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# Individual Submission

**United Nations  
Human Rights Council**

**Universal Periodic Review 2013  
on Germany**

**16<sup>th</sup> session  
April 2013**

**Individual UPR Submission  
Germany  
Date of review: April 2013**

**Submitters**

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**Main Activities:**

**Trennungsväter e.V.:**

Founded in 2002, Trennungsväter e.V. defends children's rights of contact with both parents and all grandparents after parental divorce or separation. The association contributes to awareness of the problem with politicians and mass media. In particular cases advice is provided to the concerned persons.

**Gleichmaß e.V.**

Founded in 2009, Gleichmass e.V. helps parents to help themselves in all problems concerning visiting rights, parental authority, and alimony. The association leads campaigns in order to raise public awareness of parental alienation. Lastly, it contributes to networking of parents' associations by helping them to establish professional structures.

**1. Executive Summary**

In spite of eighteen sentences against the Federal Republic of Germany by the European Court of Human Rights in matters of Family Right, violations of children's and parents' Human Rights still occur frequently in Germany. Although German Family Law has changed considerably in the last few months, the legal rules about parental authority and visiting rights are frequently violated by family courts. A specific German feature is an authority called "Jugendamt" which is not subject to any efficient supervision. This situation has even deteriorated since the 2009 UPR. There is still no political intention to modify this situation.

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, 9, 5**, Art. 3 (2) and (3), 6, 8 (1), 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;

### **Council of Europe**

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

Recommendation (2006) 8 – Assistance to Crime Victims

### **German Constitution (Grundgesetz)**

**Art. 6, 20 (3), 97 (1)**, additionally Art. 1 (1) and (3), 2, 3, 5 (1), 17, 19 (1), (2) and (4), 101, 103.

### **3. Development since the UPR 2009**

The facts enumerated in section 4.1 (below) have already been submitted to the UNHRC in the framework of the UPR 2009 (cf. Annex 1). These facts are still valid. **Germany has not fulfilled its engagement to establish an effective judicial control over administrative decisions of the Jugendamt.**

The recommendations contained in section II of the Report of the Working Group A/HRC/11/15 include:

*“24. establish a form of effective judicial control over administrative decisions of the Office for Youth called Jugendamt”*

In Addendum 1 “Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review” Germany has declared:

*“24. Germany accepts the recommendation. It has already been implemented to a large degree. According to the Basic Law, it is always possible to take legal recourse against administrative decisions made by the Jugendamt.”*

This statement is incomplete; it is even partially false. For details (cf. section 4 “Facts”). Since 2009, the general situation has not changed significantly. It has even worsened in some respects:

1. In April 2008 the German Bundestag voted a law abolishing the legal obligation to produce evidence of parental failure before withdrawing children from their families. This is incompatible with one of the most essential human rights, i.e. the respect of family life. The family court can now order the withdrawal of children if the Jugendamt pretends that there is a “risk” for the children without producing any evidence.
2. On July 15, 2010, Germany formally withdrew its reservations towards the United Nations’ Convention on the Rights of the Child (CRC). But in November 2011 the German Bundestag rejected a motion to modify German law in order to fully implement the CRC (cf. Annex 2 – Bundestag Report 17/7800). This is not the only case of a non-application of a ratified International Convention. Children’s Rights are still not fully implemented in Germany.
3. It has already been reported in 2008 that Germany does not intend to respect international conventions or sentences of international courts. This has been confirmed by the Minister of Justice and European Affairs (!) of the land of Hesse during a TV interview on June 1, 2010 where he commented a decision of the European Court of Human Rights (ECHR):

*„I will not accept that the ECHR tells us, against the decision of the Constitutional Court, that we violate Human Rights. I will fight that. (...) I am angry that the ECHR reproches us violations if Human Rights.“*

These statements demonstrate that Germany does not intend to honour certain international treaties.

4. From 2010 to 2012, the European Parliament has continued to receive an important number of petitions against the Jugendamt. (There had already been abt. 400 petitions between 2007 and 2009. The EP had recognized severe violations of Human Rights and asked the German authorities to take remedial action, but the federal Ministry of Family, Seniors, Women and Youth (BMFSFJ) refused to do so – a written refusal sent to a petitioner can be produced. 119 of these new petitions have been declared admissible. In November 2011, a delegation of the Commission organized meetings with several German authorities in Berlin in order to deal with these petitions (cf. Annex 3). It appears from the EU's Working Document that the German authorities have only given incomplete information, relating only the theoretical situation as it should be. Even this description was partially false. But the German authorities have also failed to explain that the German legal system exempts the Jugendamt from any efficient control (cf. section 4 "facts").

Although the European Parliament has deplored severe violations of Human Rights committed by the Jugendamt and legalized by the national judiciary, the federal and regional German authorities have not respected their obligation to repair them.

#### **4. Facts**

Although the federal Republic of Germany has been sentenced eighteen times by the European Court of Human 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" (JA) which is not subject to any efficient supervision. The German legislator has confirmed that there is no political will to modify this situation.

The submission to the UPR 2009 by the League for Children's Rights and supported by the President of the INGO Conference of the Council of Europe is joint to this document as annex 1. The undersigned declare that all facts stated in this annex paper are still valid. Germany has failed to fulfil its commitment to establish a form of effective control over the Jugendamt.

#### **4.1 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 agents of the JA have aggravated children's situations, sometimes even leading to injuries or death. This is mostly due to insufficient professional skills and the legal situation which still gives the JA almost unlimited power and exempts its agents 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 of 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. 162 of the Code of Family matters and Non-Contentious Jurisdiction (FamFG)). But, although this hearing of the Jugendamt as an institution is compulsory, the declarations of its agents during these hearings are generally not interpreted as the authority's official position, but the expression of their "personal opinions". Although in general agents of the Jugendamt do not

have a psychological qualification, family courts generally overrule the experts' reports with the Jugendamt's recommendations in case of contradiction. The Jugendamt ist the "real" decider.

An agent of the Jugendamt can neither be sued for false declarations to the court unless made under oath (Art. 153 Penal Code), even when these false declarations are made willingly and purposefully, nor can a party refuse such an agent for doubt as to his or her impartiality (Art. 42 ff Code of Civil Procedure). Unlike experts, an agent of the Jugendamt does not have to inform a court if he is not competent for examining a particular case, e.g. a disabled child requiring psychiatric expertise (Art. 407a Code of Civil Procedure). There is no legal recourse against false declarations or incompetent agents of the Jugendamt. The German response to the UPR 2009 is false.

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 exclusive 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. This violation has not been commented by the German government in its response to the UPR 2009.

According to Art. 1684 of the Civil Code restrictions of the parents' Right of Access to their children may only be decided 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 implementing restrictions or even total exclusion of visiting rights, sometimes even without any such decision of the Family Court. It is frequent that a Jugendamt blackmails a parent to ask for "accompanied visits", threatening them that otherwise they will not see their children again. Family courts will normally take no action against this gross violation of Human Rights.

Ms Sabine Brieger, judge at the Family Court of Berlin-Pankow/Weissensee and liaison judge in the International Haag Judges Network, declared to the delegation of the European Parliament: „*The Jugendamt is an administrative body, whereas it is the court which has the authority to take a formal decision*” (Annex 3 p. 4). This may describe the legal situation, but in practice it is not true. As we are aware of the fact that German authorities have repeatedly made false declarations towards international bodies, we fear that this might be done intentionally.

In many cases the Jugendamt refuses voluntarily to apply decisions of family courts that are "not to its liking", even refusing to obey orders of the family court to return children to their parents. According to Art. 235 (1) Penal Code child abduction is a criminal offence, but it is not sanctioned when committed by the Jugendamt. The German Bundestag has confirmed in writing that it does not wish to increase the "penal risk" of the Jugendamt agents.

Written admonitions by the family courts are willingly ignored by the Jugendamt. The Jugendamt just continues to ignore those decisions, tabling openly on the fact that time works against the alienated parents. Excessive duration of legal procedures is a well-known fact, for which Germany has been sentenced several times by the ECHR. It seems that the new German law against excessive duration is already being undermined by the judiciary. In numerous incidences courts have surrendered to the fierce determination of Jugendamt agents. By creating facts and refusing to obey the court, the Jugendamt is in fact usurping the judges' role. This fact is well known, but no action has been taken by the competent authorities.

### **Total absence of control over the Jugendamt**

The declarations of German authorities towards the UNHCR and the delegation of the European Parliament are not true.

In the German system, the term “control” is divided between the sections “professional control” and “legal control”.

All official German bodies agree that there is no professional control over the Jugendamt, as it is situated on the communal level of administration. This means, that in the German federal system only the mayor or the district administrator has the right to check whether the decisions of the Jugendamt are well-funded. Therefore neither Bund nor Land authorities will intervene, even if the Jugendamt violates German federal law. Several official documents to this effect can be produced to the UNHCR. In one of these documents the government of the Land of Hesse declares that a professional control over the Jugendamt is incompatible with the German Basic Law. The German response to the UPR 2009 was false.

The legal control is located at state (Land) level. It is strictly limited to the question whether a Jugendamt has violated a law. Petitioners invariably receive the answer that this has not been the case, without any detail. This seems to be a standard text block that is even used when a court has previously ruled that the Jugendamt has indeed committed such a violation. As neither civil nor family courts are entitled to prescribe specific actions to the Jugendamt, this statement has no effect whatever.

The undersigned are aware of a case where the ministry of social affairs of the Land has used this standard text for more than nine years - an enormous time span in a child's life. When the petitioner finally sued them for false declarations, the ministry declared that it was not competent to assess the Jugendamt's activities (the documents can be produced). It is obvious that the ministries try to silence petitioners by false and unsubstantiated statements which they are not authorized to make. The results of this retardation policy are disastrous

Parents who are victims of the Jugendamt are often unable to defend their rights as the Jugendamt's documents are kept secret, although the Jugendamt, as a public administration, has to justify each interference with citizens' Human Rights. On the other hand, parents have to provide exhaustive evidence in order to ask for repair of the damage and/or just compensation, but they are unable to do so as most essential documents are not accessible to them. Courts will then reject the claims for repair and compensation pretending that they are not sufficiently substantiated.

## **4.2 Judiciary**

The German response to the UPR 2009, „*according to the Basic Law, it is always possible to take legal recourse against administrative decisions made by the Jugendamt*”, is incomplete. The “Basic Law” is of no immediate effect for the victims of the Jugendamt, as the “Basic Law” outlines only general Human Rights. In order to be applicable these rights have to be further specified by common domestic law.

The German legal framework still lacks several essential rules against the Jugendamt (cf. the section on art. 153 Penal Code, p. 5). But even those legal rules that do exist are not applied by the courts. More than 500 petitioners to the European Parliament agreed on the fact that the German judiciary had not helped them against the Jugendamt. In most cases the facts are not even instructed. In a kind of “organizational solidarity” the courts take an *a priori* position for the Jugendamt. In spite of the obligation for the court to instruct family cases *ex officio* (art. 26 FamFG), reports of experts, physicians, teachers and eye witnesses are regularly discarded. Although the family court does not have to follow the Jugendamt in its decision, it regularly does so. If not, the Jugendamt can deliberately ignore the court's decision until the court surrenders and modifies its decision. Even if the court rules that the Jugendamt is not entitled to act in this way, there will be no sanctions.

In cases of divorce and separation, the Jugendamt's and the courts' main concern seems to be to ensure alimony to the female partner. In his book "Vom Rechtsstaat zum Faustrechtsstaat" (From the constitutional state to the state under the rule of the law of the jungle, ISBN 3-7923-0528-3) Professor Wiesner, of the Federal Ministry of Family Affairs, Senior Citizens, Women and Youth, confirms that the family courts are principally motivated by alimony. "Try to possess the children. Then your husband will have to pay for everything." Dr. Jorge Guerra González, of the University of Lüneburg, demonstrates in his book "Sorgefall Familienrecht" (Family justice – a case of concern, ISBN 978-3-643-11611-6) that the decisions of German family courts are inconsistent with the legal framework.

The so-called "best interest of the child" is often only a secondary concern. Parental authority is systematically bestowed on mothers, even against the advice of psychological experts, or simply because they have kidnapped a child and refuse to return it to the father.

The Constitutional Court does generally not intervene against violations of Human Rights by the Jugendamt. It uses to this effect the possibility to dismiss a complaint without instruction (art. 93b and 93d (1) of the Law on the Constitutional Court - BverfGG). A reason for this dismissal does not have to be given. Prof. Ekkehard Reinelt, attorney at the Federal Court of Justice calls this the "usual denial of right by the practice of the Constitutional Court" (*die übliche rechtsverweigernde Praxis des BverfG*). There is no guarantee for respect of the Basic Law, quoted in Germany's response to the UPR 2009.

Finally, because of the length of the procedures, financial damage is often very high for the victims which means that they are unable to pay the court fees for claiming repair and just compensation. These persons lose their children, their rights and their property forever. This phenomenon is not an exception, but a general rule. Harald Schütz, judge at the Higher Regional Court (Oberlandesgericht) Bamberg stated:

*„In our constitutional state the following can happen to a person, by far mostly to fathers, against their will and without any culpability: that their marriages be dissolved, their children taken away, the contact with them rendered impossible, the charge of sexual abuse of their children raised and confirmed by court decision and, lastly, sentenced to payment of alimony leaving them only the minimum of subsistence. The dimension of this state ordered suffering reaches tragic dimensions. It should have its place on stage, not in our legal reality.“* (Anwaltsblatt 8+9/97 Seite 466-468, 1997)

#### **4.3 Other actors**

##### **Jugendhilfeausschuss**

The activities of the Jugendamt are controlled by a committee called "Jugendhilfeausschuss". This committee is partly composed of members of the Jugendamt which, in fact, controls itself. Far worse is the fact that 25% of the members of the Jugendhilfeausschuss are composed of members of the "Free Youth Help" (*Freie Jugendhilfe*). These are in fact commercial organizations operating childrens' homes or leagues of foster parents. The primary aim of these organizations is to lodge a sufficient number of children in their institutions in order to make a profit. They 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 “Attorney of the Child” 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 chooses 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 the 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 property. The child or adult is generally not in a position to defend his own interests against the Tutor.

This is an evident discrimination of disabled persons who are helplessly 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.

## **5. Observation of International Conventions**

“*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 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 of Human Rights. Unfortunately it reflects the current state of German jurisdiction. (cf. also the declaration of the Hessian Minister of Justice, p. 3 - bottom).

The findings of the Committee on Petitions of the European Parliament in 2009 and 2012 (cf. Annex 3) have been ignored, the violations of art. 24 and others of the Charta of Fundamental Rights of the European Union have not been repaired. Instead the BMFSFJ has (untruthfully) declared that it had no knowledge of any case of violation of Human Rights.

According to Art. 267 (1) lit. a of the Treaty on the Functioning of the European Union a German court has to submit a question to the European Court of Justice whenever it intends to diverge from the established rules of the ECJ. (ECJ, case 283/81). This rule is constantly ignored by German courts in family matters.

Lastly, international standards for assistance to those parents who are victims of criminal acts of the Jugendamt are not applied, e.g. the Recommendation Rec (2006) 8 of the Council of Europe's Committee of Ministers to member states on assistance to crime victims, adopted on 14 June 2006.

## 6. 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. Based on the experience since the last UPR on Germany, it would be advisable to abolish the Jugendamt completely 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. The degree of disorganisation has become so immense that a reform of the existing structures seems impossible.

The necessary modifications will have to account for the following:

- Install professional 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 for 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.
- Guarantee full access to all Jugendamt and court files to all parents.
- Create the office of an "Ombudsmann", responsible for contentious cases and authorized to lead investigations.
- 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 Crime Victims

Concrete remedial actions will have to be elaborated in detail by a group of independent experts whose sole concern must be 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.

Amberg / Gera, September 30, 2012



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