

1-1-2014

Around the World: The Struggle Between Confidentiality and the Need for Transparency in German Child Abuse Reporting Laws

Jasmine Prokscha

Follow this and additional works at: <http://lawcommons.luc.edu/clrj>

 Part of the [International Law Commons](#), [Juvenile Law Commons](#), and the [Privacy Law Commons](#)

Recommended Citation

Jasmine Prokscha, *Around the World: The Struggle Between Confidentiality and the Need for Transparency in German Child Abuse Reporting Laws*, 34 CHILD. LEGAL RTS. J. 245 (2014).
Available at: <http://lawcommons.luc.edu/clrj/vol34/iss2/8>

This Featured Practice Perspectives is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Children's Legal Rights Journal by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

Around the World: The Struggle Between Confidentiality and the Need for Transparency in German Child Abuse Reporting Laws

By Jasmine Prokscha

Germany is representative of the tension that exists between the need to protect the privacy of minor victims of child abuse and the need for transparency laws that hold child welfare agencies accountable. Germany's significant emphasis on confidentiality ranks high in comparison to other countries, which is due, in part, to Germany's experiences with totalitarian regimes and gross privacy invasions. However, this emphasis directly conflicts with the need to protect victims, who are entitled to privacy and may feel further victimized by publicizing the details of their abuse.

I. GERMANY'S PRIVACY LAWS FOR CHILD ABUSE

Germany has stringent anti-child abuse laws, including ones that forbid corporal punishment. The country has a very broad definition of child abuse, which was strategically devised to protect children. The law requires a holistic assessment of a child's situation on a case-by-case basis, rather than applying a one-size-fits-all approach. The greatest deference is given to the family unit because the family, and family integrity, has been an extremely important cultural aspect to Germans throughout history. German child abuse laws are designed with a strong parental-education component, rather than relying on the default of immediately removing the child.

Another interesting aspect of German child abuse laws is the privacy it affords children. Children and young people can receive counselling without notifying the legal parent or guardian, should such notification undermine the success of said counseling. Under these laws, mandated reporters must comply because the definition of confidential information extends to data surrounding child abuse as well. Germany has extremely heavy data protection regulation, including data about child abuse. The *Sozialgesetzbuch VIII für Kinder und Jugend* (social code regarding children), contains specific regulations governing data protection for both public and private child and youth welfare providers. In order to pass-on data without the consent of a child, child welfare providers must ensure that the child receives immediate action by other institutions, such as the hospital or police department.

II. WHY IS PRIVACY SO IMPORTANT TO GERMANS?

Germans have awarded a high level of respect for the privacy of its citizens in cases of abuse since the reign of the Third Reich and the former communist regime in East Germany. Many German citizens, to this day, have continued to experience the lasting effects of the government's abuse of citizens' privacy as a consequence of having been critical of the regime. The Berlin Wall and the *Stasi* (*Staatssicherheitsdienst*, secret police) archives are tangible reminders of these violations of privacy. The *Stasi* archives offer former East German citizens a way to identify how their apartments were bugged,

learn about friends that had betrayed them by becoming informants, and even how strangers were privy to the intimate details of their lives. These very recent, and very real, examples have weighed heavily on German citizens' minds. Before the Berlin Wall, the Nazi regime also controlled every public aspect of individuals' lives, and made use of census and data collecting to ascertain who was secretly disloyal to the regime. These historical examples were on the forefront of the drafters of the German Constitution, which was structured to protect the individual's right to privacy.

Therefore, the reason that a child's right to privacy is afforded such great respect, even in child abuse situations, is due to Germany's approach to privacy in general. For example, the German Constitution holds that the respect for human dignity is a supreme principle. The German Federal Constitutional Court, in turn, holds that the comprehensive right to privacy is a direct derivative of this, and states that the right to privacy is a fundamental element of the individual's right to personhood. Confidential information arising out of protected relationships is presumptively unavailable.

III. THE CONSEQUENCES OF CONFIDENTIALITY

The greatest consequence of this level of confidentiality has been the public's inability to hold child welfare service providers accountable. Confidentiality and transparency are issues that countries must balance when considering child abuse policies. On the one hand, disclosing information regarding child abuse holds agencies accountable by ensuring that they provide information and statistics that enable other agencies, and government in general, to develop better laws and policies when combatting child abuse. Without the necessary statistical information, governments are unable to do so. Similarly, if an agency is conducting research on child abuse in order to develop greater detection and prevention mechanisms, these agencies will be basing their research on very limited samples that may not accurately represent the population.

These issues are present in Germany and are further exacerbated by the lack of centralized authority and continuity among child welfare services. Although there are federal anti-child abuse laws, enforcing these laws are left to the local level and differ between states. Each *Länder* (German state) has its own *Jugendamt* (Child and Youth Welfare Authority). The agencies, however, differ on their training, mandated reporting laws, and child abuse investigation procedures. Even the way that child welfare officials are educated on the nature of child abuse differs from *Länder* to *Länder*.

This creates numerous issues. First, the lack of continuity prevents agencies from learning from the successes and failures of other agencies. Germany has attempted to counter this by encouraging local governments to participate in the nationwide research and practice development project, *Aus Fehlern lernen-Qualitätsmanagement im Kinderschutz* (Learning from Mistakes, Quality Management in Child Protection). Second, because of how localized child welfare agencies are, local authorities serve as both the reporting center as well as the agency responsible for service, support, and treatment. This dual role can result in a negative and fearful attitude toward local social services, unwillingness to contact treatment and supportive services, and considerable backlash towards social workers. Third, the division between agencies and protection of

child abuse data has left researchers with little centralized data available from Germany. The majority of child abuse research is based off of a local, non-representative sample of cases. As a result of these cases, it is unknown what the success of current child welfare programs may be. While the federal government has developed proposed child abuse prevention trainings for child welfare workers, the extent to which child abuse and neglect are addressed among the different agencies remains unknown.

Why are Germans so against federalized agencies and national data collection? Part of this lies in the desire to protect privacy, and Germany's history affects this policy. Germans have bad memories of totalitarian regimes, from both the Nazi and *Deutsches Demokratische Republik* (DDR) regimes. Both of these regimes abused the government's power to collect data, and instituted rigid control over the population. Therefore, any indication towards a return to these regimes invokes strong reactions from the public. For example, in 1983, when Germany initially planned for a census, the government faced fierce protests and a long legal debate that mandated clarification of constitutional doctrines as to whether information gathering by the federal government was permissible.

IV. PROPOSAL

What does this all mean for German anti-child abuse practices? Germany needs greater unity between its child welfare organizations to ensure continuity between *Ländern*. At the very least, child welfare workers' trainings should be unified, which would ensure that even if a child moved between *Länder*, they would receive the same protective services; otherwise, a parent could simply move to avoid being prosecuted for child abuse.

In regards to releasing data, however, Germany has an uphill battle. German papers will not even publish the names of convicted criminals, as they believe an individual's right to privacy trumps freedom of speech. Therefore, it is highly unlikely that the media will ever be able to provide the same coverage of child abuse cases that they are able to in the United States. Instead, the only way that the federal government could ensure that *Jugendämpter* are held accountable would be through reliance on oversight from local governments on the *Länder* level, or through the local government's voluntary participation in the *Aus Fehlern lernen- Qualitätsmanagement im Kinderschutz* program.

Sources:

Majid A. Al Eissa, John D. Flukeb, Bernard Gerbakac. *A Commentary on National Child Maltreatment Surveillance Systems*, 33 CHILD ABUSE & NEGLECT 809 (2009).

Marc Rehm Gebhard, *Just Judicial Activism? Privacy and Informational Self-Determination in U.S. and German Constitutional Law*, Ludwig-Maximilians-Universität (January 23, 2000), available at <http://dx.doi.org/10.2139/ssrn.216348>.

Sozialgesetzbuch Aches Buch- Kinder und Jugendhilfe (SGB VIII) *Kinder und Jugendhilfegesetzes* 1990, para. 8, sect. 3.

Strafgesetzbuch für das Deutsche Reich, StGB, Kriminalle, Bundeslande Reich Gazette I (1998) (*German Criminal Code*).

Tijne Berg-Le Clerq, *Combating Child Abuse and Neglect in Germany, Hungary, Portugal, Sweden, and the Netherlands*, Daphne Project Nederlands Jugendinstitut (2012), available at <http://www.youthpolicy.nl/yp/downloadsyp/Publications-Combating-child-abuse-and-neglect-in-Germany,-Hungary,-Portugal,-Sweden-and-The-Netherlands.pdf>.

Ursual Kilkely, *Children's Rights: A European Perspective*, 68 JUD. STUD. INST. J. 4 (2002), available at http://www.jsijournal.ie/html/Volume%204%20No.%202/4%5B2%5D_Kilkelly_Children's%20Rights%20A%20European%20Perspective.pdf.