

League for Childrens' Rights (Bündnis RECHTE für KINDER e.V.)

Individual UPR Submission

Germany

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Submitter

Bündnis RECHTE für KINDER e.V.

In den Teilern 25a

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Germany

Report supported by

Annelise Oeschger, President of the INGO Conference of the Council of Europe

Main Activities:

Founded in 2005, the League for Childrens' Rights defends the inalienable rights of the child in general, but also in individual cases where these rights have been violated. In addition therapeutical assistance is offered to victims of such violations by means of stabilizing activities.

1. Executive Summary

Although the Federal Republic of Germany has been sentenced more than ten times by the European Court of Humans Rights in matters of family right, violations of children's and parents' Human Rights are still frequent in Germany. This is due to the fact that German family law is not fully in compliance with international conventions and to the legal construction of an authority called "Jugendamt"¹ which is not subject to any efficient supervision. The German legislator (Bundestag) has confirmed that there is no political will to improve this situation. Recently, it has even worsened it by a new legal act.

This report outlines the violations of Human Rights, details the legal basis as defined by International conventions and German National Law and points out remedial actions for this situation.

2. Violated Human Rights and International Agreements

United Nations – Universal Declaration of Human Rights:

Art. 12, 16 (3), additionally Art. 3, 5, 7, 10 and 25 (2);

UNICEF – Convention on the Rights of the Child:

Art. 16, Art. 3 (2) and (3), 5, 6, 8 (1), 9, 12, 18, 19, 20 (1), 23, 25, 27 (3), 29 (1c), 35, 37 and 39

United Nations – Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Art. 2 and 16, additionally Art. 4, 5, 14 and 15;

Charter of Fundamental Rights of the European Union

Art. 7, 20, and 24, additionally Art. 1, 3 (1), 4, 6, 7, 21, 23 and 26;

European Convention on Human Rights

Art. 6, 8, 13 and 46, additionally Art. 3, 5 (1) and 14;

¹ The term „Jugendamt“ will not be translated in this report. This institution is clearly **not** a Youth Welfare Office. Note that the word „Welfare“ is absent from the authority's German name.

“Germany does not have to execute the decisions of the European Court of Human Rights.”

This statement, issued at the session of the Committee on Petitions of the European Parliament (which received more than 400 petitions and letters in this matter) on 7 June 2007 by Mrs. Gila Schindler, German Ministry of Family, Seniors, Women and Youth, and Mr. Rainer Wieland, MEP, is clearly in contradiction with Art. 46 of the European Convention on Human Rights. Unfortunately it reflects the current state of German jurisdiction.

Council of Europe

Recommendation (2008) 17 Addendum IV - Elements for European Guidelines for Child-Friendly Justice

Recommendation (2006) 8 – Assistance to Victims of Crimes

German Constitution (Grundgesetz)

Art. 6, 20 (3) and 97 (1), additionally Art. 1 (1) and (3), 2, 3, 5 (1), 17, 19 (1), (2) and (4), 103.

3. Facts

3.1 Jugendamt

The „Jugendamt“(JA) is a German authority which is intended to guarantee children’s rights and protect them from physical and psychological damage. In practice the JA does not fulfil this task. In several cases JA officers have aggravated children’s situations, sometimes even leading to their death. This is mostly due to insufficient professional skills and the legal situation which gives the JA almost unlimited power, exempting its officers at the same time from any effective control. This lack of control leads almost automatically to an abuse of power and a violation of Human Rights as described in the UN’s Convention on the Rights of Children (CRC), The European Convention on Human Rights (ECHR) or even the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The Jugendamt enjoys a large liberty of decision and action. According to German Law it has to be “heard” by the family courts in all matters of parental separation, visiting rights, removal and placement of children in institutions or foster families and restitution of children to their parents (Art. 49a of the Code of Non-Contentious Jurisdiction (FGG)). But, although this hearing of the Jugendamt as an institution is compulsory, it is generally held that Jugendamt officers only express their “personal opinions” during these hearings. Although in general Jugendamt officers do not have a psychological qualification the courts have a habit of following their recommendations in more than 90 % of all cases (figure published by the Federal Statistical Office), even when it is obvious that these declarations are not in compliance with the facts.. In case of conflict between the recommendations of the Jugendamt on the one hand and of psychological experts on the other, family courts tend to overrule the experts’ reports with the Jugendamt’s recommendations.

A Jugendamt officer can neither be sued for false declarations to the court unless made under oath (Art. 153 Penal Code), nor can a party refuse a Jugendamt officer for doubt as to his or her impartiality (Art. 42 ff Code of Civil Procedure). Unlike experts, Jugendamt officers do not have to inform a court if they are not competent for examining a particular case, e.g. a handicapped child requiring psychiatric expertise (Art. 407a Code of Civil Procedure).

Prof. Klenner, one of Germany’s best known psychologists, has stated: *„Decisions of fateful importance are being made by agents of an authority who cannot be held responsible even when they are acting irresponsibly on purpose. This is called a space outside the law.”*

But the Jugendamt's competences extend even further. According to Art. 42 and 43 of Book VIII of the Social Code the Jugendamt may take children into custody without prior consultation of a family court. The notion of "imminent danger to the child", a legal prerequisite to this action, is left to the sole appreciation of the Jugendamt. This means that the Jugendamt assumes at the same time executive and judicative functions which is a clear violation of the democratic principle of division of power.

In addition the Jugendamt oversteps frequently its competences without being sanctioned. According to Art. 1684 of the Civil Code restrictions of the parents' right of access to their children may only be installed by the family courts. The Jugendamt does not have any competence of decision or ordinance. In spite of this unequivocal rule the Jugendamt has a habit of installing restrictions or exclusion of visiting rights at will even without any such decision of the family court. It is frequent that a Jugendamt blackmails a parent to ask for "accompanied visits", threatening him that otherwise he will not see his children again.

The summit of the Jugendamt's illegal actions is the fact that it refuses to apply decisions of family courts that are "not to its liking". There are records of numerous cases where the Jugendamt has refused to return children to their parents even upon order of the family court. According to Art. 235 (1) Penal Code the fact of withdrawing a child from its parents is an equivalent to child abduction, a criminal offence which is not punished when it is committed by the Jugendamt. The German Bundestag has confirmed in writing that it does not wish to increase the "penal risk" of the Jugendamt officers.

Written admonitions by the family courts are willingly ignored by the Jugendamt. Several courts have confirmed that the Jugendamt is bound by their decisions, but all this has been of no effect. The Jugendamt just continues to ignore those decisions, tabling openly on the fact that time is against the alienated parents. In the long run courts have frequently surrendered to the criminal determination of Jugendamt officers. Under no circumstances this can be in the best interest of the child.

Prof. Klenner states: *„Whenever court decisions are ignored without contradiction, this is regarded as a license for further arbitrary actions, so that consciousness of illegal acting does not arise at all. ... The official tolerance is the determining event of transgressing the point of no return. This is immediately followed by more illegal acting and the lack of respect of the judiciary will follow immediately.”* Many other experts share this opinion, but no remedy has been implemented as yet.

On the contrary the position of the Jugendamt has been further enhanced by a recent amendment of Art. 1666 of the Civil Code that has just obtained legal validity. Whereas until now a proof of parental failure had been compulsory for the withdrawal of parental authority, this requirement has now been abolished and replaced by a mere "suspicion" of a danger for the child. In the document explaining the reasons for this new "law for facilitation of intervention of family courts in cases of danger to the welfare of children" (Bundestag document no. 16/6815 of 24 October 2007) the Bundestag explains that the proof of parental failure is too tedious to establish.

This reasoning is a very dangerous step towards the abolition of the constitutional state. Parents are put under general suspicion, and this suspicion is declared sufficient for a violation of the Right of Respect of Family Life, but also the Right of Liberty and Security. The abandon of the basic maxim "in dubio pro reo" is a violation of the fundamental Right to a Fair Trial: It is no longer necessary to prove the guilt of the suspect. Once this movement is started there is no way of knowing where it will stop, and to which offences it will be extended. Germany is about to leave the basic principles of international conventions on Human Rights.

Lastly it has to be mentioned that, according to the state of international research, it is beyond discussion that parental deprivation is a traumatic event that traumatizes the victims, children and their parents, for their lifetime. When committed by state organizations without legal justification, it must therefore be banished as mental torture.

3.2 Other actors

Jugendhilfeausschuss

The activities of the Jugendamt are controlled by a committee called “Jugendhilfeausschuss”. 60% of the members of this committee are recruited from the regional administration (Kreis or Stadt) so that, in fact, Jugendamt controls itself. What is far worse is the fact that the remaining 40% of the members of the Jugendhilfeausschuss are composed of members of the “Free Carriers of Youth Help” (Freie Träger der Jugendhilfe). These are in fact commercial organizations operating children’s homes or leagues of foster parents. It is clear that the primary aim of such organizations is to receive a sufficient number of children in their institutions in order to make a profit. These organizations receive public subsidies for operating their homes or fostering children. There is written evidence of at least one case of a director of a home offering a recompense to a Jugendamt for sending him children.

Verfahrenspfleger

The “Verfahrenspfleger” or “child’s attorney” is a person selected by the court in order to represent the child’s will during the hearings. The Verfahrenspfleger is selected arbitrarily; there is no objective rule for the choice. Although it is not the Verfahrenspfleger’s role to define the best interest of the child to the court, he will frequently do so. Like the Jugendamt, the Verfahrenspfleger is reputed to express only his personal meaning and can therefore not be held responsible for any false declarations.

Psychological and psychiatric experts

The nomination of an expert is not compulsory in family matters. Like the Verfahrenspfleger, the choice of the expert by the family court is not determined by any objective rules. A family judge once confirmed to a psychologist that he fixes his choice of the expert according to the desired result. This absence of rules is another violation of the fundamental right to a fair trial.

Unlike the Verfahrenspfleger, however, experts are responsible for prejudice caused by false recommendations.

Legal Tutor

In some cases a legal tutor is appointed by court. Whenever this is the case, the biological parents lose automatically every right to represent their child (decision of the Supreme Court, BGH XII ZB 7/96). This causes a serious problem when the appointed tutor does not fulfil his task properly, mistreating the child, putting him into a home or alienating his possessions. The child or adult is generally not in a position to defend his own interests against the tutor.

This is an evident discrimination of handicapped persons (for it applies also to adults) who are helplessly and defencelessly delivered to their tutors. Depending on the personality of the tutor, this can amount to Torture or Inhuman Treatment not only for the disabled person himself, but also for their close relatives who have to watch this without being able to help.

4. Recommendations

In order to guarantee the observation of Human Rights in German family affairs, the legal position of the Jugendamt and its agents must be profoundly modified. As the rules concerning the Jugendamt are split amongst an important number of national laws, it might even be necessary to abolish the Jugendamt altogether and to assign the essential tasks to other authorities having a structure in compliance with national law as well as with the international conventions on Human Rights. This will become even more important as the so-called Lisbon Treaty (formerly known as European Constitution) explicitly defines the European Convention on Human rights as an integral part of the legal framework of the European Union.

A set of recommendations has been defined in the so-called "Bamberg Declaration" (cf. annex). The most important modifications in law and in facts will have to account for the following:

- Install factual and legal control over the Jugendamt.
- Make the control structures effective and easily accessible to the public
- Apply all rules of German national law to the Jugendamt and its agents and to the Verfahrenspfleger and Umgangspfleger in order to make them responsible for their actions. Tolerate no exceptions
- Separate all instances responsible of the best interest of the child from organizations bearing an economic interest, such as homes, foster families etc.
- Reinforce observation of Human Rights by the legislator and observation of the law by the judiciary
- Establish objective rules for the choice of experts and children's attorneys, establish compulsory rules for their qualification and execution of their tasks
- Apply recommendations on assistance and compensation to victims of crimes

Concrete remedial actions will have to be elaborated in detail by a group of independent experts whose sole concern is the best interest of the child. Therefore they must not have any economic interest in any decision concerning the child. International best practice has to be considered during the definition of the future structures and procedures. The execution of these remedial actions should be reported to the European Commissioner for Human Rights at least once a year until full approval is obtained.

More details and written evidence can be obtained from the undersigned if necessary.

President of League for Childrens' Rights
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Council of Europe

