

# Counteraction to Offenses against Sexual Self-determination of Minors in Criminal Law of Germany

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**Keywords:** Criminal law, counteracting crime, child pornography, youth pornography, procurement, possession of pornographic written material involving children.

**Abstract:** This article focuses on the urgent problem of the rapid spread of child and youth pornography and the involvement of children and young people in the pornography business. Paragraphs 184, 184b, 184c, 184d and 184e of the Criminal Law of Germany, as well as rules on the reform of criminal law legislation (Strafrechtreformgesetze), laws amending the criminal law (Strafrechtsaenderungsgesetze), and other laws adopted between 1993 and 2020 have been analyzed for the purpose of a detailed description of the dispositions of the norms governing criminal liability for the distribution, procurement, possession of child pornography, as well as the creation of pornographic content through radio and television. The article also explores the judicial practice of the German Federal Supreme Court (Bundesgerichtshof). The authors set out to form a comprehensive understanding of German criminal law in the field of combating child and youth pornography based on a study of German legal literature and an analysis of legislation and jurisprudence, using such methods as dialectical-materialistic, historical, comparative law and legalistic.

## 1 INTRODUCTION

The dissemination of child pornographic material is an issue today, both globally and in individual countries. In Germany, for example, 7,449 cases were initiated in 2018 for the illegal possession, production and dissemination of pornographic material involving children and minors. In 2019, there was a sharp increase in illegal acts on the Internet, prompting the Bundestag to take tough action against online child pornography in January 2020.

The authors set out to form a comprehensive understanding of German criminal law in the field of combating child and youth pornography based on a study of German legal literature and an analysis of legislation and jurisprudence.

## 2 MATERIALS AND METHODS

The methodological basis of this article was the dialectic materialism methodology of inquiry, based on which the following methods were applied:

historical method, which made it possible to reveal the specific features of the formation of German criminal legislation in the area of protecting minors from the effects of written pornographic materials involving children and minors; the comparative law method, which enabled the formation of the institution under study in relation to the specific historical and legal situation; the legalistic method, which was used to clarify nature and significance of the norms of the Criminal Code of Germany and other regulations. The comparison also used the analytical-comparative method, involving not only analysis of the legal material compared, but also drawing certain conclusions based on the comparisons.

## 3 RESULTS AND DISCUSSION

Protecting children and young people from the effects of pornographic materials is a priority for the German government, because the acts covered by §184, §184b, §184c, §184d, §184e of the Criminal Code of Germany infringe upon public morals and ethics of

children and youth and cause irreparable harm to the younger generation.

German criminal law in the area of protecting children and young people from exposure to pornography has undergone significant reform under the influence of socio-economic and political changes: the social revolution of the 1960s; the adoption of the Act on the restriction of access to child pornography in communication networks (repealed under pressure from opposition factions of the Bundestag in December 2011). Significant changes were also made to the German Criminal Code in 1993 and 2003, and in 2008 youth pornography was criminalised under the influence of the Framework Decision on combating the sexual exploitation of children and child pornography.

## 4 CONCLUSIONS

The sale or other fee-based distribution of obscene works, illustrations or images to persons under 16 years of age was already criminalised under the Criminal Code 1871. Later, in 1900, criminal punishment was also introduced for providing such materials to such persons free of charge. In the first half of the twentieth century, the distribution of pornographic material became so widespread that in the mid-1920s, dedicated service was established to control the press market in order to suppress the printing of "licentious" publications. In 1926 the Law to Protect Youth from Trashy and Dirty Writings came into force. This law was in force until April 10, 1935. In 1953 the Law Regarding Dissemination of Youth-Endangering Writings came into force, stipulating that the moral development of children and adolescents was primarily threatened by immoral and degrading works. In 1961 the law banned the advertisement of pornographic material to minors.

The sexual revolution in the late 1960s significantly decriminalised the legislation. The case against Kurt Desch Verlag Publishing House, having published the novel by John Cleland, "Fanny Hill: Memoirs Of A Woman of Pleasure", 1749, became much talked about. In July 1964, the Munich District Court (Judge Schweiger) ordered all copies of the novel to be confiscated and fined the publisher DEM 120,000. Judge Schweiger ruled the novel indecent in July 1964, and the actions of the editors were classified as a criminal act under §184 of the German Criminal Code as an intermediary in the dissemination of "naked sensual pleasure". However, the case was revised in the city of Karlsruhe, and editor Kurt Desch was acquitted. Later, the German

Supreme Court made a decision in the Fanny Hill case, according to which a "description of sexual events" was understood as rude, intrusive, suggestive description, violating or seriously threatening the public interest. The sexual process, on the other hand, was seen as a way of arousing sexual feelings, brutally affecting the human psychology, and changing the perspectives on sexual relationships. The act of distributing pornography to minors was also decriminalised in 1973.

On July 23, 1993, the 27th Law amending the Criminal Code came into force (BGBl I.S. 1346), which made significant changes to §184. For example, possession of child pornography has been criminalized for the first time; the criminalization of distribution of pornographic publications depicting violence against children was strengthened; undertaking to import it by means of a mail-order business and selling such products in places accessible to persons under 18 were also criminalized.

The Criminal Code of Germany was substantially amended in December 2003 to broaden the criminal offenses and increase the limits of punishment. Thus, §184 "Dissemination of pornographic written material" contained separate qualified offenses – paragraph 3-5 §184 of the Criminal Code, in the course of the reforms, the legislative body made them separate offenses under §184a, 184b, 184c of the Criminal Code of Germany, i.e. the legislative body distinguished between hardcore and extreme hardcore pornography, including child and youth pornography in the latter.

§184, "Dissemination of Pornographic Written Materials" was reformed in detail, criminalizing the distribution, public display, production, ordering, supplying, procurement, advertising, importing or exporting pornographic printed materials containing violent sexual acts or sexual abuse of persons under the age of eighteen. Separately, the following constituent elements were singled out:

§184b – Dissemination, procurement and possession of child pornography.

In 2008, under the influence of the framework decision of the Council of the European Union on combating the sexual exploitation of children and child pornography, adopted on October 31, 2008, youth pornography was criminalized by the introduction of §184c – "Dissemination, procurement and possession of youth pornography".

A heated debate was sparked after the adoption of the Law on Fight Against Child Pornography in Communication Networks. Based on this Law, German government planned to enter into an

agreement with leading providers within the next 6 months, whereby the providers would block websites containing child pornography by displaying a stop sign and notification that the content of the site was illegal. However, some opponents of the law were pointing out that the law "disproportionately infringes on fundamental rights", while others believed that the blocking measures were limiting the secrecy of telecommunications. Still, others argued that this was a "placebo solution" and that it was necessary to provide for not only blocking, but also removal of pornographic sites. Under the pressure from opposition factions of Bundestag, the law was repealed on December 28, 2011.

During the 2015 reform, separate offenses were classified under §184d, §184e, and §184g, which criminalized making pornographic content available through broadcasting or telemedia services; accessing child or youth pornographic content via telemedia; attending a presentation of pornography by children and youth, and prostitution likely to corrupt juveniles.

The last significant changes took place in January and March 2020, when the Bundestag amended §184b of German Criminal Code, criminalizing the attempts to contact minors online via the Internet for the purpose of sexual violence. Legislators have extended the powers of police officers to perform public tasks arising from agreements with competent public authorities; or to perform official or professional duties. Thus, as part of the investigation, with the permission of the judge, police offices were entitled to use generated child pornographic materials to gain access to the relevant Internet platforms.

Currently, the offenses of dissemination of pornographic written material (§184 of the German Criminal Code); dissemination, procurement and possession of child pornography (§184b of the German Criminal Code); or youth pornography (§184c of the German Criminal Code); making pornographic content available through broadcasting or telemedia services; accessing child or youth pornographic content via telemedia (§184d); attendance of presentations of child and youth pornography by children and juveniles (§184e); prostitution likely to corrupt juveniles (§184g) are included in the group of offenses relating to criminal acts against the sexual self-determination of minors.

These crimes pose a significant danger to the public, as they give rise to sexual violence, encroach on the public morals of young people, and cause irreparable physical and moral harm to children (minors).

There is currently no unified approach to understanding the term "pornography" in German

scholarship. Nicola Döring identifies three types of sexual imagery: erotica; simple pornographic, softcore or hardcore imagery; and pornography.

The latter type of sexual imagery is prosecuted under German criminal law. The Federal Court of Justice (BGH) ruled in 2014 that pornography as an illegal act is characterized by the following characteristics: it aims exclusively or predominantly at arousing sexual stimulation in the viewer; it exceeds the limits of sexual propriety established in accordance with universal human values. The term "pornographic material" refers to obscene material with content intended to corrupt and defile a citizen.

German criminal law distinguishes between child and youth pornography, which refers to images or performances containing acts of sexual violence against children (under 14 years of age) and adolescents (14-18 years of age). It does not matter to the enforcer whether it is a real or realistic event, or a fictional image, such as a cartoon. Not only photographs, books and magazines, but also relevant materials placed on analogue and digital sound and graphic media and data storage can be considered pornography.

The legislative body classifies the acts stipulated in §184 of German Criminal Code – Dissemination of pornography as criminal infractions. Thus, a penalty of imprisonment for a term not exceeding one year or a fine is stipulated for the purchase of pornographic written material involving persons under 18 years of age for oneself or for a third party.

The basis for criminal liability is the possession of a document relating to sexual acts and its availability to a third party.

Possession of pornographic written material shall mean the ability to have actual substantive control over the material in question. In case of digital images, possession is defined as storing them on a hard disk or other data storage medium. Information and images can also be stored in the cache, which equates to email attachments, i.e. images attached to an email. Pornographic material may also be stored in the hard disk buffer.

A victim is a person under 18 years of age. The Federal Constitutional Court once pointed out that if the victim is a "fictitious young person" who is in fact an adult, but a third party (an observer) perceives the victim to be a minor, the perpetrator's actions fall within the scope of §184c of the German Criminal Code. The harm caused to the victim must be serious. The jurisprudence proceeds from the assumption that there may be an abstract possibility of serious social and ethical disorientation in the minor.

The object of the crime is public morals and civil ethics. The main purpose of §184 of German Criminal Code is to protect minors from exposure to pornography. Therefore, they should not have access to such materials.

The objective side of §184 of German Criminal Code is expressed in the fact that the perpetrator offers or leaves pornographic material freely accessible to minors; keeps such material in a place accessible for viewing by a person under 18 years of age. This can be a house, other premises suitable for permanent or temporary occupation or residence: house, flat, retail outlets, kiosks, post offices, libraries, reading groups, except shops not accessible to minors; sends by mail; or displays in a public place accessible to minors; or the perpetrator allows minors to attend such a place; and if the perpetrator produces, obtains, supplies, stocks or exports it in order use it; or undertakes to export it in order to disseminate it to third parties.

The subjective aspect is expressed in the form of intent. The perpetrator must be aware of what he/she is doing, and to want it. Thus, a person will not be prosecuted if child pornography comes via an Internet page, or an email with attached files containing the relevant pornographic material.

The subject of the offense under §19 of German Criminal Code is a person who has reached the age of 14, but the perpetrator, aged 10 to 14, may be brought to justice in accordance with civil law. For example, Charlottenburg court sentenced a 13-year-old boy to pay his girlfriend of the same age a compensation of 1,000 Euros for sending her private photos via WhatsApp.

§ 184b of German Criminal Code "Dissemination, procurement and possession of child pornography" defines child pornography, as sexual acts by or before a person under the age of 14 (child); reproduction of a fully or partially undressed child in an unnatural sexual posture; or sexually stimulating reproductions of the naked genitals or buttocks of a child (sexually stimulating visualisation). The purpose of this article is to prevent the imitation and indirect promotion of child sexual abuse.

A victim is a person under the age of 14. The Federal Court has repeatedly stated that if an objective observer perceives a person as a child (a person under 14 years of age) regardless of actual age, the acts in question are subject to §184b of German Criminal Code.

Virtually created images, fictional characters or manga, which can be used as an object, are also prohibited in Germany. For example, at the end of December 2017, the FSK (Self-Regulatory Body of

the Movie Industry) banned the exhibition of anime series "My Girlfriend is a Faithful Virgin" on the grounds that episode 3 presents minors in an unnatural position with a gender-sensitive accent.

Applicable law: Clause 15, paragraph 2, 4 of the Youth Protection Act, dated March 10, 2017, Paragraph 1 (9) of the Treaty on the Protection of Human Dignity and the Protection of Minors in Broadcasting and in Telemedia, and § 184b of German Criminal Code prohibit the depiction of minors in an unnaturally gender-sensitive positions. Judicial practice, however, points out that "expression of the child" and "physical development" should also be taken into account when awarding judgement.

Posing for intercourse must involve active actions by the child such as spreading the legs, the child must adopt unnatural sexual postures. However, not every material containing the image of a naked child or child genitals should be qualified as an offense under §184b of the German Criminal Code. Since passive behaviour alone is insufficient, images of naked children in their natural positions – sleeping, on the beach, in the bathtub, changing clothes – would not be considered pornographic material, as there is no clear sexual meaning in the behaviour of children.

The subjective aspect is expressed as follows:

- showing actions of sexual nature by or in the presence of a child;
- display of (partially) undressed child in an unnatural posture emphasizing the gender. So-called "staging" also falls under this act;
- leg spreading or showing sexually provocative body parts. In this case, it is not necessary for a child to realize the sexual nature of his/her actions;
- sexually provocative display of the naked genitals or buttocks of the child.

Showing child's naked genitalia or buttocks does not require any additional unnatural, gender-emphasising posture. The display as such is sufficient for bringing criminal charges.

Law enforcement and court practice proceed from the assumption that the type and size of the penalty depends on the number of stored files containing such products. For example, if there are no more than a hundred files on the media, the act in question constitutes a misdemeanor offense, so the prosecution may refuse to press public charges under §153a of the German Code of Criminal Procedure, but may at the same time impose an obligation on the accused to pay a monetary claim, in certain cases to be examined by a sex therapist in order to ascertain whether special therapy for pedophilic tendencies is necessary, and an obligation to pay the costs of special examination of files containing child pornography.

If the media contains several hundred to a thousand files or the material is of a violent nature, the applicable sanction is usually imprisonment for more than three months or a fine of more than 90 daily wage rates. The most severe penalties are provided for possession of several thousand to 10,000 files on a medium. In some cases, additional disciplinary measures – suspension from public service – are allowed as an additional punishment.

The acts characterising youth pornography are specified in §184c of German Criminal Code, namely: sexual acts committed by a person over fourteen but not yet eighteen; or before him or her, or the display of a fully or partially undressed person between the ages of 14 and 18 in an unnatural sexual posture.

Disposition of §184c of German Criminal Code virtually repeats the disposition of §184b, with the exception of clause c) of §184b of the German Criminal Code "sexually provocative reproduction of a child's bare genitalia or bare buttocks". It is worth noting that the creation of pornographic material without the intention of dissemination, the possession of such material shall not be subject to criminal liability if the person who posed for such purposes consents to posing.

Disposition of §184d (2) provides for criminal punishment against anyone who undertakes to demonstrate images of child pornography via telemedia. The same applies, according to §184b (2), to youth pornography. The purpose of this provision is to protect against the indirect sexual abuse of children and adolescents. The legislative body also banned the organisation and attendance of presentations of child and youth pornography in §184e of German Criminal Code.

## 5 CONCLUSION

Child pornography is a global problem for any state. For decades, the German authorities have been searching for the best mechanisms to combat this evil. In 1993, possession of child pornography was criminalised for the first time. However, reforming the institution by repeatedly amending the German Criminal Code has failed to solve this problem, as the emergence of new digital forms of crime on the Darknet has become another serious threat to society. In 2017, for example, Germany shut down Elysium, the largest child pornography platform with around 90,000 users worldwide, indicating that the State needed to take urgent, comprehensive (political, socioeconomic, legislative) measures to counteract

sexual violence against children and young people on the Internet. Therefore, we believe that the amendments made to the German Criminal Code in March 2020 will help the German law enforcement agencies counteract sexual violence against children and young people in more detailed and professional way. We assume that further tightening of control over the Internet and Darknet, as well as tougher penalties for crimes against the sexual identity of children and juveniles, will also help counteract the increase in crime in this category of cases.

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