

Right to refuse testimony



Brochure for the workshop

„The role of social work in changing societies with a strong orientation towards order and safety“

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The role of social work in changing societies with powerful political drives towards order and safety

Demand for a right to refuse testimony in the profession of social work

What we are currently experiencing in Germany, Europe and beyond is a growing orientation of societies towards greater order and safety. The issue of being obliged to provide regulatory agencies and the judiciary with information in social work is also arising in Germany. Does the supported person take centre stage, meaning that the colleagues can refuse to provide regulatory agencies and the judiciary with information (*in parallel to the right to refuse testimony established in Germany for a number of professions, etc*), or can the colleagues be forced to testify, against the interests of their wards vis-a-vis the regulatory agencies and judiciary, when the discovery of evidence is in the foreground?

Stay alert and nip things in the bud

The International Definition, "Code of Ethics" and International Principles (implemented in Germany by the professional Code of Conduct) show the way forward and required attitude. That this call to adopt a corresponding stance is not met with approval by all parties involved is understandable. Social work maps a cross-section of society through the people employed in it. All social currents are represented in the profession of social work, too.

It is therefore all the more urgent for the profession of social work to specifically dedicate itself to this subject if its members are not to become "social officials" serving as "implementation aides of regulatory state agencies".

Respecting the mandate of social work

According to Prof. Dr. Thomas Schumacher (member of the DBHS Ethics Commission speaking for the discipline) "social work realizes a societal mandate that is oriented towards the common interest, but requires the individual interests involved there to be taken as a starting point" (Ethics Commission 2019).

At a 2019 meeting of the Ethics Commission in Neustadt an der Weinstrasse, Prof. Dr. Thomas Schumacher also found that "ethics are the criterion for the profession". But this claim can only be based on the ability to independently clarify and interpret one's own operational framework and how it relates to society. The conception of the human being becomes an argument in this.¹ This notion needs to be seen as the "starting point for social work". There are principally many – indeed any number of – ways of formulating conceptions of the human being while – just to make this very clear once again - the understanding applicable to social work for historical reasons (based on its development history) shows its embedment in modern European thought. This is not necessarily a limitation, but a positioning borne by a commitment to the idea of human rights (see also Schumacher, 2018, p. 117 in this regard).

"It acquires its value framework from this basis. And the manner in which this value framework demonstrates its claim as a profession also highlights that the profession includes the aspiration that the professional activities provided in it be realized in keeping with prescribed ethical frame lines. This consequently leads to an understanding of social work which is recognizable by its ethical frame lines – and threatened by departures from such lines. That is the perspective of a professional ethics, however", as Prof. Dr. Schumacher put it.

1. This thought is found in Schumacher, Thomas (2018): *Mensch und Gesellschaft im Handlungsraum der Sozialen Arbeit. Ein Klärungsversuch*, Weinheim and Munich, p. 112 ff. It makes clear that the lines of ethical argumentation converge in the conception of the human being. In its conception of the human being, social work finds the "programme" (ibid p. 112) from which its action imperatives derive.

Painful cuts to the activities in social work

Where do we stand in Germany? Germany has a right to refuse testimony. *"The right of relatives e.g. fiancées, spouses, civil partners, members of the family (Code of Criminal Procedures § 52, , Code of Civil Procedure § 383 I.1-3) and members of specific professions e.g. clergymen, lawyers and doctors (Code of Criminal Procedures § 53, 53a , Code of Civil Procedure § 383 I.4-6) to refuse to testify in court proceedings, i.e. provide information relating to the case. They need to be informed of this. Persons subject to professional confidentiality only enjoy the right to refuse testimony with respect to facts entrusted to them in their professional capacity. If not released from their duty of confidentiality, witnesses need to decide for themselves whether they want to testify or not. This in consideration of the fact that the unauthorized disclosure of professional secrets is punishable (Criminal Code § 203)."*

Such a right to refuse testimony already existed for some fields of social work in the past. But this unfortunately failed to cover all its fields of activity, as the grounds for the decision refer to a 1972 ruling by the Federal Constitutional Court. In this period, Germany neither had a professional code of ethics, nor was the profession of "social worker/social education worker" conclusively defined in legal terms. This has been seen to in the meantime.

Germany has currently witnessed attempts to include social work in the legislation applicable to the right to refuse testimony by political means. But the political responses rather tended to contain dismissive feedback. The reasons given for example included the statements that this rejection is in the name of "justice and the constitutional state", that the "discovery of evidence is in the foreground", that the granting of a privilege "does not legitimize a corresponding intervention in the constitutionally required discovery of the truth", etc.

Given these reasons, one can summarily say that social work is thus de facto to be allocated/subordinated to the regulatory agencies and judiciary.

This de facto places law and order above the social

This development started emerging as early as 2016. Now Germany has reached a new stage. Virtually all the Länder have tightened their police laws. In Saxony, the right to refuse testimony has been further curtailed by a new police law (draft bill, status 10 April 2018). "74 parliamentarians voted for the draft by the black-red coalition and 34 against it – with nine abstentions. The amendment, which will give the police markedly greater powers in the fight against terrorism and cross-border crime, is to come into force on 1 January 2020. It is the first comprehensive amendment of police law in Saxony for 20 years." (MDR - online 11/04/2019) – available at

(<https://www.mdr.de/sachsen/politik/landtag/polizeigesetz-sachsen-landtag-102.html>)

The draft on Saxony's government website has the following to say on this: *"Measures that would affect persons bound by professional secrecy as per § 53.1.1, nos. 3 and 5 of the Code of Criminal Procedure, apart from lawyers and chamber legal advisors or their professional assistants as per § 53a of the Code of Criminal Procedure, and are expected to yield findings this person would be permitted to refuse to testify on are admissible, in derogation from paragraph 1, insofar as required to prevent a significant risk for the body, life or liberty of a person or the existence and safety of the Federation or a Land."* (available online at <https://www.polizei.sachsen.de/de/dokumente/Landesportal/Referentene EntwurfXArtikelgesetzXNovelle.pdf>).

What emerges in practice, however, is that law and order are coming to the fore even before these tightened regulations. The social work provided in fan projects (looking after adolescent football fans) has witnessed several proceedings in the last two years where regulatory agencies and judicial authorities demanded testimonies from colleagues against their clients. Colleagues are being dragged into proceedings again and again, now also under threat of coercive detention (prospectively imprisoning them for their refusal to provide information until they do).

Expert opinions

In 2014, the Fan Project Coordination Office (FPCO) and Federal Working Committee of Fan Projects (FCFP) had established a working group looking into the legal situation of colleagues working in the field of fan projects. Prof. Dr. Titus Simon and Prof. Dr. Peter Schruth from Magdeburg/Stendal University elaborated an expert opinion that was published by the FPCO in March 2018. This expert opinion comes to the clear conclusion that a reform of § 53 of the Code of Criminal Procedure is seen to be urgently required, including an expanded right to refuse testimony for the fan projects. This is intended to be also applicable for other sensitive fields of social work requiring comprehensive protection of confidential information in their dealings with clients.

In the eyes of the profession

This brochure contains two commentaries on the "right to refuse testimony from the profession's perspective". First off is Michael Leinenbach's article "Right to refuse testimony awakened from deep slumber" (Forum Sozial no. 3-4/2018), which examines the ruling of the Federal Constitutional Court in its 1972 decision (BVerfGE NJW 1972, 2214) and expanded decision of 1988 in its statement of grounds referring to Basic Law Article 3 (equality before the law) and constitutionality. In it he shows that the obstacles and failures highlighted by the Federal Constitutional Court have already been overcome today.

The second commentary is provided by Prof. Dr. Thomas Schumacher. He has derived an own "right to refuse testimony for the profession of social work" from the attitude and aspirations of social work as a profession.

Author: Michael Leinenbach – DBSH chairman

Right to refuse testimony awakened from deep slumber

Having been in a deep sleep since the 1980s, the debate around the right to refuse testimony has now been roused again by the Fan Project Coordination Office (FPCO) of German Sports Youth (dsj) in cooperation with its partners. "One foot in jail – on the necessity of a right to refuse testimony in social work" was the name of a one-day conference organized by the dsj Fan Project Coordination Office (FPCO) together with the German Professional Association for Social Work (DBSH) and the Federal Working Committees for Fan Projects and Street Work on 24/10/2018 on the premises of the Hesse Sport Association.¹ Speaking for the DBSH, the federal chairman recommended a clear "yes" for a necessary right for social workers to refuse testimony.

The FPCO had already established a working group on the right to refuse testimony in cooperation with the Federal Working Committee of Fan Projects (BAG) in 2014. In a position paper, the working group describes the foundations of the work with fan projects. It follows Social Security Code VIII, the "National Concept for Sport and Security" (NCSS) and the working principles of street work and mobile youth work. Successful work with fans is based on a "trusting relationship with the target group, developed by intensive relationship building". Given the lack of a clear-cut applicability of § 203 of the Criminal Code (Secrecy) in the practices and conduct of the police and public prosecutors, the paper calls for social workers to be included amongst the professions named in § 53 of the Code of Criminal Procedure (Right to refuse testimony).²

To support this demand and other positions detailed in the paper, the FPCO commissioned a legal opinion examining a possible need to reform § 53 of the Code of Criminal Procedure, Right to refuse testimony. This report was drawn up by Prof. Dr. Titus Simon and Prof. Dr. Peter Schruth from Magdeburg/Stendal University. The FPCO published it in March 2018.³

1. <https://bit.ly/2PKlQpf>

2. The position paper is retrievable here.: <https://bit.ly/2Sb9N68>

3. <https://bit.ly/2Bs0jwq>

The report

The bottom line of the report is a demand to reform the right to refuse testimony. It deems the protection of confidence afforded social work inadequate for consultative fields of activity in critical situations. Especially the field of outreach work is seen to require a statutory guarantee of confidentiality, with § 53 of the Code of Criminal Procedure needing to be expanded for this group accordingly. The service law permission proviso needs to be expanded to other fields of employment, it says, and a sponsor-specific application procedure introduced over and beyond this.

In the report's opinion, the bases and attitudes cited by the Federal Constitutional Court in its 1972 ruling (BVerfGE NJW 1972, 2214) 4 and expanded decision in 1988 5 in its explanatory memorandum relating to Basic Law Article 3 (Equality before the law) and constitutionality have ceased to reflect realities by a wide margin.

The report summarized the decisions and attitudes maintained by the rulings as follows:

- that this profession is not defined clearly enough and not consistently regulated,
- that this profession is still lacking specific preparatory training and a professional ethos grown in long professional practice,
- that the trusting relationship between the welfare worker and ward is less deserving of protection than an exhaustive investigation of the truth in criminal proceedings,
- that welfare workers are disregarding their duty of confidentiality by reports to the mandating entities anyway,
- that there is no "practical need" as the social workers are mostly civil servants and subject to the service law permission proviso, and
- that the term of "social secret", although introduced (1972), has in all other respects failed to acquire firm outlines so far.

4. <http://www.servat.unibe.ch/dfr/bv033367.html>

5. BVerfG, NDV 1972, 331 ff. so-wie BVerfG, NJW 1988, 2945 ff.

Demanded long since

The role of professional associations at the time

In 1973, the then director of the "Professional Association of Social Workers / Social Educator" (BSS) 6, Günther Grunert, wrote in "Sozial aktuell" (1/73 – 24th volume – January / March 1973) that the debate around the right to refuse testimony had already been intensively pursued in the 1950s. "Social work" had already seen itself "on a level with doctors, clergy and lawyers" even then.

He points out that the (then) Federal Minister of Justice, in a letter dated 07/05/1952, rejects the inclusion of social workers in the group of those authorized to refuse testimony. The reasoning at the time was already also that an approval could only be provided for professions that, after their preparatory training, are able to maintain a "well-founded professional ethos grown in a longer history of the profession and with their basis in professional law with court of honour, etc ". The various professional associations of the time tried to rebut this argumentation. The failure of this attempt had to be conceded after the Federal Constitutional Court's ruling dated 19/07/1972. After the publication of this ruling, the colleagues in the BSS and others continued to campaign for "social workers" being granted the right to refuse testimony in publications, surveys and public relations.

As a consequence of these activities, the association received a letter by the then Federal Minister of Justice on 7 October 1972 saying: "... The group of persons authorized to refuse testimony is meant to be kept as small as possible in criminal proceedings in the unanimous opinion of all judiciary and scientific bodies involved in the consultations for drafting a criminal law amendment act. The right to refuse testimony is principally only to be granted to professions that, after their preparatory training, are able to offer a guarantee that no abuse is to be feared with a well-founded professional ethos grown in a longer history of the profession and with their basis in professional law with court of honour, etc. 7

6. The BSS was one of the precursor associations of the DBSH
7. „Sozial aktuell“. (1/73 – 24. Jahrgang – Januar / März 1973)

If one follows the discussion at the time, the expansion of the professions foundered on the "preparatory training", on social work not being conceded a history as a profession, the lack of rules governing the profession, and the lack of a professional code of ethics.

Discourses in the action area of juvenile courts and juvenile court representatives

Further important discussions took place in the areas of juvenile courts and juvenile court representatives. The 16th Conference of Juvenile Courts in 1974 thus described the bandwidth between the required relationship of trust and necessities of the juvenile court proceedings: 8

"To the extent that consultancy and education are based on relationships of trust, they can be jeopardized by the disclosure of personal data. This especially applies with respect to the juvenile court representatives' and probation officers' obligation to testify, which remains unaffected by the statutory duty of confidentiality and (planned) right to refuse testimony of the social worker providing the consultancy. ...

Whereas a complete release from reporting and communication obligations would considerably impair the information basis and action options of the other parties involved in proceedings, and thus put the educational objective of the juvenile court proceedings at risk.

The role conflicts of the social worker, simultaneously entrusted with investigation and treatment tasks, can insofar neither be solved by extending the right to refuse testimony to all forms of social work. A function-related protection of relationships of trust can help defuse such conflicts, however."

The report then problematizes that the "continual discussion about training courses, job descriptions and professionalization that the social workers are generally still in search of a firm place." But clarifying the latter needs to be accorded an "eminent practical importance" after the FCC ruling., he says.

8. Schriftenreihe der deutschen Vereinigung der Jugendgerichte und Jugendgerichtshilfen, new series – issue 9 – 1975 - Selbstverlag der Deutschen Vereinigung für Jugendgerichte und Jugendgerichtshilfen e. V., Hamburg 13, 28 Schlüterstr. Report on the proceedings of the 16th German Juvenile Court Day in Darmstadt from 17 to 20 September 1974

He also sees the issue of the right to refuse testimony as an "essential conflict between administration functions and the inherent requirements of social work", while "commending a loosening of the hierarchic bureaucratic structure, and extensive individual responsibility of the social workers". There were hopes at the time for a later solution by way of a "therapeutic orientation of social work, as already recognizable in the area of probationary services".

Renewed discussion of the subject was occasioned by the 18th German Juvenile Court Day, with various working groups established as part of the events. Working group X, "The cooperation between juvenile courts and probation services as a process", agreed that communication with the juvenile court judge is necessary and able to have a positive effect on the decisions to be made. As to the question if facts of relevance for the decision may be withheld from the judge in certain circumstances, most were of the opinion that such a course of action is legally and methodically inadmissible. Everyone agreed, though, that probation officers should be provided with a right to refuse testimony by law, to a certain extent, in any case. 9

Prof. Schöch, who took part in workshop X, is quoted as follows: "He said that he was unable to agree with paragraph III of the work results as a legal specialist, true to expectations, but would, instead of making this the subject of a separate motion, prefer to emphasize that a right to refuse testimony for probation officers was unthinkable under the relevant legal framework, and also not desirable, as it would principally change the position of the probation officer. Admitting that thinking about a right to refuse testimony for social workers is a different matter, he asked for this difference to be paid unflinching attention." 10

9. Schriftenreihe der deutschen Vereinigung der Jugendgerichte und Jugendgerichtshilfen, new series – issue 12, 1981 „Die jugendrichterlichen Entscheidungen – Anspruch und Wirklichkeit“ – published by the Deutsche Vereinigung der Jugendgerichte und Jugendgerichtshilfen e.V. – page 478 10. *ibid.*, p. 462
10. *Ebd.*, S. 462

The same document also quotes judge Stein at Cologne Higher Regional Court: "It was very difficult and perhaps not even possible, he said, to provide a right to refuse testimony where a professional duty applies, but should on the other hand indeed be possible to grant a right to refuse testimony below and up to this level, for example with respect to facts the probation officer finds out about their offenders on probation by way of third parties, or that relate to the time before the start or after the end of the probation period, or possibly also up to the threshold where the duty to report arises in the first place." 11

This clearly shows that the possibility of granting social workers a right to refuse testimony is ultimately seen to depend on whether the respective "professional duty", i.e. the professional mission, is directly linked with given obligations of the social worker to cooperate with the courts. Besides the juvenile court representatives, this can also concern the activities in youth welfare offices, for example, insofar as linked with decisions against a risk to the child's well-being, and that cooperate with the family court and guardianship court and initiate corresponding risk prevention measures or perform equivalent activities required for the committal of psychologically disturbed and/or mentally ill persons.

Discourse in the other fields of social work

Years later, Heiko Kleve attempts a corresponding differentiation in his publication "History, theory, action areas and organizations of social work – reader: fragments – definitions, introductions and overviews": 12

Social work/social counselling and therapy: differences and commonalities

11. Ebd., S. 563

12.

http://www.forschungsnetzwerk.at/downloadpub/kleve_2003_sozialarbeit_Reader.pdf

<p>Working for change – based on the difference: actual and target</p> <p>The intention is to change a current state of human behaviour or perception (actual state) in the direction of a desired state (target state). This involves the application of various measures describing and explaining individual behaviours or perceptions(i.e. evaluations) and/or social conditions that are ultimately meant to change them as respectively desired.</p>	
<p>Double mandate:</p> <p><i>Simultaneously working for clients and society and/or public institutions. (No right to refuse testimony)</i></p>	<p>Univocal mandate: <i>for the clients and/or patients. (Right to refuse testimony)</i></p>

The dividing line in this debate for the right to refuse testimony hence ran between social work in general and the performance of tasks in the governmental administration associated with a special status (e.g. civil servants) and/or special tasks in the action area of social work.

Further development of social work

In summary, the problematization of the right to refuse testimony in politics and jurisprudence rests on three lines of argumentation:

- the lack of consistent training and other regulations governing the profession;
- lacking alignment with a professional ethos
- mandating of social work in the performance of public assignments.

These lines of discussion will be addressed below:

Development of the profession

The decisions of the Federal Constitutional Court are based on a social work that largely moves in municipal "welfare" commissioning, is not that professional, and moreover seen to operate without basis in a professional ethos and training standards. The report quoted above has this to say on the subject: "This outdated understanding of welfare is opposed by the developments of over 40 years of professionalism, methodical standards, a professional ethos that has increasingly gained general valence, as well as normed training standards." The position of the Federal Constitutional Court de facto needs to be regarded as outdated.

Training for social work

Relevant degree courses have afforded full access to the respective action areas of social work for over 20 years already.

The training / study contents for social work have most recently been comprehensively regulated with respect to the teaching fields and envisaged standards by way of the quality framework for social work (QR SozArb 13) in the Bologna process, explicitly including their university degree courses and educational fields.

This is based on the "Bologna qualification framework" (Framework for Qualifications of the European Higher Education Area - QF EHEA) and thus compatible with all other qualification frameworks referencing the QF EHEA. The QR SozArb serves as a generally recognized reference document for the discipline and profession of social work. In terms of training, there is thus no longer any notable difference from other professions granted a special right to refuse testimony.

Rules of professional conduct

The rules for the profession take various forms on a European and international level. The USA requires special qualifications and post-graduate training as an entry condition for practicing the profession, similar to physicians and psychotherapists. Great Britain maintains a separate professional register. The profession can only be entered by accreditation here. The system in Germany has a more open design. It needs to bear up to the European legal specifications on the one side and satisfy the need to employing skilled workers and of state accreditation on the other, at least for the fields of activity named in Social Security Code VIII. The Länder's accreditation laws for caring professions can be referred to correspondingly here for the degree courses in social work. A regulated entry of the profession in the wider sense can thus indeed be assumed here, similar to an accreditation.

Statutory regulations governing the profession

In many cases, the state has farmed out the accreditation for specific occupations to the profession's own organizations. This especially where the state would be either overtaxed with monitoring the quality of the respective services, or where they are linked with special responsibilities. A corresponding university degree will regularly suffice as a permit for entering the profession with the Chambers of Industry and Trade, however.¹⁴

What is also regularly at issue in the professions granted a special right to refuse testimony is their status in the context of their specific missions under constitutional dictates excluding closer interference by the state, with the administration of justice, freedom of religion, health, the freedom of the press and respect for human dignity (esp. in medicine) to be named here.

That the services of social work are also closely derivable from the requirements of the constitution shall be demonstrated below.

The last time the DBSH pointed out the need for legal client protection in the consultancy and support provided by social work was in its Basic Programme of 1998. The association accordingly campaigns for "the right to refuse testimony in criminal procedures to become applicable in many fields of activity".

In its quality criteria, the DBSH has required social workers to observe professional confidentiality with respect to their clients, and to point out its limits in keeping with the respective service's mission, since 2001. The "demand for a comprehensive right to refuse testimony" is brought home in this context.

This objective follows the ethical orientation of the profession, which is called into question by the Federal Constitutional Court, alas.

14. These own organizations under professional law are increasingly also serving the curtailment of market competition, however, and have repeatedly also courted criticism in the past.

Its (indirect) commissioning in society is based on the imperatives of human dignity and the welfare state. The helping, educational (developing, activating) and advocational person-oriented objectives of social work gain in importance wherever the state is unable to reach people by setting legal frameworks and providing material help,. And such a setting demands embedment in a professional ethos:

Ethical orientation

The German professional association for social work, DBSH, represents Germany's profession of social work in the global umbrella organization, "International Federation of Social Workers" (IFSW), as well as in the IFSW Europe on a more regional level. The IFSW is a worldwide association of social workers from over 116 countries. They jointly campaign for social justice, human rights and social developments by giving the profession of social work a voice on an international level.

As a worldwide organization, the IFSW lacks the structures of the German legal system. Similar to the honour courts in the German system, the IFSW has adopted a code of ethics and international principles for the profession of social work around the world. The IFSW approved "Ethics of Social Work – Principles and Standards" as early as 1994 at its General Meeting held in Colombo, Sri Lanka, on July 6-8 of that year. The resolution adopted at the time already declared: "The problem areas raising ethical issues directly are not necessarily universal due to cultural and governmental differences. Each national association is encouraged to promote discussion and clarification of important issues and problems particularly relevant to its country." 15

Special methods with global applicability were adopted for the solution of issues and/or problems.

15. Resolution of the IFSW General Meeting on June 6-8, 1994, in Colombo, Sri Lanka
- Ethics of Social Work – Principles and Standards

The General Meetings of the International Federation of Social Workers (IFSW) and International Association of Schools of Social Work (IASSW) then adopted the Ethics in Social Work, Statement of Principles in Adelaide, Australia, in October 2004. This resolution was also applicable for the profession of social work worldwide. It was based on the Definition of Social Work adopted by the IFSW and IASSW at their respective general meetings in July 2000 in Montreal, Canada, and then as their joint definition in Copenhagen in May 2001:

"It is the responsibility of the national organizations in membership of IFSW and IASSW to develop and regularly update their own codes of ethics or ethical guidelines, to be consistent with the IFSW/ IASSW statement. It is also the responsibility of national organizations to inform social workers and schools of social work about these codes or guidelines. Social workers should act in accordance with the ethical code or guidelines current in their country. These will generally include more detailed guidance in ethical practice specific to the national context."

The "Ethics in Social Work, Statement of Principles" document was adopted at the General Meeting of the IFSW and IASSW in Adelaide, Australia, in October 2004. ¹⁶

As the representative of the German profession of social work in the IFSW global and in keeping with the latter's instructions, the German Professional Association for Social Work, DBSH, implemented the "Code of Ethics" in its professional ethos for Germany, with the "Professional ethical principles of the DBSH" modified in 2014 and adopted as the "Professional Ethics of the DBSH".

This professional code of ethics describes the principles of professional practice, detailing them with respect to the activities in the own professional working environment in dealing with people, professional colleagues, members of other professions, employers, organizations and in public. 17 The International Principles themselves and the International Definition of Social Work were translated and published, the latter in the German translation coordinated with the Social Work Faculty Conference (FBTS).

To implement the international principles in conflict cases and/or issues and problems, the DBSH established a professional chamber that is partly able to satisfy the requirements for a court of honour system on the basis of its professional ethics and the principles.

It can be noted in summary that the profession's legal foundation with court of honour, as demanded by the Federal Constitutional Court, is being provided in keeping with the international standards and principles of social work by means of the national professional code of ethics and "professional chamber for social work" laid down in it.

Differentiations

At the time, the Federal Constitutional Court was still able to state that, by reporting to the mandating entities, "welfare workers" disregard their duty of confidentiality as part of their official assignment anyway and that there was no "practical need" as the social workers were mostly civil servants and subject to the service law permission proviso. Plus the fact that statutory reporting requirements apply in areas like child protection and probationary services, along with "sovereign tasks", and that without being disputed in principle.

But rather than the rule, these fields of activity tend to be the exception.

17. See *"Professional Ethics of the DBSH", Berlin 2015, p. 29f.*

By now, around 93 % of the academically trained social workers can be assumed to be working in independent charitable organizations and/or outside of public assignments that also exert control. Statutory requirements able to meaningfully limit a right to refuse testimony are only provided for the areas of probationary services, juvenile court representation, addiction aid in a "treatment not punishment" context (§ 35 of the Narcotics Act) and child protection (re. involvement in family court proceedings).

The attitude that "welfare workers are disregarding their duty of confidentiality by reports to the mandating entities anyway" is thus no longer tenable, with the mentioned work areas **18** only making up just shy of 7 % of the staff whose assignment immediately implies cooperation with the courts.

Summary

It must be principally noted that the assessments arrived at by the Federal Constitutional Court with respect to the profession, training and professional ethos no longer apply these days.

The "profession of social work" has been legally standardized according to the requirements of the European Parliament and in the course of its classification as a regulated profession. The professional recognition regulations and/or provisions regulating state approval in the sovereignty of the Länder standardize the training for the profession of social work in keeping with Basic Law § 5.3, "Freedom of teaching".

The QR SozArb qualification framework **19** underlying most professional recognition regulations includes the German-language FBTS and DBHS Definition of Social Work in its preamble.

18. The number of full-time jobs in the general social services is stated as 13,996 for 2016 (children's and youth aid workplace statistic, Dortmund University, statement dated June 2018, downloadable from [https:// bit.ly/2BrQxtZ](https://bit.ly/2BrQxtZ); once the other fields of work are added, no more than 18,000 jobs should be found overall. In 2016, destatis estimated that the total number of jobs for social workers exceeded 280,000 (see:

<https://de.statista.com/statistik/ daten/studie/461648/umfrage/ beschaeftigte-im-bereich-erziehung-sozialarbeit-heilerziehungspflege/>). The assumption of the Federal Constitutional Court that social workers are forced to disregard their duty of confidentiality by their public assignment would hence apply to less than 7 % of the jobs.

19. http://www.fbts.de/fileadmin/fbts/QR_SozArb_Version_6.0.pdf

Their inclusion ensures that human rights, inter alia, form an essential part of the training for the profession of social work, as does the Code of Ethics in its regional German interpretation (as regionally implemented in Germany by the Professional Code of Ethics), based on the international principles.

As they frame the training for the profession of social work, these foundations furnish clear guardrails for the cooperation with other public structures and agencies. Based on this, the profession of social work can no longer be regarded as a "vicarious agent" of law and order. It rather needs to be accorded the right to act independently within the framework provided by its basis in the International Definition of Social Work, the Code of Ethics and professional accreditation regulations recognized by public agencies in Germany for regulated professions. Allowing the profession a right to refuse testimony is an essential part of this.

This privilege to be accorded the profession of social work needs to be equally applicable for everybody employed in it, be it at public agencies or institutions under the subsidiarity principle.

Current discussion

The parliamentary group of "Die Linke" has picked up on the subject of refusing testimony and asked the federal government about the weighting of the required relationship of trust between social work and clientele, as well as the attendant importance of a privilege to be accorded. In Bundestag paper 19/4371 dated 18/09/2018, the Federal Ministry of Justice, which is responsible for this issue, stated the following:

„The federal government is of the opinion that the activities of social workers in the field of mobile youth work, the reintegration of young people with a propensity for violence, and counselling of victims of violence call for a special relationship of trust.

It is to be noted, however, that the interest in efficient criminal justice comes under the protected area of due process as per Basic Law Section 20.3. Insofar as the due process includes the idea of justice as an essential, it also calls for the maintenance of a functional administration of (criminal) justice, without which justice cannot be realized. This also includes the fullest possible investigation of the truth (BVerfG 44, 353 ff., ruling dated 24 May 1977– 2 BvR 988/75; ruling dated 27 June 2018 – 2 BvR 1405/17 and 2 BvR 1780/17; est. case law). The group authorized to refuse testimony in criminal proceedings therefore needs to be limited to the absolutely necessary number. A curtailment of the fullest possible investigation of the truth will thus only come into question in the presence of particularly important interests."

The government meanwhile merely considers these important interests as given in the activities of advisory services as per section § 53 numbers 1 Nummer 3a and 3b StGB of the StGB.

It is thus subjecting the profession of social work to an order and security profile that is informed by the administration of criminal justice. A social work that is quasi intended to act as a supplier for the administration of criminal justice is untenable in ethical terms and/or under professional ethics. From the perspective of the profession of social work, such an attitude must be vehemently contradicted.

All actors rather need to realize that the profession of social work is a human rights profession and that human rights come first in its practice. This attitude does not excuse the profession of social work from upholding the rights and laws of the German constitutional state. Social Security Code VIII, the Federal Child Protection Act, and similar legislation provide corresponding frameworks that will not stand in the way of a right to refuse testimony overall.

If the government sees the maintenance of a functional administration of (criminal) justice at risk, it will need to enable the respective agencies outside the profession of social work to ensure the maintenance of a functional administration of (criminal) justice.

The order and security sector should be self-contained for regulatory tasks in keeping with the protected area of due process.

Social work very predominantly serves unique, original tasks and responsibilities that are outside regulatory provisions.

Conclusion

To accord with its mission and attitude, the profession of social work must not be the vicarious agent of state sectors in the area of order and security policy.

The independence of the profession takes top priority on the basis of its values, stance, ethics and professional standards. The profession's legal foundation with court of honour, as demanded by the Federal Constitutional Court, is provided in keeping with the international standards and principles of social work by means of the national Professional Code of Ethics and "professional chamber for social work" laid down in it.

A limit to the assignment of a right to refuse testimony emerges where social work acts within a framework of sovereign tasks.

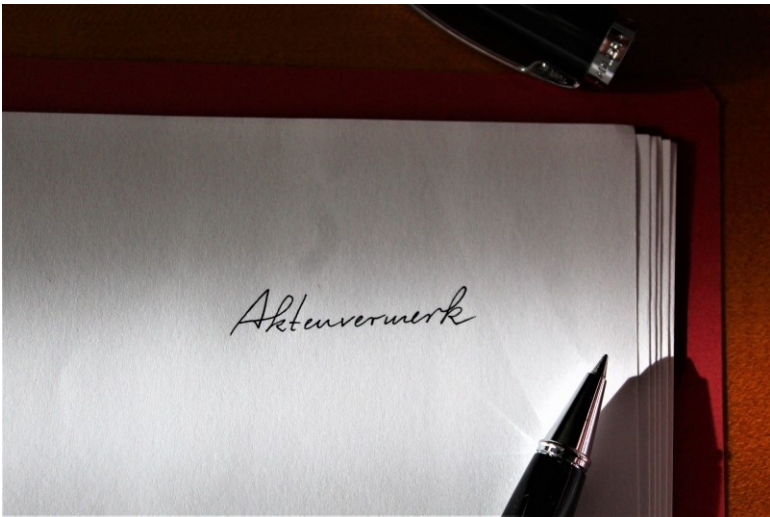
The obligation of members of the profession with civil service status to comply with the Code of Ethics and International Definition of Social Work remains in place.

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The call for a right to refuse testimony in social work

by Prof. Dr. Thomas Schumacher



Preface

The reference point and occasion for the deliberations to follow is the action area of social work in socio-pedagogical fan projects in the football fan scene. They have been around for quite a while and greatly contribute to the safety of fan groups in football stadiums today, but also to their interrelations, as it were. They support the enjoyment of football and competition, the social cohesion within fan groups, and a respectful attitude to the fans of opposing teams. They draw red lines wherever fan behaviour becomes discriminating, or also criminal, however. They oppose racism, denigration and violence, and campaign for an open and diverse fan culture that is centred on the human being.

The issue concerned in this work is the question to what extent persons working with fans as social workers, and therefore members of the profession, can be forced by the courts to divulge knowledge gained through their trusting work relationships with fan group members for use in criminal proceedings against a member of that group.

This issue is less interesting where major transgressions need to be investigated by the police or dealt with in court in the interest of an aggrieved party, but rather more so with the minor matters: when a relatively insignificant theft has been committed, the stolen goods have been returned, but the state now emphasizes a public interest in prosecuting the committed crime in court. And whether social education workers who refuse to disclose their case knowledge – not to protect a culprit, but so as not to jeopardize the basis of their work in a fan project – should be legally forced to disclose this knowledge.

1. A right to refuse testimony as a subject for social work

1.1 The situation

The rules for criminal proceedings in Germany (Code of Criminal Procedures, CCP) stipulate a right to refuse testimony in court in specific cases – cue "professional bearer of secrets". The right to refuse testimony of such

professional bearers of secrets is mentioned in CCP section 53. Professionally provided social work is touched upon there in a narrowly defined framework relating to function, as evidenced by subsection 3a and 3b, and paragraph 1. CCP section 53 thus declares:

„The following persons may also refuse to testify

(...)

- 3a. Members or representatives of a recognized counselling agency pursuant to sections 3 and 8 of the Act on Pregnancies in Conflict Situations, concerning the information that was entrusted to them or became known to them in this capacity;
- 3b. Drugs dependency counsellors in a counselling agency recognized or set up by an authority, a body, an institution or a foundation under public law, concerning the information that was entrusted to them or became known to them in this capacity; (...)"

In contrast to the members of other professions ("clergymen", "attorneys", "doctors" etc.: see CCP sections 53.1.1-3), members of the profession of social work are not listed. Their right to refuse testimony in court is limited to the involvement in very specific operating contexts. It is not generally and explicitly related to confidential knowledge they acquired in their capacity as professional social actors. The upshot being that the professional actors of social work have no right to refuse testimony in criminal proceedings.

1.2 The perspective

It should be noted right at the start that it continues to be a nuisance when colleagues in socio-pedagogical fan projects are legally forced to disclose knowledge about persons entrusted to them on the job as confidential information. This becomes a nuisance precisely when - and this shows that other fields of activity

are also concerned - the disclosure of the knowledge jeopardizes the basis of professional work that is predicated on trust and only realizable in such a framework. The irritation harboured by this nuisance gives reason and occasion for continued thought about a right to refuse testimony for actors in the profession of social work.

This demand has been raised for decades (see Damian as early as 1981, or also Simon, 2016). The right to refuse testimony is conversely regarded as a hard criterion for a profession – and its non-provision as an indication of professional standards in social work that are significantly compromised in the direction of semi-professionalism (see Müller, 2012, p. 958). The debate around the right to refuse testimony thus also reveals a struggle for a professional understanding and classification of social work as a profession.

This is the track I would like to follow here. To be noted and highlighted is the approach pursued by a current legal opinion prepared by colleagues at Magdeburg-Stendal University (see Schruth/Simon, 2018). Taking fan projects as a reference point, it clearly expresses that the field of outreach work requires "a legal guarantee that confidence will be protected", to be provided in the form of a right to refuse testimony as part of CCP section 53, with a new subsection 3c suggested there in paragraph 53.1 (ibid, p. 71). This aims in the direction of a professional bearer of secrets, but is limited to the employees of, as the suggestion puts it, a "youth welfare sponsor recognized pursuant to section 75 of Social Security Code VIII who offer consultancy to young people about what has been confided or become known to them in this capacity in the fields of outreach social work" (ibid).

The opinion's emphasis on youth welfare and youth work is rooted in its relating to the socio-pedagogical work in fan projects. The reason for arguing in the described direction for social work is evident here. But it is also a reason that has wider implications. In conjunction with an argument that is also raised in the report, there could actually also be reason to not

limit the demand for a right to refuse testimony to outreach social work, but consider it in fundamental terms and as relating to the profession.

In their report, Schruth and Simon counter the argumentation of a 1972 ruling of the Federal Constitutional Court that courts continue to cite by referring to a "changed understanding of the profession" since then (see Schruth/Simon, 2018, p. 66). One argument raised in the ruling of the Federal Constitutional Court against the demand for a right to refuse testimony in social work is that the profession of "welfare worker" does not come under the scope CCP section 53. This is said to be so because

- the profession is thought to be not defined clearly enough and not consistently regulated,
- the profession is thought to be still lacking specific preparatory training and a professional ethos grown in long professional practice,
- the trusting relationship between the social worker and client is considered less deserving of protection than an exhaustive investigation of the truth in criminal proceedings,
- welfare workers are disregarding their duty of confidentiality by reports to the mandating entities anyway,
- there is thought to be no "practical need" in all other respects as the social workers are mostly civil servants and subject to the service law permission proviso, and because
- the term of "social secret", although introduced (1972), is seen to have failed to acquire firm outlines in all other respects. ¹

1.3 Analysis of the current situation

What irritates at first sight is actually the characterization of professional actors as "welfare workers". It is also striking that social work is regarded as a kind of provisional profession that has not yet managed to develop clear outlines or set a professional ethical framework. To be noted with respect to the anachronism of the term welfare worker is a contribution by Silvia Staub-Bernasconi from the year 1995.

It points out that social work has made a great effort, from as early as the 1950s, to dispel the appearance it had "something to do with love and personal devotion", which it had been "sneered at and criticized" for "over 40 years ago". Staub-Bernasconi already postulated a "rejection of patriarchal-feudal in favour of objective/knowledge-based forms of relationship" for this period. She notes:

"Welfare was a frowned-upon, outdated term from the vocabulary of patronizing clerical as well as secular help." 2

The supreme court's assessment from 1972 bemoaning the lack of a professional ethos grown in long professional practice is also in need of revision today: The way into the profession has long since been leading through an ethically sound study course (see Schumacher, 2013; or also Social Work Faculty Conference, 2016). And the professional association has meanwhile bindingly installed a code of professional ethics for a value-oriented professional practice (see Deutscher Berufsverband für Soziale Arbeit, 2014). These are significant developments showing that the time's yardsticks in the understanding of welfare and professional ethics no longer apply. 3 That is the one thing.

Something else emerging in the statements of the FCC's ruling is more challenging and tricky, however, as it bases its rejection of a right to refuse testimony on the argument of the double mandate in its unwieldy form of control and help: help yes, but as decided by the authorities and under their supervision! Triple mandate or not, the development situation here is not all that clear as yet: We know about the altruistic understanding of the task in the 1950s and 1960s; we see how the FCC ruling follows a definition of the function of the social work profession that also informed the theoretical discourse in the early 1970s; we thirdly know that

2. For the quotes, see Staub-Bernasconi, 1995, p. 60.

3. How development processes have also advanced the professional understanding in the past is demonstrated by a look at the 1920s, e.g. when Clara Timmermans, in a contribution for the *News of the Social Women's School of the German Catholic Women's League Aachen* (1st vol. 1927, issue 3, p. 3-6), saw professionals as "female order and female welfare police" and also "women's welfare police" (*ibid*, p. 6). Nobody would call the profession's development away from such characterizations into question today.

the inside view, but also outward appearance of social work have significantly changed since then; - but also know at the very same time that social work has not managed to be perceived in a clarified role as a profession with an own perspective of standards and objectives to this day.

That this ruling from 1972 is nonetheless still being fielded against a right to refuse testimony in social work today – and the anachronism is obvious as the reproaches in it refer to the welfare work of the 1960s and even earlier – says something about the external perception of social work and the small extent in which clarification and specification processes within the profession, also underway in 1972 already, are perceived by the public. One is tempted to wonder how unfeelingly modernity is excluded for a profession that has constructively and significantly helped to shape the modernization of society since the 1970s. But the truth is: Social work is encountering this problem because it has worked on its professional self-conception so controversially, indecisively and sceptically in past decades, and often so indifferently and inconclusively.

Making demands - e.g. concerning a mandate for the profession - is not enough if an unwieldy understanding of the double mandate is still accepted to this day on the other side, or at least left unchallenged, as described. And it continues to emerge as a problem to this day that no definition, no proprium, no unique attribute is consensually put forward at social work's various sites of action.

Not having a right to refuse testimony for the profession of social work is thus either justified because the FCC's assessment was and is correct to this day, or presumably unjust because the social work in 2019 is of a different nature to that of 1972 and before. In which case this nature will need to be plausibly explained, followed by a review on this other basis of whether the criteria for a right to

refuse testimony are also applicable to social work – and with this we mean the overall profession.

1.4 Interim assessment

We suppose that social work should be granted a right to refuse testimony:

- We see the impending embarrassment of professional actors needing to betray the trust their addressees place in them – *and are meant to* place in them – because it does not extend into the criminal proceedings.
- We know that the reality of the profession of social work is informed by another understanding of its functions than 50 years ago, and that the theory and practice of social work is subject to a value perspective today that is embedded in the concept of human rights.
- We experience social work in the responsibility of a profession when it is the occupation that independently names, classifies and processes complex and diverse tasks at the social interfaces of living together.

But even if there are reasons and good arguments: no right to refuse testimony exists for social work. This is not automatically a scandal, but rather a finding requiring careful clarification and categorization. Because one thing is certain: A right to refuse testimony in criminal proceedings is the exception in the modern constitutional state and not the rule. It is a privilege that is only granted in justified cases. As an exception from the rule, its legitimate justification can only reside in ultimately affirming it. That rule, however, is the obligation to testify.

2. On the meaningfulness of an obligation to testify in modern communities

2.1 Constitutional thinking as a position

I would next like to show how the demand for a right to refuse testimony is conceivable and plausibly presentable from the perspective of a general obligation to testify. We will see how its meaningfulness

and necessity are wholly rooted in the perception of social work as a profession, and justified as a *unique* state of affairs in this regard. The perspective of an obligation to testify needs to be seen against the development horizon of modern constitutional thought. Because if we are looking for arguments for a privilege that the profession demands for itself, but find that not the privilege, but the rule it provides the exception from, represents the pinnacle in the modern constitutional state, this interdependency needs to be understood. The sketch below is designed to provide reference points and arguments for this. So why do we assume an obligation to testify? And why are there exceptions from this in the first place?

We should think back to the basic references underpinning constitutional structures as a key aspect for modern coexistence. To this end, I take a look at the history of European thought at the point where it becomes clear how the modern polity is rooted in the idea of individual liberty. We should generally be aware of the fact that this idea does not reflect any law of nature, but follows an interpretation of the human condition, and is posited as a *decision*. As a point of view and argument, it has a philosophical background.

The course of European intellectual history features interrelated periods – epochs – that each tend to accentuate different basic convictions. We differentiate three such epochs by such basic convictions and refer to them as antiquity, the medieval period and modern times. This is – admittedly – a huge historical arc that marks everything and nothing by itself, but I want to use it as a basis for rendering our situation and constitutional thought of today comprehensible by way of their basic convictions – which we can also safely refer to as basic interpretations.

2.2 The framework in the history of ideas

First off: This is about looking back to make us aware today that we are seeing our time and present in the horizon of a history which makes them appear new and current, and relates what came earlier – the preceding

history – to our present in two ways: on the one hand by way of the time immediately preceding the new, modernity, and that the new directly contrasts with, an in-between and, given that we think and interpret differently today from the way we did then, a *Middle Age*; and on the other hand via a time of beginning and foundation, setting the impulses through which our present can be understood as part of a history. This is the old and primordial, an antiquity as the epoch in which thinking and interpreting a self-conception gets underway, becoming the framework we move in to this day.

Any such categorization, such *understanding of history*, is an interpretation in itself. What else could it be? Its reference points and framework arise from an understanding of the human being that emerges as a basis in each of the epochs, is rooted in ideas that make for their epochal cohesiveness, and demonstrates various convictions by the epochs' various emphases, ways of thinking and interpreting.

The foundation in antiquity can be perceived in the insight that thinking and reason, cognition and understanding are what make us human. The key term for this in ancient Greece was *logos*,⁴ so resolutely put forward as an idea that we can feel the reverberations to this day and call an approach in its manner *logic*.⁵ The characterization of humanity as living beings whose specific resides in their ability to think – "of having *logos*" – by and large underpins the European-Occidental understanding to this day. This should be noted first of all.

A transition and transformation into a Middle Age occurred in the 4th century, when Christian religious thought started to consistently see the *logos* idea as founded in an initial and original event.

4. *Lógos* as an expression with this broad meaning: word, thought, reason, realization, thinking, teaching, science, concept.

5. The broad and yet precise meaning of the word *logos* also permits it to be translated as eloquence, reckoning or common sense.

Christian theology had a biblical argument for seeing the one god at work in human thought and cognition: "In the beginning was the logos, and the logos was with God, and the logos was God." 6 The key concept of ancient thought was given a framework that permitted – and admittedly: conclusively so – human existence to be viewed from the perspective of the Christian history of salvation.

The attraction of such a perspective was that – dogmatic or not – a monotheistic understanding of god could yield life perspectives for humanity where a primordial, universal, creative force promised inalienable happiness. We still attribute the ability and right to happiness to humans to this day. The striving for happiness sustains the scientific work: in antiquity as a striving for a happiness found by those who know the truth, and in the Middle Ages with a pointed emphasis on an expectation of happiness where all that is good and true has been *realized*.

Happiness also interests us today. With a critical glance at the promises of science and religion, we are nowadays often looking for it in experiences and lifestyles: happiness helps life make sense. We have and see a basis here from which the primordial driving forces also penetrate our critical, open, modern and postmodern world. Even today, in the self-conception of our epoch propagating a new time against the past, the logos – wisdom – and meaning of life are intrinsic spurs for how it is lived. But we are setting out from another foundation.

Let me put this briefly and succinctly: The new basis – and our foundation to this day – was uncovered by the philosophy of the 17th century. It consists of an insight, namely that all knowledge, be it acquired by experience, taught by tuition, or rooted in faith, can only ever serve to demonstrate a single true core: The existence of the person who develops this knowledge in him- or herself. We no longer use vague reason and an

6. This sentence is the first in the Gospel of John, Jo 1.1. *Lógos* is generally translated as "word" here, e.g. in Luther's translation: "In the beginning was the word, and the word was with God, and the word was God".

invisible god as criteria for what is important to us: we are this criterion for ourselves. What comes into effect here is no less than the familiar dictum of *I think, therefore I am.* 7

We are now near the point where the value of an obligation to testify in the state for people can be demonstrated. What needs to be noted is that this is exactly what a modern understanding of society and coexistence in a state is meant to be about: designing hegemony and governance in a manner ensuring that its workings won't only serve the retention of power, but the well-being of the people subjected to the governmental power.

The overarching framework of intellectual history confirms and supports this expectation. Which is why I have traced it. Three key moments emerge from this: reason (the logos) whose value we see in a context of calculation and strategy today and that helps us master life's tasks; religion (faith), whose relevance is once again tangible today where coherence and meaning are sought for lifestyles and life tasks; and finally and centrally the human being (the individual), who needs to be accorded the right to shape his or her own life.

2.3 The human being as the centre of society

This starting point for modern attitudes to life and its place in the context of the intellectual history that holds it together are important for assessing the right to refuse testimony in social work. It presents us with a starting situation that social work refers to as a profession itself.

But let me first reiterate again that it is this thought from which we start today and on which we also base our coexistence as a society on a larger scale: People exist each on their own, with themselves as their lives' starting and destination point.

7. This dictum is also well-known in the Latin version: "Cogito, ergo sum." It goes back to René Descartes (1596–1650) who formulated it first as "Je pense, donc je suis" in his "Discourse on Method" (*Discours de la méthode*), published in French in 1637.

In this, they are all equal, with the same right to pursue their interests. 8

What this means for communities today is that they need to be designed from the perspective of the person, the individual: his or her rights, aspirations and needs come into their own here. If not, we criticize this. But they are the rights, claims and needs of every one. And so that the strong won't get everything and the weak nothing, we subscribe to a type of polity as modern people where a strong, determined state ensures that the weak are provided with the protection they need against the strong to assert their interests.

That is the basic idea of the *social contract*, which has shaped the political thought of European provenience since the 17th century and which is also what I referred to above when I said that the modern polity is rooted in the idea of individual liberty. Liberty is the principle, and the contract its guarantee. If not, we criticize this. What is important here is that we start off from this liberty because we want things to be that way – and because we have a sound argument for this: the will of the individual to unfold an own life.

So if we go along with a social, cooperative life, it is not because this might be part of human nature: human nature – *my nature* – only involves concern for 'myself'. We rather go along with a life together because we want to, again. This will may be conditioned because we can't get by without one another. But it draws its power from the rules we can find for making our life together sustainable – and enabling everyone to look after themselves.

8. One could actually regard this "myself" as exalted into a principle for our times: as everybody's right to seek happiness and legitimate claim to establishing a life truth of their own.

2.4 The idea of the social contract

The historical influence of this perspective goes back to the political thought of Thomas Hobbes (1588–1679), whence it can be classified and consolidated. Two texts by Hobbes are of import for this context: one is his 1642 book "On the Citizen" (*De cive*) and the other his major work, "Leviathan", dated 1651. Hobbes stakes out the following framework:

- People have interests.
- Where people live amongst people, these interests come into conflict, threatening those who lack the power to assert theirs. Because: "Man is wolf to man."
- Regulating our life together contractually is a dictate of prudence. But this contract needs to be enforced, and that is what the state is needed for. A strong state, one that can also intimidate if need be, a *Leviathan*.

This framework entails two essential consequences:

- This structure renders person into *citizens*, contributing as bearers of rights relating to claims and needs.
- On the other side is the state with a monopoly of power charged with asserting the rights of the individual, in what is de facto a protection mandate (which will be important for the right to refuse testimony in social work a little further down.)

Hobbes is the first to demand our coexistence to be based on a contractual agreement that is binding for everyone (see also Schumacher, 2018, p. 79). His idea of the social contract points in a new direction and introduces a new political thinking. The development since then is that we as a society understand our coexistence today as an invitation to participate for every person included in it. The key features of the social contract – and basis for a modern polity – can be outlined as follows:

- The state looks after its citizens.
- The citizens give the state the power to do this.
- The state looks after the rules for living together.
- The rules serve to ensure a good life together.
- The citizens and state respect one another.
- The state legitimizes itself by acting fairly.

2.5 The obligation to participate

Our appraisal of social and political concerns today is based on an individualized understanding of the human being (see Schumacher, 2018, p. 140). One crucial point of this is: The individual is *obliged to participate* in the community. This obligation need not be detailed any further as it depends on the individual possibilities. It may be narrowly formulated here and more broadly there. But it is indispensable because it helps to protect individual liberty in the overarching social framework.

Let me formulate this more pointedly for the obligation to testify in modern communities: It cannot and must not be that individuals high-handedly refuse to disclose information they are privy to where general rules – laws – have been violated. Such an attitude would encumber the constitutional state and prosecution of crime, whose aim and purpose is public peace as a common good.

Even if the application of coercive means is restricted and the rules for criminal proceedings prohibit abuse, torture, etc. (see § 136a.1 of the Code of Criminal Procedure): The obligation to testify needs to be seen as the normal case. The life together will not worsen, but be improved if a strong state acts and ensures that everyone enjoys equal rights – or more precisely: that nobody needs to relinquish a right they are due because another refuses to contribute to clarifying a situation as required for it. The obligation of the one is the right of the other, and it is always a right based on a requirement nobody is excluded from. Social work thus also

remains correlated with an obligation to testify in content terms where damaging activities against an individual or society need to be cleared up.

2.6 The right to refuse testimony

We start off from the principle of a general obligation to testify. Protected spaces are also established, however. These relate to two areas::

1. Citizens are *not obliged to testify against themselves* (§ 136.1 of the Code of Criminal Procedure). Close relatives are also exempted from the obligation to testify (Code of Criminal Procedure § 52).
2. Bearers of professional secrets *are not obliged to testify* as a concession to occupations whose practice depends on the confidential treatment of knowledge gained about people in the course of their work (Code of Criminal Procedure § 53).

There are further provisions for fixing the protected spaces. They go in two directions, with the betrayal of professional secrets criminally prosecuted on the one side (see § 203 of the Code of Criminal Procedure) and exceptions where reporting requirements apply on the other, e.g. with epidemics. One can clearly see that exceptions from the obligation to testify and exceptions from them in turn will lead to the definition of a very narrow framework. This can be qualified as follows:

- The citizens' obligation to testify is a valuable asset in a polity that is meant to work well and in their interest. It would be conceivable to not permit any exceptions from this at all.
- Another valuable asset is people's personal integrity in a right to live and exist that enjoys special state protection. The others' right to live and exist is meanwhile always to be regarded as equally important. A – I'm tempted to say: nonetheless – *granted* right to refuse to testify against oneself ultimately shows how determinedly a modern polity is basing itself on protecting the individual

- No valuable asset, but a preeminent societal interest exists in also protecting individuals where they disclose their personal secrets to get medical or legal help. This is another *granted* right, applicable where professions (1) cater to the well-being of body and soul and (2) people's social well-being in the societal framework. This calls for further definition and demarcation (Which occupations are involved? Which group of persons?) to ensure that the general obligation to testify is not abandoned without good reason.

3. The right to refuse testimony in social work

3.1 Serving the commonwealth

We need to start off by noting that the way social work functions, looking at its surface, does not point to a right to refuse testimony. This is not yet a statement in the sense of the court's outdated argumentation relating to fan work as detailed above. We are merely noting as a basic perspective that the professional work caters to a body politic that is meant to work well and in the interest of its citizenry. Anyone failing to look at these professional activities more deeply, alas, will perceive subservience and the subordination of professional activities under executive interests of the state. As if a well-functioning community were automatically provided as soon as a state order comes into existence.

But that is the whole point: We see social work as *entirely* relating to a body politic which is meant to function well and in the citizens' interests. This applies on a small as well as a large and very large scale. But the reference point for social work is not directly the given political structure incorporating the professional activities. Its reference point rather resides in an idea and a political objective in whose pursuit the state's given (political and legal) structures may also need to be changed as required. This and no other is the self-conception of social work today (see Schumacher, 2018, p. 247).

Based on an understanding of the human being that is applicable in its professional action framework – we find it detailed in the DBSH Code of Ethics (Deutscher Berufsverband für Soziale Arbeit, 2014), with the key impulse provided by the idea of human rights (see Staub-Bernasconi, 2019) – social work serves a community that offers every person protection, participation, justice and well-being. If a state aspires to this, social work will support it, but if it doesn't, social work will oppose it.

If we regard the professional objectives of social work in this manner – and only then – will a special benefit for society emerge when the work of a profession that knows what is good for a successful life together is protected, that works with fans because it is important and good for fan groups to be tended to, and that witnesses injustice and rule violations, but knows to responsibly evaluate how its work can be combined with the public interest in healing the violation.

3.2 Societal interests

I see a preeminent interest of society in the profession of social work, very much in parallel to the professional work of doctors, lawyers and also clergy:

Social work that knows how to explicate that its service for the community does not call the state's duty of care into question, but fulfils it functionally; social work that takes the state's protection mandate in hand and knows how to interpret it needs rights against that state wherever it demands the work for its benefit to be stopped.

Providing social work and its actors with a right to refuse testimony, thus formally recognizing their autonomy of action, would be a wise political step. But this naturally requires the profession to clearly state its value for

society, to plausibly show that its work is always dedicated to the commonwealth, even where it critically calls for structural changes and sides with target groups. (For more on this understanding of social work, see also the *Supplement* of these deliberations below.).

By its role in society and the fact that the help provided to people in social work is always dedicated to an inclusive, socially just whole, a social work presenting itself as a profession features no greater parallels to the line-up of bearers of professional secrets. Neither would a right to refuse testimony granted it be classifiable there.

The addressee of social work is society. This is from where it draws an understanding of the profession. It calls for an occupation that provides help and structural work in the pursuit of a successful social coexistence, with an ethical competence and professional understanding that is wholly based on the scientific and political framework of modern societal thought. That is the claim and framework into which social work is conceived and designed. It has an important interpretation task there as a profession and a – constructively intended – responsibility to cooperate with the state and civil society.

This is also precisely where the basis and argument lie for demanding a right to refuse testimony for the professional concerns of social work activities. Such a right would neither be a rejection of the state nor society; it is also not about protecting clients or wards, but would rather furnish a guarantee that a profession which offers itself to support and develop the state and society with scientific and ethical expertise is able to act with the professional autonomy required for this.

3.3 Protective space for the profession

If we perceive two defined protective spaces within the general obligation to testify, as demonstrated above, one of them for the accused and their relatives, and the other for the bearers of professional secrets, what is clearly emerging now is that there should be a *third* protective space for the tasks and operational concerns of social work where no general obligation

to testify must exist. It would be assigned to a society-related professional activity that is borne by a clearly defined understanding of tasks, by transparent criteria cemented in a professional ethos, and by the public interest in an establishment of justice, not law, in cases of doubt.

The two start to go different ways where law becomes an end in itself, and its function for a socially just commonwealth is overlooked. This is about the field of tension between legality and legitimacy and making a profession that addresses society co-responsible for *legality, justification and consent* going hand in hand in the area of public welfare (for more on these three criteria, see Ochsner, 2016, p. 58). 9 Social work offers itself to shoulder this responsibility. Such a perspective accords with its self-conception. 10

That such a protective space would place high demands on the social work is clear. The profession would be required to ensure that its actors conduct themselves in accordance with defined professional criteria. And it would need to demonstrate the competence required to actually use a right to refuse testimony for the benefit of society and ultimately everyone embraced by it, in the sense of a legally oriented legitimacy. What also needs to be noted for a protective space conceived in this manner is that it should not be regarded as a valuable asset, but as based on a preeminent societal interest, similar to the protection perspective for patients and lawyer's clients, and needs to be *granted* as a right for this reason.

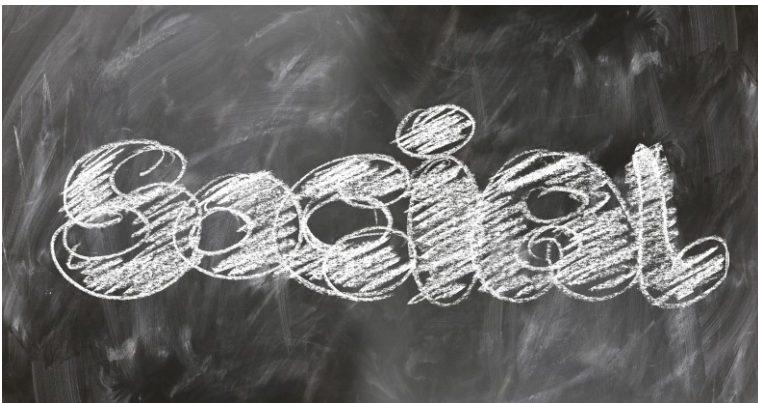
Looking at the structural level makes clear: while the right to refuse testimony as per sections 52 and 53 of the Code of Criminal Procedure currently realizes the state's protective mission, a right to refuse testimony in social work is aimed at the framework aspects this protective mission of the state is embedded in. In terms of our example, good, professional fan work where a right to refuse testimony applies and is simultaneously realized

9. For the field of tension between legality and legitimacy, see especially the thoughts of Carl Schmitt; see Voigt, 2015, for this. For social work referring in this direction, see Staub-Bernasconi, 2019, p. 242 ff.

10. Also in this respect, see the statement by Schumacher, 2018, p. 257, that the conception of the human being and understanding of society demonstrate a starting point in social work "from which humanity can be seen and understood as a joint project".

in recognition of legal interests, will be of greater – significantly greater – benefit for the state in its welfare work than any action challenging this work for whatever reason.

But this is not just about the work in fan projects, as it were, or the fields of outreach youth work in a slightly broader framework. What is suggested in the aforementioned legal opinion by Magdeburg-Stendal University as a new section 3c for section 53.1 of the Code of Criminal Procedure, and related to recognized sponsors of youth welfare (see Schruth/Simon, 2018, p. 71), will not suffice as a privilege. The privilege is rooted in the profession's responsibility for a functioning commonwealth that is geared to the human being, which conclusively leads to a right to refuse testimony. This is not aimed at client protection, but at a legally protected space enabling the professional actors of social work to realize in help and structural work whatever is important for a socially equitable and successful social coexistence. 11



11. The report by Peter Schruth and Titus Simon from Magdeburg-Stendal University is valuable because it shows how social work needs to be seen and understood. Providing a broader privilege would suggest the inclusion of a new subsection 6 in section 53.1 of the Code of Criminal Procedure, however, naming this responsibility, and a right to refuse testimony in the profession of social work on this basis.

Literature:

Wording of § 53 StPO: <https://dejure.org/gesetze/StPO/53.html> (Zugriff am 30.07.2019).

Wording of the BVG-Urteils von 1972: BVerfG, Beschluss vom 19.7.1972, Az.: 2 BvL 7 / 71 (<https://openjur.de/u/192852.html>, Zugriff am 30.07.2019).

Damian, H. [1981]: Geheimhaltungspflicht und Zeugnisverweigerung der Sozialarbeiter / Sozialpädagogen – Versuch einer Bestandsaufnahme. In: Nachrichtendienst des Deutschen Vereins 61, S. 202–211.

Deutscher Berufsverband für Soziale Arbeit (Hrsg.) [2014]: Berufsethik des DBSH. Ethik und Werte. In: Forum sozial, Heft 4, S. 5–43. (<https://www.dbsch.de/fileadmin/downloads/DBSH-Berufsethik-2015-02-08.pdf>, Zugriff am 30.07.2019).

Fachbereichstag Soziale Arbeit [2016]: Qualifikationsrahmen Soziale Arbeit (QR SozArb). Version 6.0 vom 8. Juni 2016. (http://www.fbts.de/fileadmin/fbts/QR_SozArb_Version_6.0.pdf, Zugriff am 30.07.2019).

Müller, B. [2012]: Professionalität. In: Thole, W. (Hrsg.): Grundriss Soziale Arbeit. Ein einführendes Handbuch. 4. Aufl. Wiesbaden: VS Verlag, S. 955–974.

Ochsner, M. [2016]: Die soziale Verantwortung des Staates. Wie sich Wohlfahrtsleistungen auf die Legitimität des Staates auswirken. Wiesbaden: VS Verlag.

Schruth, P./Simon, T. [2018]: Strafprozessualer Reformbedarf des Zeugnisverweigerungsrechts in der Sozialen Arbeit. Am Beispiel der sozialpädagogischen Fanprojekte im Fußball. Rechtsgutachten im Auftrag der Koordinationsstelle Fanprojekte bei der Deutschen Sportjugend (dsj) im Deutschen Olympischen Sportbund (DOSB): <https://www.sozialraum.de/assets/files/praxis/ZEUGNISVERWEIGERUNGSRECHT%20Gutachten%20KOS%20Endfassung%202018.pdf> (Zugriff am 30.07.2019).

Simon, T. [2016]: Sozialarbeit benötigt unverändert ein umfassendes Zeugnisverweigerungsrecht. 50 Jahre bislang vergebliches Bemühen um eine bessere Rechtsstellung. In: Forum sozial, Heft 2, S. 37–40.

Staub-Bernasconi, S. [1995]: Das fachliche Selbstverständnis Sozialer Arbeit – Wege aus der Bescheidenheit. Soziale Arbeit als „Human Rights Profession“. In: Wendt, W. R. (Hrsg.): Soziale Arbeit im Wandel ihres Selbstverständnisses. Beruf und Identität. Freiburg i. Br.: Lambertus, S. 57–104.

Staub-Bernasconi, S. [2019]: Menschenwürde – Menschenrechte – Soziale Arbeit. Die Menschenrechte vom Kopf auf die Füße stellen. Opladen, Berlin, Toronto: Barbara Budrich.

Schumacher, T. [2013]: Lehrbuch der Ethik in der Sozialen Arbeit. Weinheim, Basel: Beltz Juventa.

Schumacher, T. [2018]: Mensch und Gesellschaft im Handlungsraum der Sozialen Arbeit. Ein Klärungsversuch. Weinheim, Basel: Beltz Juventa.

Voigt, R. (Hrsg.) [2015]: Legalität ohne Legitimität? Carl Schmitts Kategorie der Legitimität. Wiesbaden: VS Verlag.



Supplement of reflections on a right to refuse testimony

On the understanding of social work

- The profession of social work is no minion of the state, as implied by the aforementioned and still cited 1972 ruling of the Federal Constitutional Court. Social work rather forms an own functional system within society.
- It takes on public welfare tasks for citizens independently – and that also means: on its own responsibility – where the state discharges its duty of care and protection.
- Social work formulates a basis for its occupational activities in its Professional Code of Ethics. This makes clear that the basic nature of social work's activities will be lost if it is obliged to disclose confidential information unreservedly.
- But even more important is to grant social work an autonomy of action and decision-making as a profession with regard to its society-shaping tasks and concretely where it acts in the interest of the legitimacy of state power.
- Social work hence needs to be seen as based on its self-conception and not its serving relationship with state interests.
- The following sketch expresses this. What needs to be seen as a reference point for social work's conception of the human being is the idea of human rights:

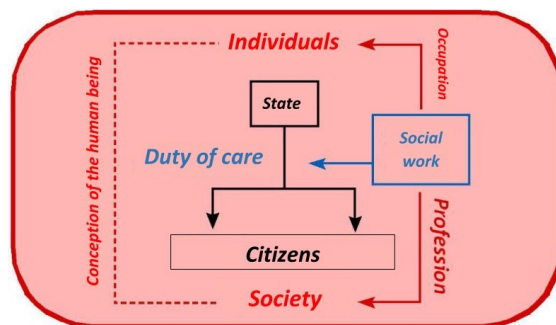


Illustration: Social work as a functional system in society

July 2019 / Prof. Dr. Thomas Schumacher, KSH München

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