making power to lay authorities, stands in the way of reflection on typical problems and deficiencies and the development of adequate concepts for the treatment of cases implicating immigrant families. The little time usually available to lay authorities and the overburdening by a wide range of communal policy issues means that it depends on the initiative of the individual councillor too much, when deciding whether professional knowledge and competencies should be sought for the treatment of child protection cases.

The inadequacy of substantial law with regard to procedural rights of both children and parents is another important reason why mistakes occur. The absence of lawyers from child protection proceedings means that the imbalance of power, which must be assumed as being even more important when foreign nationals are subject to the authorities intervention, cannot be counterbalanced by a third person taking the part of the weaker, which in relation to the authority can be both the parents and the children.

The conclusions drawn from international socio-legal thought and child protection literature, when discussing difficulties such as the incompatibility of values or unequal treatment, give a series of indications as to where the development could go in the future. An ideal practice can be described as aware of the danger of selectivity of child protection clients, as sensitive to discriminatory prejudice, to gender issues, to culture and at the same time to the structural situation of immigrants. It is marked by responsiveness to the child's voice and by openness to the transformation of values and standards.

The way to achieve this goal is to place high value on the procedural rights of both immigrant parents and their children. Both must have the right to a publicly funded legal representative and to the translation of both language and cultural signification by a cultural inter-mediator. Child protection measures must include new forms such as ethno-psychiatric therapy or intervention by cultural inter-mediators.

The organisation of authorities on a regional level as it is planned according to a reform project at the federal law level, would not only prevent today’s often too close link between the decisions on protective measures and the decisions on their funding. This regionalisation would also bring about the potential for genuine professionalisation of the authority members, which would include the reflection on the own position towards the "Other", on gender issues and on the own role as a representative of the state's power to intervene in the "private sphere".

In the context of ethnicised immigration policy and long-term residential insecurity resulting from the law, the promotion of a legal system that is responsive to immigrants' needs is maybe an illusion. However, in the light of the increasing awareness of children’s rights in legal practices and the movements already underway, the time is right to begin questioning the way child protection has met the challenges of immigration up till now, and to question it fundamentally.

Table of Abbreviations

ANAG	Bundesgesetz vom 26. März 1931 über Aufenthalt und Niederlassung der Ausländer (ANAG), SR 142.20 (Federal Law of Abode and Settlement of Foreigners http://www.admin.ch/ch/d/sr/c142_20.html)
Art.	Article
AS	Amtliche Sammlung des Bundesrechts (Official Collection of Federal Law, chronologically)
BBl	Bundesblatt der Schweizerischen Eidgenossenschaft (Swiss federal journal; http://www.admin.ch/ch/d/ff/index.html)
BGE	Entscheidungen des Schweizerischen Bundesgerichts (Decisions of the Swiss Federal Supreme Court; http://www.bger.ch)
CC	Swiss Civil Code of 10 December 1907, SR 210 (http://www.admin.ch/ch/d/sr/21.html?210)
EU	European Union
EFTA	European Free Trade Association
PC	Swiss Penal Code of 21 December 1937, SR 311.0 (http://www.admin.ch/ch/d/sr/c311_0.html)
SGS	Systematische Gesetzessammlung (Systematic Collection of the Law of the Canton of Baselland, http://www.baselland.ch/index.htm)
SR	Systematische Sammlung des Bundesrechts (Systematic Collection of Federal Law; http://www.admin.ch/ch/d/sr/sr.html)

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Annexe: Interview Guidelines

First Part: General Information about the Interviewee:

- gender
- profession
- organisation of the authority
- interviewee's position
- structural link to the welfare authority

Second Part: General Questions Concerning Child Protection Practice

1. I am interested in your work in the field of child protection. Could you describe how such cases are usually treated and which situations are more commonly encountered?

2. Which are the most ordered child protection measures?

3. How is a child protection case opened, how do you learn about a situation where you probably have to intervene?

4. Which are the persons and services/authorities which you usually are or can be in contact with in a child protection case?

5. Which persons are chosen for the position of guardian for the child?

6. Which are the most useful materials (handbooks, court decisions, other publications) when preparing your decisions?

7. Does it make a difference for you, if you have to decide cases concerning foreign nationals, compared to Swiss clients?

8. Do you have particular ways of proceeding in these cases?

Third Part: institutional support, further training, perspectives

9. Do you receive institutional support from your supervisory authorities and from the canton?

10. Are you content with the further training offered to you, do you use the offered opportunities?

11. Do you think child protection and guardianship law should be amended?

12. Do you think the child protection system or the distribution of tasks between the authorities should be changed?

13. Do you see need for reform in other policy areas?