Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

Cultural Considerations in Criminal Proceedings: Minors as Private Accessory Prosecutors Without the Consent of Their Parents?

Question(s) at stake:

Whether minors can participate as private accessory prosecutors (Nebenkläger) in child abuse proceedings without parental consent if they fear that their parents' knowledge of their participation could seriously endanger their lives given the high value commonly attached to honour in their culture of origin.

Outcome of the ruling:

The lower court initially allowed the minors to join as private accessory prosecutors without parental consent if obtaining such consent would seriously endanger the minors. However, the Higher Regional Court later overturned this decision and declared the joining of minors as private accessory prosecutors without the consent of their parents invalid.

Topic(s):

- Crime and Punishment under State Law

Keywords:

- Best interests of the child
- Children's rights
- Sexual abuse (child/adult)

Tag(s):

- Minor
- Private accessory prosecutor
- Consent of parents

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Country:

Germany

Official citation:

Regional Court Berlin, 30. Criminal Division, Decision of 27 November 2009, 530 - 37/09, (530) 5 Ju Js 343/07 (37/09) (LG Berlin, 30. Strafkammer, Beschluss vom 27. November 2009, 530 - 37/09, (530) 5 Ju Js 343/07 (37/09))

Link to the decision:

https://openjur.de/u/281336.html

ECLI:

ECLI:DE:LGBE:2009:1127.530.37.09.0A

Date:

27 November 2009

Jurisdiction / Court / Chamber:

Regional Court Berlin, 30. Criminal Division

Remedy / Procedural stage:

First stage

Previous stages:

None

Subsequent stages:

- Higher Regional Court of Berlin, Decision of 22 March 2010, 4 Ws 6/10-1 AR 48/10 (KG Berlin, Beschluss vom 22. März 2010, 4 Ws 6/10-1 AR 48/10)

Branches / Areas of law:

Criminal procedure law

Facts:

The underage boys Ö and H, who were victims of sexual offences, chose to participate in the criminal proceedings against the accused by declaring joinder. They did not seek their parents' consent because they come from a cultural environment in which particularly strict moral concepts prevail, and girls and boys who have been abused are considered dishonoured. Both victims feared for their lives if it became known in their community that they had been victims of sexual offences, even if only their parents knew of the case.

Ruling:

The Criminal Division affirmed the validity of the joinder declaration (*Anschlusserklärung*). In its reasoning, the Division initially clarified that a sufficient level of understanding is adequate for a valid declaration, justifying this on the basis of an overall examination of various criminal procedure norms. Simultaneously, the decision was justified by the underlying objective of private accessory prosecution, which is to enhance the victim's position, for instance through the right to submit independent motions for evidence. The states thereby fulfil its duty to protect victims of criminal – especially sexual – offences, A requirement of an age of majority, when imposed, creates an intolerable dilemma for victims who come from a cultural background that is morally very strict and regards girls and boys who have been victims of sexual offences to be dishonoured. The victims would either have to rely on their parents, risking serious social disadvantages and even endangering their lives, or forfeit their role as private accessory prosecutors and thus be treated as second-class victims – an unacceptable outcome.

Furthermore, the decision is based on the constitutionally protected right to life and to the protection of private life, which includes the authority to decide the extent to which someone wishes to disclose personal information, in this case, the fact of having been a victim of a sexual offence. In contrast, the parents' right to

information was considered to be of lower priority.

Main quotations on cultural or religious diversity:

“It is precisely here, however, that a requirement to be of age would confront such underage injured persons – who come from a cultural environment in which particularly strict moral concepts prevail, according to which abused or raped girls and boys are regarded as ‘dishonoured’ – with an intolerable conflict: These underage victims of sexual offences would then be faced with the alternative of either having to turn to their parents and accepting considerable reprisals and serious social disadvantages, or foregoing participation as private accessory prosecutors. As a result, contrary to any legislative intention, those children and adolescents who have to cope with the consequences of the crimes committed against them without the support of their families would be reduced to ‘second-class’ victims. In the present case, the injured persons even fear for their lives if the circumstances of the sexual offences committed against them were to become known in their family or social environment. The Division does not consider this concern to be exaggerated at all. According to the Division’s experience, the present constellation is not an isolated case either. Especially in a big city like Berlin, there are population groups with strict moral concepts. There are sections of the population in which, for example, the parents’ only concern is that their daughters are still virgins – they are completely indifferent to whether the girls have voluntarily become involved with a man or have become victims of sexual offences. It contradicts the explicit objective of the accessory prosecution provisions to expose the injured parties to a life-threatening danger in precisely such cases or to de facto deprive them of the possibility of joining the proceedings as private accessory prosecutors.” (para. 12)

Main legal texts quoted in the decision:

- Section 182(1)(1) of the German Penal Code.
- Section 395(1)(a) and 396 of the German Code of Criminal Procedure

Cases cited in the decision:

Decisions of the Federal Constitutional Court

- Official Collection of the Decisions of the Federal Constitutional Court vol. 46: 160 (BVerfGE 46, 160)
- Official Collection of the Decisions of the Federal Constitutional Court vol. 96: 56 (BVerfGE 96, 56).

Commentary

Cultural Considerations in Criminal Proceedings: Minors as Private Accessory Prosecutors Without the Consent of Their Parents?

The Berlin Regional Court's decision deals in detail with the question of whether minors, especially those nearing the age of majority, can participate in criminal proceedings as private accessory prosecutors without the consent of their parents.

The reason for this decision was that the minors did not want their parents to find out because in their cultural environment, the victims of a sexual offence are considered dishonoured and are sometimes in danger. Given the public nature of the criminal proceedings, whether it would have been possible at all to prevent the parents from finding out remains uncertain. Nonetheless, the Regional Court affirmed the effectiveness of the joinder. The Court's argument is particularly interesting with regard to the cultural problem.

The Court pointed out that amongst certain population groups in Berlin, an alleged violation of honour in the sexual realm had dangerous – even life-threatening – consequences for those affected. In doing so, however, it focused primarily on girls, although the victims in this case were boys. Drawing on this, the Court decided to contrast and weigh the constitutionally protected rights of life and privacy of the children against the parents' rights. In this deliberation, the rights of the children outweighed the rights of the parents and the joinder was therefore considered effective.

However, the Higher Regional Court of Berlin overruled this decision. It allowed the complaint of the accused against this decision, ultimately deciding in his

favour (Higher Regional Court of Berlin, Decision of 22 March 2010, 4 WS 6/10 – 1 AR 48/10). At the outset, it agreed with most of the reasons given by the Regional Court. In particular, it also recognized that “an inadmissible restriction of the constitutionally protected parental rights would not necessarily be connected with a confirmation of the private accessory prosecutor’s capacity to act from the age of 14”. It also provides a number of constitutional reasons for this. Importantly, the Higher Regional Court of Berlin remained silent on the Regional Court’s balancing of the right to life and privacy of the children versus the rights of the parents. Additionally, the cultural background was not addressed at any point in the decision.

The crux for the Higher Regional Court of Berlin was the potential conflict between a minor’s right to declare an effective joinder as a private accessory prosecutor without parental consent and substantive law. Offences allowing joinder, including insults, can only be prosecuted upon request, limited to individuals 18 years or older. Therefore, the qualification to join as a private accessory prosecutor without the consent of the parents should generally hinge on reaching the age of 18. The Higher Regional Court found it not acceptable that joining as a private accessory prosecutor under the age of 18 without the consent of the parents is prohibited in substantive law and permissible in procedural law. In this specific case, Ö turned 18 during the proceedings, rectifying the invalidity of his joinder declaration by confirming it when of age. However, H’s joinder was invalid, lacking the consent of his parents.

Literature related to the main issue(s) at stake:

** General legal literature on the topic**

- Wenske, Marc. 2022. “§§ 373 b-406 l”. In Löwe/Rosenberg, *Die Strafprozessordnung und das Gerichtsverfassungsgesetz*, vol. 9/2, 27th ed. Berlin Boston: De Gruyter.
- Valerius, Brian. 2019. “§ 395”. In Christoph Knauer et al., *Münchener Kommentar zur Strafprozessordnung*, vol. 3/1, 1st ed. München: C.H.Beck.

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