

Holm Putzke

The Circumcision Debate From the Viewpoint of a Protagonist

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Comments on the origin and classification of the circumcision judgment and also on the law (§1631d BGB) and its consequences.

With its ruling from May 7, 2012, the regional court in Cologne has caused a stir not only in Germany by declaring a medical unnecessary circumcision unlawful that had been performed *lege artis* by a medical doctor on a 4 year old son of Muslim parents. This ruling did not come out of the blue. It had the background of an intense legal debate, which, triggered by the first article of the author (Putzke) began in 2008.

Not only shall the developing steps be traced here, but also the judgment and its direct political, societal and legal repercussions. The political-legal product shall also be looked at, the newly created §1631d BGB, also known as the »circumcision law«.

Genesis of the legal discussion

At the beginning of 2008, in the commemorative publication on the occasion of the 70th birthday of my academic mentor, Rolf Dietrich Herzberg, my essay was published, titled »The penologic relevance of circumcision of boys,« subtitled »Also a contribution regarding the boundaries of consent in custody cases« (Putzke 2008a). In the German-speaking world, it was the first comprehensive investigation of the topic. The fact that not a single German legal scholar had hitherto taken the topic on was astonishing, since the physical invasion was evident. As with any medical procedure, the question of its justification arose. A vigorous debate ensued whether, with given consent, a physical injury even meets the legal prerequisite for bodily injury according to §223 Abs. 1 StGB, and if so, under which circumstances this bodily injury can be justified via consent given by the guardian of the legally protected right to bodily integrity.

The fact that a »thunderbolt-judgment« and the entire subsequent discussion can be traced back to a single publication is a rare occasion in the world of academics. Most problems have been debated over and over down to the last footnote, and new essays can hardly influence the rigid expressions of opinions. If the development can be traced back to a single cause, in some it apparently draws the interest to apply themselves to the origin of this legal concept and to the motives of its proponents.

It certainly is legitimate to question an author's epistemological interest and the background of his thoughts. He who, as an American obstetrician for example, writes an article that sings the praises of infant circumcision must live with the reproach that solely financial self interest influences his point of view. This might also be true for some pediatric surgeons with outpatient practice for whom foreskin circumcisions mean a lucrative business. Therefore, the suspicion that they generously diagnose pathological phimosis is probably not unfounded (cf. vom Lehn, 2013). These interests do not necessarily render relevant arguments *eo ipso* useless when put forth by these people, yet they awaken justified doubts regarding the objectivity of what is said or written.

When jurists speculate on an author's epistemological interest, they most often lack the arguments with which to animate the debate. To extrapolate for instance, from my socialization in the former GDR that religion is foreign to my mindset and therefore I lack the understanding of (religious) minorities, has more to do with provoking sentiment than with exchanging and analyzing arguments. All that has nothing to do with science. Notwithstanding this, such speculators apparently knew nothing about the fact that the author belonged to the Protestant Church and had neither been a member of the »Junge Pioniere« [Young Pioneers, a youth organization in the GDR – *the translator*], nor did he belong to the followers of the »Friendship«-proclaiming FDJ (Free German Youth). One could hardly be more of a minority than that!

Impact

Even less meticulous with the facts were usually those who had decided to be outraged. For instance, on August 24, 2012, Lamy Kaddor claimed in »Deutschlandradio Kultur«, that Rolf Herzberg, after having read »The Lost Sons« by Necla Kelek, promised the book's author to intervene and assigned a legal draft to his disciples. Such nonsense could already be read in the July 23, 2012 issue of the magazine »Der Spiegel«: »Herzberg was revolted by the description and

fascinated at the same time, but most of all he was surprised that none of his Jurist colleagues had so far concerned themselves with this. He promised Kelek to take this matter on. Holm Putzke, then research associate, worked his way into the topic« (Bönisch et al., 2012). And on August 19, 2012, Matthias Drobinski said in the program »Glaubenssachen« [matters of faith] (NDR kultur) the following: »Herzberg is impressed, he invites Kelek, in addition a female Muslim student, a Turkish doctor he is friends with and Holm Putzke, his aspiring assistant..«

What the above named broadcasted was, by and large, complete fabrication. Firstly, Herzberg had not promised Kelek to intervene, neither verbally nor in writing. Secondly, he had not invited her to the evening discussion that took place in the beginning of 2007. Thirdly, I had neither been his associate nor assistant at the time. And fourthly, there was no assignment of a paper on religious circumcision.

Such deviation in detail would not be worth mentioning, if they had not been used in the debate to construct various conspiracy theories and to speculate wildly on the protagonist's motives. It surely would have ever so nicely fit the picture: An aspiring assistant gets instructed by his lord and master - who is appalled by the circumcision practice and, moreover, has given his word to Islam critic Necla Kelek - to declare religious circumcision prosecutable, which the assistant immediately sets out to do with the zeal of a loyal underling.

That was rather amusing for those who knew how it really had been. For those who were looking for simple explanations it was just what they were waiting for and equaled a welcomed revelation. Finally, they would no longer have to follow the uncomfortable and complex argumentation, but could settle for pointing at a campaign, planned well in advance to discredit two world religions and their followers. It was not a far step from here to the accusations of anti-Islamism and anti-Semitism. As blatantly false and stupid as such allegations were, they did follow right away, purposefully used to discredit – partly publicly, partly in the form of offensive letters.

Well, not every insult must be followed by holding its criminal initiator accountable. Especially the internet is known to also be a pool for people with a troubled socialization who dare under the cloak of anonymity to behave uninhibitedly, whose lack of courage and rhetorical abilities however, lets them not be part of an objective dispute. This is one side. On the other side, the insulted one should not put up with everything, especially if the insult crosses a line and becomes slander and defamation. Therefore, I pressed charges against several perpetrators. In most cases, the lawsuits ended with penalty orders and punitive fines that were ruefully paid. Apparently, the insulters were embarrassed enough by having their true identity detected and known. Initiating a criminal procedure alone brought some of the perpetrators to their senses.

A particular case appears to me to be of general interest, because it shows what prejudice and lack of journalistic professionalism can lead to. Jennifer Nathalie Pyka, to whom I will return later, does not accept that such filing of charges has a good effect on the circumcision debate. She rather thinks that libel suits turn the »fight for the foreskin« into »bickering about sensitivities« and »ultimately into a farce,« because the one who hurts and unsettles others with his critique should be able to take flak (Pyka, 2013). This sounds plausible, but only on first sight. Looked at it more closely, a basic attitude hostile to the legal order can be found behind it. This approach leads – consequently followed – directly to approval of breaches of law. According to this, the right would be forfeited, the right to invoke the protection of criminal law if he expresses his opinion and thereby causing others to feel hurt or insecure. Must therefore one who makes fun of the »the mother of God« expect to be insulted without sanction? Minor bodily injury for a mere caricature of the prophet Mohammed, and major injuries for comments on Mohammed that get labeled as blasphemy, even though being covered by the right to freedom of speech? Here it becomes clear how foolish Pyka's utterances are.

Yet the constitutional democracy is still functioning. Therefore, the prosecution department in Munich initiated criminal investigation proceedings against a Facebook user who in July 2012 contacted me under a pseudonym in a insulting manner. Thanks to his profile information, the account holder was quickly found: a 14year old student. Because the style of the insult was not typically juvenile there were already then doubts about his authorship. Nevertheless, in order to preserve evidence, a search warrant was issued by the district court in Munich. This warrant was declared illegal after the search, because it was directed against the boy but not optimally substantiated in light of the boy's dubious authorship.

The search was executed on a Wednesday at 6:20 am. Neither the boy nor his mother seemed surprised by the content of the warrant. According to the search report, the boy responded spontaneously, »Yes, that was after the TV program when my father wrote something on my computer!« His father was in the bathroom at the time, but appeared shortly after. Obviously irritated and »in a furious mood« he admitted to being the author of the insult, but claimed his right to free speech. This again was too much for his son who was – according to the search report– »obviously embarrassed« by his father's behavior and who admonished his father that while giving one's opinion is allowed, insulting others is not. Yet

Maurice Z. From Taufkirchen continued to talk himself into a rage and tried to provoke the police officers. Among other things, he told them that they probably were aware that Jews had been gassed in the Holocaust and that they had inherited the culpability for it. When one officer replied that he does not feel personally liable for the past, Maurice Z. said he already knows in which corner the policeman stands. He then threatened several times to complain to Ms. Knobloch about this incident, and that he immediately will blow up this case in the press. Upon departure of the police, the wife of Maurice Z apologized for his behavior.

But apparently there were no serious journalists willing take up the issue of this unspectacular case. Only blogger Jennifer Nathalie Pyka, who calls herself »freelance journalist«, saw the opportunity to be indignant at circumcision critics. She showed very little interest in a truthful narrative and trampled on journalistic principles: 6:20 am as the time of the search becomes »six o'clock sharp«. The following description of the police actions sounds dramatic: »a few seconds later they stormed the bedroom of the still sleeping youth«. To those who had previously read the title (»Jewish family in the crosshairs of German investigators«), the scene appeared automatically in front of their eyes: German police storm the room of a Jewish boy to interrogate him and confiscate his personal belongings. What a picture! Pyka wanted to evoke associations. To do that is her journalistic right - but to distort the truth is not! At »six o'clock sharp« instead of »6.20 am« might be just the result of sloppy research. But fabricating a situation and camouflaging the lie as a report is definitely a violation of journalistic principles, which are to truthfully inform the public and to relay true facts and circumstances.

In fact, the mother had opened the door and read the search warrant before going to the first floor to fetch her son. The son was then initially instructed and informed about the charge by the police officers who were waiting on the ground floor. They then they let the son show them his room. Policemen who stormed into the room of a sleeping youth only existed in the article by Jennifer Nathalie Pyka, but not on that day at the house of Maurice Z. and his family. Also concealed by Pyka were the facts that the family of Maurice Z. seemed not even surprised about the accusation, that the boy was embarrassed by his father's behavior and the fact that the boy's mother explicitly apologized for her husband's behavior. The real story would just not fit with the impression that the »freelance journalist« wanted to evoke. Pyka had drawn a caricature, not only via journalistically permissible exaggeration, but by significant falsification and suppression of facts.

It also fits into the picture that Pyka, although reporting in a later post on the termination of the proceedings, concealed the fact that Maurice Z. had – through his defender – previously confessed to the prosecution and regretted his offensive behavior. Apparently the criminal case brought the offender to his senses. And because Maurice Z. admitted his guilt and apologized, it was not unreasonable to finally close the case due to insignificance.

Later, a Munich lawyer tried in vain to thwart access to the case files. Anyone who knows their content, knows the reason: The attempt was apparently to prevent the true and unspectacular conclusion of the search to become known and thus to avoid Nathalie Jennifer Pyka being accused of evidently sloppy research, distortion of facts and lies.

But let us dwell for another moment on the history. Anyone who would have devoted some time to thorough research would have come across the description in my essay in the aforementioned commemorative publication (see Putzke , 2008a , pp. 671 f.) Everything has taken place rather unspectacularly, namely as follows:

Among other things, reading Kelek's book »The Lost Sons« led to Rolf Herzberg's desire to deal in detail with the topics it covers. That's why in the beginning of 2007 he invited me and a Muslim student, a medical doctor from Turkey who is a friend of mine, for an exchange of ideas. We talked about integration topics, biographies of migrants and subsequent generations, and not least about religion. This is how the topic of religiously motivated circumcisions of boys and girls came up. Even then, we lawyers wondered why circumcision of boys seemed to be tolerated uncritically, while even the lightest forms of circumcision of girls is considered, according to unanimous opinion, to be unlawful bodily injury. Then followed, in fact, a promise: I promised Rolf Herzberg that I would look more intensively into the legal aspects of this issue. But there was neither a promise from Herzberg to Necla Kelek nor an assignment directed towards me. Also the issue did not »promise significantly more excitement« than my previous publications, as the authors of the aforementioned »Spiegel« article stated; rather the issue promised to be uniquely suitable for a legal essay in a commemorative publication. After this evening together until the day of handing over said essay in February 2008, Rolf Herzberg and I never revisited the topic. After all, the commemoration piece and its contents on the whole should be a surprise.

Until the completion of the commemorative publication, I dealt intensively with the topic. I spoke with doctors, but also with imams, rabbis, mohelim and other circumcisers, constitutional lawyers and those affected. A predetermined result was neither at the beginning nor during the thinking and writing process. In the end, the aforementioned forty-page treatise on boy circumcision emerged.

From one essay to a juridical majority opinion

On February 14, 2008, during his 70th birthday celebration in Wuppertal, Rolf Dietrich Herzberg received this commemorative piece of writing. Included was my essay on circumcision of male minors. In it, I take the view that it constitutes a personal injury if a medically unnecessary circumcision of a boy is performed who is incapable of giving consent, because the child has an erogenous part of his body irreversibly amputated during circumcision, which demonstrably leads to a loss of sensation. He also suffers pain, which can lead to trauma, and he is exposed to a significant operational risks and risks of complications. This procedure is not justified - neither by parental rights nor their rights to exercise their religion.

Heiner Bielefeldt, who as UN special correspondent on freedom of religion and worldviews, apparently felt particularly challenged to comment on the essay. He chose a form of criticism of whose consequences Ingeborg Puppe once warned as follows: »Never adopt [...] the portrayal of an opinion from one of your critics that you intend to reject [...]« (Puppe, 1998, S. 288). The reason for Puppe's warning is obvious: Critics like to change the object of critique so that their criticism fits by concealing the context of the statement. Often though, the object of their critique then no longer corresponds with what the criticized person expressed. Heiner Bielefeldt provides a prime example. He disagrees with the following statement: »What benefit does the religious circumcision promise? It must be measurable and rationally justifiable, otherwise religious acts could be justified with salvation of the soul after death, leaving any assessment arbitrary.« (Putzke 2008a, p 701). He takes this up as follows: »If the logic that Putzke promotes would prevail, meaning that only such religious or ideological motives that can stand before generally comprehensible rational arguments can be considered in the context of the legal system, it would be nothing less than the end of religious freedom. Which religious beliefs, interests and claims could satisfy this rigid criterion at all?« (Bielefeldt, 2012, p 66).

Although my statement was referring absolutely clearly and solely on physical interventions of the intensity of a boy's circumcision, Bielefeldt transmits it in his critique to any and all religious behavior. With his context-distorting representation, Bielefeldt secures the indignation of the reader, which is necessary for his text's uncritical approval. Scientifically, the whole thing is an outrage, caused either by particular audacity or coarse ignorance.

Despite the illegality of medically unnecessary circumcision of boys, at that time I answered the question of criminality of those involved in the negative, assuming an unavoidable mistake of law pursuant to §17 sentence 1 of the Criminal Code: »Therefore, criminal liability is not to be sought in the past. For the future, however, a preventable mistake of law, has to be assumed, at least as soon as the insight provided by this essay has become widespread.« (Putzke, 2008a, p 708). The District Court of Cologne had viewed the matter - this may be mentioned here in anticipation - exactly the same way and the subject physician was acquitted referring to §17 S 1 StGB.

Commemorative essays are not usually suitable for sparking a fundamental discussion and eventually triggering the German Bundestag into action. Thus, in order to be recognized, it is advisable to place one's important message in other periodicals, not to produce double publications, but to increase the visibility of the written word, as happened to my commemorative essay. With the same core message it appeared in May 2008 in the journal »Medical Law« (Putzke, 2008b), in July 2008 in the »Monthly Pediatrics« (Putzke, Stehr and Dietz, 2008) and in August 2008 in the »German Medical Journal« (Stehr, Putzke and Dietz, 2008) - the last two publications in co-authorship with MDs Maximilian Stehr and Hans-Georg Dietz, both then working at the Dr. von Hauner Children's Hospital in Munich. This cooperation resulted from a contact I had made during the preparation of my commemorative article. Stehr and Dietz had already addressed the subject in 2001, the focus of which had then been placed on medical-ethical aspects (Stehr, Schuster, Dietz and Joppich, 2001)

Also in May 2008, a further contribution was published in the weekly »Neuen Juristischen Wochenschrift« in which I presented an overview of the existing judicature. It ends with an outlook that should occur within four years: »Sooner or later, the courts will have to take a position on the question of whether the circumcision of a boy incapable of giving consent can be justified by the consent of his acting legal guardians. For reasons of legal certainty, it would be desirable, especially for doctors, if this case gets decided sooner rather than later« (Putzke, 2008c, p 1570).

These different contributions, distributed to medical and legal journals, ensured that the problem was made available to a wider group. Especially among the medical community - even prior to the reference to possible liability consequences - there were mainly ethical concerns about participating in a medically unnecessary procedure on children who cannot give consent. While those who already were skeptical about such operations had their doubts confirmed, the thought of possible criminal liability presented to others quite an existential threat. This refers especially to some established pediatric surgeons whose economic success also depended on the performance of boys' (religious)

circumcisions. They were and still are among the most eager - besides religious-fundamentalist defenders of traditional customs - to play down the severity of the surgery. In readers' forums, such as the »German Medical Journal« their angry protests can be found. In numerous discussions I have met them myself and can say that the more money they earned with boys' circumcisions, the less they wanted to hear about its consequences, and the more they polemicised against those who tried to push aside the veil of ignorance. One could also say: The sharper the blade, the more obtuse the logic (see Krause, 2012).

One of these discussions took place in October 2008 in Berlin-Neukölln, entitled »The circumcision of underage boys - medical-legal assessment versus socio-cultural and religious traditions«. The event was organized by the symposium of Bernd Tillig, the director and chief physician of the Hospital for Children and neonatal surgery at the Vivantes Klinikum Neukölln. I was not invited, but I decided to take part without the organizers knowledge. The hall was packed and it quickly became clear why the event should primarily serve to reassure the medical professionals with regard to civil and criminal consequences. That was quite legitimate, but no one was invited or desired, who could bring critical aspects into the discussion. In the ensuing discussion, the pent-up anger about my legal position was unloaded. As the participants did not know I was there, no one held back. This went so far that the lawyer sitting on the panel, who previously had certified legal safety for non-medically indicated circumcision of boys, eventually began to protect my position from misinterpretation. At this point, I raised my hand from one of the back rows. A murmur went through the room and those who had previously bluntly dismissed arguments I had made, were visibly expressing how uncomfortable they suddenly felt.

I thanked the lawyer for the support and set a few aspects straight that had fallen into disarray during the discussion. Then Reinhard Merkel (a Hamburg criminal law professor and member of the German Ethics Council who had accompanied me to the symposium) added his words in a quiet and thoughtful manner, pointing out that the legal position championed by me does hold water. That seemed to cause the organizer's set goal of reassuring the medical community to slip away, so they quickly concluded the event.

Discussions did not always proceed in this way, which was ultimately dependent on the composition of the forum. Anyone who meets the subject unbiased and is open to precise juridical arguments realizes quickly that adherence to the medically senseless circumcision of boys only works if you disregard important arguments and accept fatal normative breaches.

This is how the first opponents who soon defended medically unnecessary circumcisions of boys, were claiming its legality in the legal literature. Noticeably, their contributions were supported by the intention to certify especially religious circumcision's safety legislation. The fact that they themselves had been circumcised or had their children circumcised possibly played a role. Personal concerns or partiality, however, were never good advisers. The fact that legal texts produced under such circumstances could not hold up to an objectively-critical examination, was obvious. To authors who scrutinized such one-sided argumentation, criticism came easily, such as the sound deliberations by Herzberg (2009; 2010) or the discourse by Schwarz, clearly intent on damage control (2008) and Fateh-Moghadam (2010).

In the first two years after the publication of my essays, the debate occurred predominantly in medical circles. In particular, some established pediatric surgeons railed against the Damocles sword of criminal law, which certainly was associated in most cases with the already mentioned fear of financial loss, and less with concern for the affected children or the religion of their parents. However, clinicians had from the beginning far less trouble to welcome the legal situation as I saw it. In many discussions the medical principle *primum non nocere* (first, do no harm) was pointed out. There are no immediate medical benefits in a medically unnecessary circumcision. On the other hand, the disadvantages (pain, risk of complications, irreversible substance and sensory loss and much more) are evident.

But soon the discourse was no longer limited to only physicians and lawyers who volunteered their opinion for reasons of personal concern. The issue slowly found its way into the legal written comments and textbook literature. Soon the notion that non-medically indicated circumcisions of boys are to be regarded as unlawful bodily injury dominated. Therefore, the judgment of the Landgericht (LG) Cologne came as no surprise - at least not for doctors and lawyers who have a modicum of interest to pursue basic scientific discussions and developments.

Dogmatically, the judges therefore did not enter new ground. Rather, they were able to use a prevailing opinion at the time. Of course it is true that the bulk of jurists was still silent, which Beulke and Dießner (2012) pointed out. Charlotte Knobloch went even further: The decision was made by »a single judge based on a jurist minority opinion« (Knobloch, 2013). However, anyone who believes that an Appeals Chamber is staffed by a single judge cannot really be blamed for his/her other errors.

There was plenty of opportunity for the silent lawyers to take a position (see the list at Putzke, 2008c). Already in 2002, the Higher Administrative Court (OVG) Lüneburg stated that parents of a boy who had been circumcised for religious reasons have a right to a claim against the welfare agency for payment of the costs of circumcision surgery (OVG Lüneburg, New Legal Wochenschrift [NJW] 2003, 3290). The judge referred to a judgment of 1993, in which the court had ruled that the welfare agency had to cover the cost of a »circumcision party« (similar to the granting of aid for a Christian baptismal ceremony) (OVG Lüneburg, BeckRS 2005, 21681).

In 2004, the LG Frankenthal had to rule on a case in which the non-medically trained surgeon had performed a religious circumcision incorrectly, because minimum medical standards had not been adhered to (LG Frankenthal, MedR 2005, 243 ff.). Therefore, the court awarded to the plaintiff damages for pain and suffering.

The Higher Regional Court (OLG) Frankfurt ruled likewise in a decision dated 08/21/2007, because the devout Muslim father of a 12 year old boy had - without the knowledge of the mother who held sole custody - arranged for his son's circumcision (OLG Frankfurt, NJW 2007, 3580 ff.)

All three decisions do not address specifically the question of whether parents can, with justifiable reason, consent to a religious, non-medically indicated circumcision of minors incapable of consent. However, already in 2002, the District Court (AG) Erlangen had taken a position (order of 07/30/2002, Az: 4 F 1092/ 01). It revoked the parents' right to initiate a religiously motivated surgery on their child who at the time was living with foster parents, in accordance with §1666 of the Civil Code, citing the violation of physical integrity and the risks affiliated with the surgery (anaesthesia, wound healing, scarring). At the same time, the Court revoked the biological parents' right to represent the child in passport matters to prevent a departure from Germany, followed by circumcision in the home country of the father. This shows that already ten years prior to the judgment of the Regional Court of Cologne a court decision had been made that pointed in the same direction. In 2002, no one took the opportunity to investigate the legal aspects of the issue. The issue was scientifically discovered only in 2008. The flood of publications has only followed after the judgment of the Regional Court of Cologne and continues still. Hardly any topic has spawned so many contributions in such a short time.

The judgment and its public impact

The facts on which the Cologne decision was based were not particularly spectacular, as it documents a fairly common course of circumcision.

In November 2010, an established doctor, a specialist in surgery in Cologne who claims to be a devout Muslim, performed a medically unnecessary circumcision of a four-year-old boy with the consent of his Muslim parents. The surgery took place under local anesthesia and on religious grounds. Although the doctor - according to an expert - had performed the surgery *lege artis*, two days later bleeding occurred, which is not uncommon. The mother brought the boy to the children's emergency room of the University Hospital of Cologne where a urologist operated on him under general anesthesia and the bleeding could be stopped. Because the doctor had reason to suspect that circumcision had not taken place according to the rules of medical science, the hospital informed the police. Inevitably, this made the prosecution aware of the matter and brought charges against the circumciser. Because the doctor had used a scalpel, the charges were for grievous bodily harm under §224 paragraph 1 No. 2 of the Criminal Code. The AG Cologne initiated main proceedings, thus initially assumed a conviction probability, but then the defendant was acquitted, because his actions were justified by the consent of the legal guardian (AG Cologne, judgment of 21 09 2011, Ref : 528 Ds 30/11, BeckRS 2012, 13648).

The prosecution filed an appeal, which was dismissed by the Cologne Regional Court (LG Köln, judgment of 07 05 2012, Az: 151 Ns 169/11, NJW 2012, pp. 2128 et seq.). LG Köln also acquitted the defendant. However, the reasoning was an entirely different one. Unlike the district court, the regional court affirmed the unlawfulness of the conduct, and the acquittal was based on the lack of guilt on the doctor's part, because an unavoidable error of the law was assumed, according to §17 sentence 1 of the Criminal Code. The prosecution decided not to appeal revision, although it could have been done with the aim of a conviction and with the reasoning that the error of the law was indeed avoidable.

Not only the verdict of illegality, but also the acquittal caused criticism - strangely enough also from jurists. The accusation by Beulke and Dießner (2012) read: »The decision of the Regional Court of Cologne is first and foremost one thing: annoying. With the granting of unavoidable error of law the court avoided a deepened involvement with the issue and as a result prevented clarification through a supreme court ruling.« In the same vein, by Beck and Künast (2012): »With a legal trick (acquittal of the accused doctor in spite of alleged criminality because of an unavoidable mistake of law), a high court clarification has been prevented.«

What, in the opinion of Beulke & Dießner as well as Beck & Künast, should the judges have done? Condemn the accused against their own convictions, formed according to § 261 StPO? That would have clearly fulfilled the facts of § 339 StGB, and would thus have been a perversion of justice. The Cologne chamber did not use a »legal trick« to evade deeper involvement with the issue, but it dutifully omitted bending the law. However, the above mentioned appear to demand just that. Such absurdity is hardly to be surpassed. Maybe such nonsense spread by Beck and Künast can be attributed to an often observed superficiality in politics. If, however, a criminal law professor must let something like that be ascribed to himself, because he appears as a co-author of an essay, then that is more than strange.

Perhaps comments like this should suggest that a higher court could have ruled on circumcision being legal. That is, however, not certain at all. If the Cologne case, for instance, would have been heard in the first instance by the LG Cologne, a revision of the public prosecutor's office would have landed at the second criminal senate of the Federal High Court. It just so happens that there are two judges working there who have decidedly expressed their opinion against the legalization of circumcision. (Eschelbach, 2013, § 223 Rn. 9 and 35; Fischer, 2013, § 223 Rn. 44a FF.).

The written judgment was sent to the magazine »Medical Law«. There it was decided to ask me whether I would write a comment on the judgment. I was happy to do so. It appeared at the end of 2012 (Putzke, 2012a).

Immediately after the judgement was sent to me, I first published a smaller article that appeared on June 26, 2012 in »Legal Tribune ONLINE« (LTO) a (Putzke, 2012b). The day before, »Financial Times Deutschland« had taken up the topic and reported on the judgment.

Using the fact that I knew the author of this newspaper contribution, the journalist Müller-Neuhof fabricated a kind of conspiracy scenario. His contribution was published in the newspaper »Tagesspiegel«. In it, Müller-Neuhof designs all too blatantly and obsessively a reality of his own by connecting banalities and coincidences. In the introduction of his article it reads: »The dominant opinion and those who formed it: How a law professor, a public prosecutor and a judge controlled the debate about circumcision «(Müller-Neuhof 2012). If three people together control and steer some event, criminal law calls it collusion. It's surprising that Mueller-Neuhof, always searching for the greatest dramatic effect and attention, did not use this word. The fact that, in his eyes, the circumcision debate was produced by the media could actually be taken as praise, which could hardly have been higher. But Müller-Neuhof erred. Especially imaginative were his reflections on my alleged vision: »In the case of the criminal action against circumcision, the impression emerged that religiously motivated circumcision should be outlawed immediately. And it is not coincidence that it emerged in such a way. Some wanted it so. One of those is Holm Putzke«. That sounds dramatic. One could also capture the sentence as follows: »In the case of the reporting on the criminal action against circumcision, the impression emerged that the circumcision debate was media-produced. And it is not coincidence that this impression should emerge. Some wanted it so. One of those is Jost Müller-Neuhof.« Müller-Neuhof was not interested in representing the legislative history correctly and factually. He might also have been lacking the necessary background knowledge, because the same juristic naïveté permeates his text.

Reactions

The reactions to the Cologne decision were divided as is well known. In the beginning, representatives of Judasim spoke up the loudest. They conjured up a threatening scenario: We are dealing with »the heaviest attack on Jewish life since the Holocaust«, and »with a prohibition of circumcision Jewish life in Germany is no longer possible«. The historian Michael Wolffson has rejected such statements appropriately as being as »insubstantial and tactless« (Wolffson, 2012), which left Jewish spokespersons unimpressed – they were solely after the effect of the threatening scenario. This effect was soon to be felt.

Above all, politicians did not allow time for reflection but showed a panicky knee-jerk reaction. Eschelbach (2013, §223 para 9.8) puts it in a nutshell: »The German legislature, having overlooked earlier discussions at home and abroad, was taken by surprise by a single court ruling and was rather unprepared, yet it wants to act quickly and exclude infant circumcision from the elements of a criminal offense.«

Exactly this reaction invited religious communities to make maximum demands, i.e., to insist that in fact the archaic ritual of circumcision does not need to change. On this, Reinhard Merkel (2012b): »The authors of the draft unburdened the two large religious communities from all impositions, that could – besides the already unquestioned cutting – be loaded onto the affected children.«

Before the Members of the German Bundestag could obtain comprehensive information on the subject, the majority – driven mainly by religious groups – hastily decided upon a resolution, according to which circumcisions of boys should be generally allowed under certain conditions. The reason for this decision is probably due to the fact that most voting members based their vote on false assumptions. They believed they had to correct the consequences of an Islamophobic judgment. That however, was a phantom. At the time, Harald Stücker (2012), expressed it aptly: »It's not about religion, it's about the children.«

Later, many parliamentarians could be heard saying that this resolution would never have come about in this manner, if all the facts about boys' circumcision and the reasoning underlying the judgment would have been known in detail. Soon after, the impression of an even vaguely anti-religious motivated court ruling crumbled entirely. The Cologne judges had simply applied governing law and given reasonable grounds for their judgment. Of course, the statements could have been more intense in some places. But holding this against the Court means ignoring the fact that firstly, the Court referred to a previous legal debate and secondly, it is not the task of an Appeals Chamber to continue scientific discussion, but to reach a reasonable decision. Exactly this standard was met by the Cologne Regional Court. The parliamentarians, however, had fallen victim to a concerted religious-clerical threat scenario. They had not noticed that the strings that they thought they held in their hands, were pulled by others.

However, the resolution had created facts. Tied to this hastily defined goal, the Federal Ministry of Justice developed, also in the utmost haste, a bill, which was insufficiently thought-out. Federal Minister of Justice Leutheusser-Schnarrenberger, in any other context very much focused on civil rights, did not have the rights of children on her agenda, perhaps because they could not contribute to the parliamentary survival of the FDP. The protection of children's rights alone was apparently too little for her to get involved in the protection of physical integrity.

Among other things, she propagated the idea that the complication rate with circumcisions lies worldwide at 0.01%. (on this Putzke, 2013). This was especially naive and clueless. It is appalling that someone who spreads such nonsense carries the responsibility to draw up a law. This statement of the former FDP Minister is not reflected at all in scientific studies. No one denies that serious complications are rare. But amputations of the penis or glans have occurred and even deaths resulting from circumcisions are known. This alone documents enough damage potential to make a halfway sensible person realize that such medically unnecessary procedures are not covered by the parents' rights. In addition, pain traumas are verifiable, in many cases wound infections occur and follow-up surgeries become necessary - not to mention the loss of sensitivity that causes significant physical and psychological problems in numerous circumcised males. What is the matter with smart people if they close their eyes and ears before all of this?

Just for clarification: Of course I know that most circumcised men do not remember the act of injury negatively and are satisfied with their condition. Yet, there also are many adults who comment unconcerned about a spanking in childhood, supposedly inflicted for educational purposes, by saying »It did not harm me by any means«. This we do not accept, and rightly so. The abstract potential for damage and some documented damage done is enough to enforce the right to violence-free education, if necessary, by criminal law. Why can't those who have been physically or psychologically harmed by circumcision be reason enough to prohibit foreskin amputation due to the risk of such damages?

Not surprisingly, not much about complications, risks and pain can be found in the explanatory memorandum, which was drawn up by the Justice Department. Reference is made instead to a statement by the AAP, the »American Academy of Pediatrics« (AAP, 2012a; 2012b). The Federal Justice Minister, who is by now voted out of office, could not help but put her partisanship on display again. She seriously claimed that the AAP has even recommended circumcision. The fact is that the AAP has not issued a »recommendation« for circumcision in its latest statement, but merely stated that the decision should be left to the parents, because health benefits of circumcised newborns would weigh more heavily than the risks.

As for those reasons, the opinion of the AAP is actually useless. Firstly, it is a statement that was influenced by lobbyists, since the Association includes the U.S. obstetricians. Especially for them infant circumcision is a profitable business. Their business declined after the AAP had issued statements to the contrary in the years 1999 and 2005. In the current statement, the telltale clue can be found in the explicit remark that the reversal of the AAP is supported by obstetricians.

Secondly, the task force of the AAP itself consisted of numerous circumcision advocates, some of whom had even cut their own children by hand (see the contribution by Matthias Franz in this book). It is quite obvious that such people want to find foreskin amputation harmless to justify their own behavior, and are eager to discover anything beneficial in it.

These two aspects mentioned above would be irrelevant, if what the AAP writes on the matter were convincing. For »Even if someone is the only voice calling for something and even if he does so out of financial self-interest, he still can be right in his claim« (Scheinfeld in this book). However, the project group has ignored or disregarded current studies in its overall view, as, among other things, studies regarding the impact of foreskin amputation on the sensitivity and on the consequences of suffered pain (see Svoboda and Van Howe, 2013). Therefore it is not surprising that many pediatric medical associations have vehemently objected to the AAP statement; in short, with its current error of judgment, the AAP stands totally isolated, and rightly so.

The fact that this statement is nevertheless uncritically cited in the explanatory memorandum, documents the superficial level of the explanatory remarks. It also shows that the repeated mantra-like emphasis about the child and the child's right to physical integrity, is mere empty talk and pure hypocrisy. The real goal was to be concealed: saving the archaic ritual of religious circumcision at any cost.

Despite the resolution of the Bundestag, the subsequent debate would probably have been different if the Justice Department would have weighed facts objectively and would not have intentionally collected facts selectively. Had it objectively shown the damage potential of circumcisions, as documented by solid studies, a majority vote for the law would have been very unlikely because many members of parliament would have then become aware that they were not making a decision that serves the wellbeing of children. Yet no one really wanted to find out such facts. The parliamentary processes that allowed such blinding can be found described in this book in the article by Marlene Rupprecht.

That in politics there exists no interest in letting uncomfortable truths hinder the realization of the law is also apparent in the selection of experts for the Committee on Legal Affairs. Their majority signed off on the bill. But what is the value of this majority vote? It was quite clear from the beginning how the invitees would vote, because most of them had previously expressed their opinion. Thus from the outset a few circumcision critics faced many circumcision advocates. Of course, the carefully selected experts had produced exactly what the policy had ordered from them: whitewashing. Here is how politics work: You invite the claqueurs and yes-men that you need and voila, you get the result you want and that just fits the concept.

Why had Gotzmann Andreas, Professor of Jewish Studies at the University of Erfurt, or the historian Michael Wolffson, not been invited in addition to or in place of the Jewish circumciser Antje Yael Deusel and the General Secretary of the Central Council of Jews, Stephan J. Kramer? Why was Henning Radtke heard, who had just been appointed to the Federal Supreme Court and not the long-standing Supreme Court Judge Thomas Fischer, author of the famous commentary of the Criminal Code and, more recently Chairman of the Criminal 2nd Division? What qualified Hans Kristof Graf, medical director of the Jewish Hospital Berlin, as opposed to Boris Zernikow, head of the German Children's pain center, or Matthias Franz, Professor of Psychosomatic Medicine and Psychotherapy? What qualifications make Siegfried Willutzki, honorary chairman of the German family court conference, favorable over a representative of the German Children's Help organisation? Why was Aiman A. Mazyek, Chairman of the Central Council of Muslims invited, but not a single individual who laments his circumcision and suffers from his condition? And by what right does the canonist Hans Michael Heinig receive priority as compared to Winfried Hassemer, former Vice President of the Constitutional Court?

As one can see, the panel of experts could easily have been assembled very differently. Then the outcome would have been very different as well, and the media would have reported the next day: »Experts disagree on Circumcision Act« or »Experts reject Circumcision Act«. But that would have thrown a wrench in the works of the hastily fired up legislative machine. And politicians did not allow themselves more thinking time, because they felt that the pressure exerted upon them was too great and because they believed they would have to fear the result of a fact-based discussion.

In the meantime, it has become apparent that the statements of some experts did not live up to a standard that should have been expected. Let us glance at the comments written for the hearing of experts by the authors' collective Fellmann, Müller and Graf (2012), the latter of whom is the aforementioned director of the Jewish Hospital in Berlin. Although serious indications existed that the application of EMLA® ointment is insufficient in boys' circumcisions, this did not impress Fellmann et al (2012), as they declared without even the smallest hint of doubt: »Clinical data or evidence do not exist showing that EMLA® would not relieve pain sufficiently if used adequately«. The appropriateness of considerable doubt towards the medical expertise of the statement can be deduced from the practical application EMLA® ointment as described therein: The authors propagate the use of the ointment - despite the lack of official approval of this drug for pain relief for circumcisions.

In addition, in the assessment of effectiveness for the reduction of pain, they referred to so-called »soft factors«: »This includes an immediate cessation of crying when returning to the mother's arms. A behavior that also observed before

surgery. Other indicators are that the children drink quickly and urinate spontaneously.« These factors should have been called «Fellmann-Müller-Graf's Conscience-silencing factors«. Scientifically, they are anything but reliable in the case of infant circumcision, because the urgent question arises whether there was a control group of infant circumcisions without the use of EMLA® ointment, in which the authors collective would have observed the infants' reactions. Obviously, these children were screaming, then did not drink anything and did not urinate. Perhaps the experts had envisioned the real screams of agony, which infants exhibit who undergo circumcision by Mohelim in synagogues and whose lips are then wetted with a cloth soaked in wine before they often fall into a state of shock (cf. Paix and Peterson, 2012, pp. 511 ff. Merkel and Putzke, 2013, p 445). The reactions observed by the authors and the »soft factors« derived from it might as well mean the opposite, namely lack of screaming as pain-induced shock and spontaneous urination as a result of extreme physical stress. Obviously, the majority of members of parliament wanted to trust especially those dodgy opinions and be manipulated by them.

The Circumcision Law (§1631d BGB)

Regulatory content

As expected, the German Bundestag passed §1631d of the Civil Code December 12, 2012, which constitutes applicable law since December 28, 2012. There were 434 consenting members, 100 votes against and 46 abstentions. There was even a counter-proposal, which had many supporters, though no majority. That proposal would not allow medically unnecessary circumcisions of boys until the age of 14.

Since §1631d of the Civil Code is governing law, medically unnecessary circumcision of boys who do not have the capacity to consent are no longer merely tacitly allowed despite punishability - as before the change in the law - but are, under certain conditions, indeed permitted. However, in comparison to the state of the law before the commencement of §1631d, it contains some serious tightening - especially with regard to circumcision by non-physicians. The implementation of the legal requirements in practice will be crucial. So far, they are being disregarded by non-medical circumcisers in most cases – in some cases offensively and deliberately.

MD Caveat

Firstly, it is made clear that non-medical circumcisers are banned in the future from circumcising children who are older than six months. This is a success. Previously, the foreskin of sons to Muslim parents was often times amputated by itinerant circumcisers. That did not always proceed without complications, as numerous cases demonstrate.

Yet, by no means have the activities of such charlatans been stopped permanently. When parents with a migration background travel to their home countries, they can have their sons circumcised by non-physicians, if they feel like it, even if the affected boy is older than six months. This is not punishable, because German criminal law does not apply, at least not if the act is not punishable under local law (cf. §7 StGB), which is the case of circumcision in Turkey, Morocco and Tunisia.

This may apply even if, for example, the father lets his son be circumcised against the expressed will of the mother. The prosecution department in Freiburg had to decide such a case, where the father is Tunisian and the mother is German. They have a common child, six years old at the time. After separation, both agreed on the following before family court: »The parents agree that the child should not be circumcised«. The father did not abide by this agreement - during a Tunisia holiday he had the boy circumcised. When the mother found out after the child's return to Germany she filed a criminal complaint. The prosecution then initiated an investigation for dangerous bodily injury, which soon afterward was stayed because of lack of probability to reach a conviction. It was believed that the father lied (as well as the corroborating doctor) when stating that acute phimosis with severe micturition had made immediate circumcision inevitable. An expert came to the clear conclusion that sudden retentional severe phimosis was virtually medically excluded if there had never been any discomfort in the years prior. Father and doctor had obviously lied. However, punishability of an injury offense committed abroad requires that the act also constitutes a criminal conduct under foreign criminal law. This is exactly what was not the case, for the Tunisian law defines the legal representation of a child, including the religious upbringing of the child as belonging, in principle, in the hands of the father. The mother's position does not matter in Tunisia. Therefore, agreement before the German family was irrelevant in Tunisia. Consequently, the prosecution had to drop the case against the father. The German legislature could easily provide a solution for such cases, simply by extending German criminal law on

circumcision to offenses committed abroad (done as in §5 No. 9 with respect to §218 StGB). Unfortunately, child protection from circumcision of the genitals not only ends if the victims are boys, but also at the German border.

Education of Parents

Secondly, in the future, also non-medical circumcisers are obliged to comprehensively inform the parents about the procedure and the associated risks. So far this has hardly ever happened. Instead, the amputation of the foreskin was made to appear harmless, which is why many parents did not know about the risks to which they expose their child. The still ongoing discussion of circumcision has made it clear that it is by no means a harmless procedure. Although the complication rate is not high with regard to severe cases, information about such cases must still be provided. The compulsory wound and healing pain have to be endured by all circumcised children. Unfortunately, there are still doctors around who claim that the rate of lighter complications is far below one percent. Those who still propagate this trivialize the surgery and are either unaware or deliberately lead parents astray. Such misinformation is misleading and makes the consent ineffective. It has the same consequences if no reference is made to the sensory loss that is demonstrably associated with a circumcision. If a treatment contract exists (§630a BGB), also the 630e BGB must be observed, which obligates the practitioner to inform and the treatment must be documented (§630f BGB).

In order for a consent to be effective, information on the following must be provided (cf. Scheinfeld, 2013, S.277):

- irreversible loss of the penile foreskin,
- loss of its protective function (from contaminants, friction, dehydration and injury),
- loss of antibacterial and antiviral functions, capping of connection channels for numerous important veins, leading possibly to erectile dysfunction
- psychological consequences (eg. castration anxiety in boys, who consciously experience the circumcision act).

The possibility of the following complications also has to be mentioned (cf. Stanford School of Medicine, 2012; Franz, 2012b, S.219):

- local bleeding,
- post-operative hemorrhage,
- local and systemic infections,
- insufficient foreskin-shortening (making a second surgery necessary for cosmetic reasons or because of a secondary phimosis),
- too severe shortening of the foreskin,
- adhesion of remaining penile skin to the glans,
- blistering under the remaining penile skin,
- meatitis (inflammation of the urethral opening),
- meatal stenosis (constriction of the urethral opening),
- urinary retention because of bandages,
- secondary phimosis,
- chordee (abnormal curvature of the [erect] penis),
- hypospadias (opening of the urethra located too wide and too far on the underside of the penis),
- epispadias (opening of the urethra located on the upper side of the penis),
- forming a fistula between urethra and penile skin,
- necrotising of the penis,
- (partial) amputation of the penis,
- pain during and after circumcision,
- painful scars on foreskin,
- allergic reactions to medication,
- abnormal wound healing,
- medical malpractice,
- death of the circumcised.

The risks include not only psychological late sequelae (see Franz, 2012a, and in his article in this book) but also all classical anesthesia and surgical risks. It does happen that not only the foreskin of the infant is amputated, but that the circumciser even accidentally cuts off parts of the glans - recently again at a brit milah performed by a mohel in Israel.

The pediatric surgeon Maximilian Stehr describes a disturbing anesthesia incident with impressive words: »In July 2011, a mother took her two-year-old son into a pediatric surgery practice in Munich. The boy was perfectly healthy up to this day. He was supposed to be circumcised in the doctor's office for religious reasons, according to the will of his parents.

During anesthesia, the child suddenly could no longer breathe on his own. The oxygen content in his blood decreased, and his heart stopped beating. Dramatic scenes took place in the following minutes. The doctors tried to revive the child and notified the Munich pediatric emergency physician. At his arrival the little body had been without sufficient oxygen supply for at least ten minutes. The revival was successful and the boy was brought to our hospital in the ambulance. However, the child never regained consciousness, brain damage due to oxygen deficiency had been too severe« (Stehr, 2012b, p 124).

One has to be aware of two things: Firstly, such incidents are indeed rare, but they do happen Secondly, the once healthy boy is severely brain-damaged because physicians, following the wishes of his religiously motivated parents exposed him to a totally unnecessary risk!

While in Germany parents' education prior to a circumcision performed by a medical doctor is the rule, although by no means always sufficiently given. In the traditional Jewish circumcision, Brit Mila, this is not the case despite legal obligation. There it is either not at all offered or not of the quality required by §1631d BGB. This is because non-physicians, too, are allowed to circumcise. This constitutes a special provision for Jewish circumcisers who usually do not have adequate medical qualification - beyond the mere foreskin amputation - and are not familiar with generally accepted professional standards. Therefore, they are rarely able to adequately describe risks as acknowledged by professional associations.

Besides, it would probably not be conducive to the reputation of the Brit Mila, which was once described by the eminent Rabbi Abraham Geiger as »a barbaric bloody act« (Geiger, L., 1878, p 181), if prior to its implementation parents were openly and honestly told what risks the irreversible procedure actually bears and what massive pain the infant suffers. Maybe it also helps if one persuades oneself with the myth Charlotte Knobloch propagated: »We do not hurt our children!« (Jewish Community, 2012). Can such a denial of reality really be taken seriously? Infants have no pain-suppressing system, which is why they feel more pain than adults (Zernikow, 2012). One has to be living in one's own world, characterized by auto-suggestion, in which medical facts do not matter if one believes such nonsense. Unlike Charlotte Knobloch, Stephan Kramer, general secretary of the Central Council of Jews, does live in the real world: »It's also idiotic to dismiss criticism by arguing that it did not hurt. It hurts.« (Lau, 2012)

The EMLA® ointment is certainly not suitable to adequately reduce circumcision pain in infants. Recent studies have confirmed this. If parents are not informed that the child is exposed to massive pain, despite treatment with EMLA® ointment, that information is flawed, the parents' consent is ineffective and the circumcision act as grievous bodily injury is a criminal offense.

Eschelbach is doubtlessly correct in his view that, given the blatantly deficient information practice, there currently should not exist any effective consent (2013, §223 Rn. 35.4): »Therefore, the widespread assertion of incorrect facts about significance, implications, risks (OLG Oldenburg NJW -RR 1991, 1376) and side effects of circumcision [...] means that the parents' given consent shall be void. Misconceptions prevail especially about the alleged biological insignificance of the foreskin, its irrelevance for male sensations, especially in sexual conduct, the alleged medical-prophylactic relevance of the removal of the foreskin to the prophylactic prevention of significant disease in those affected and infection risk to a third party, the alleged absence of pain and trauma after surgery, especially for infants, the impossibility or dispensability of anesthesia, the equivalence of circumcision in hospital or by a circumciser who, as the case may be, is not a doctor, the lack of complications during and after the procedure and the regular absence of traumatic effects afterwards. In all these points factually false assertions are found. Given this misinformation, parents can hardly ever give a valid consent, unless in a particular case where complete, accurate and neutral medical information (OLG Oldenburg NJW -RR 1991, 1376) is presented prior to a non-medically indicated circumcision [...].«

»Mohel Clause«

Thirdly, according to the »Mohel clause« (paragraph 2 of the German Civil Code §1631d) especially Jewish circumcisers called Mohelim are obligated to comply with medical standards. The law allows circumcisions only if they are performed *lege artis*, to which paragraph 2 refers.

Sterility Standards

A violation of the new law is present if sterility standards are not met, that is standards which are applicable to similar medical procedures. However, most ritual circumcisions do not take place in a hospital or in a medical practice where sterility of surgical instruments and the immediate environment can be ensured. Circumcisions in synagogues usually do not meet these requirements. There are no long minutes of washing hands with subsequent disinfection; the mohel does

not wear medical scrubs, gloves or a face mask, not to mention the absence of a low-germ surgery environment. A Brit Mila carried out under such circumstances is illegal - especially on the basis of §1631d of the Civil Code.

Therefore, circumcisions performed by the mohel with his sharp fingernail or where he sucks the blood from the penis of a circumcised baby with his mouth, which is still commonly required and practiced in the ultra-Orthodox Metzitzah B'peh ritual, are clearly prohibited.

Pain Treatment

Also prohibited are all circumcisions (not just ritual ones) during which no effective treatment of pain is administered (cf. German Bundestag, 2012, p.3). To this Hoernle and Huster write, »Parental consent justifies procedures under §1631d para 2 BGB only in cases where circumcision is performed under anesthesia that effectively prevents the emergence of significant pain. Here, anesthesia is understood according to current medical knowledge and not by the self-understanding of a religious community.« (2013, p 339).

Most Jewish circumcisions were and still are performed without any effective anesthesia. In the past, Jewish representatives often made no secret of the fact that the associated pain is considered essential for the covenant with God. By now, these voices have fallen almost silent. Now, not only Jewish circumcisers realize that it is anything but well received by the public when it becomes known that eight-day-old infants are intentionally exposed to massive physical pain. Yet, the silence is deceptive. Infants are still being circumcised by Mohelim as their practice has always been - namely without acceptably effective pain treatment. What has changed is only the official language, not the practice of the ritual - at least if non-doctors are at work.

Circumcision of boys without effective anesthesia not only celebrates a painful ritual, but also constitutes assault, punishable under §224 StGB. The parents' consent is ineffective, because the procedure is not performed *lege artis*, but with disregard to §1631d BGB requirements. Appropriately, Ralf Eschelbach, judge of the Federal Court has pointed out that circumcision of a child who is poorly protected against pain is an experience of violence in the intimate area, objectively a more serious case than most cases of aggravated sexual abuse (Eschelbach, 2013 §223 para. 9.4).

However, it might still take some time until the provisions of §1631d BGB develop their efficacy. The judiciary has to ensure that this happens. Maybe among circumcisers the insight will spread that compliance with the law makes sense. However, in a lawful solution several aspects must be considered:

Mohelim are usually not medical doctors, which is why they are in this case not allowed to use suitable painkillers. They are therefore not in a position to administer effective pain treatment. It follows that circumcisions should in the future only be performed if the circumciser at the same time meets the requirements of the Licensing Regulations for physicians or if a physician is present at the circumcision to assume treatment of pain. (also Scheinfeld, 2013, p 276).

What constitutes effective pain treatment? Certainly not the previously mentioned practice to moisten the infant's mouth with wine. General anesthesia must be excluded as well, because it would be too risky for circumcision of an eight-day-old infant.

Until now, doctors have therefore relied primarily on the use of the above-mentioned EMLA® ointment. In the meantime, however, it has been shown that it is not suitable for use with infant circumcisions. In the course of the legislative process that led to §1631d BGB, this was already distinctly pointed out by pediatric surgeon Maximilian Stehr, now chief physician of the Cnopf'schen Children's Hospital in Nuremberg, together with lawyer Reinhard Merkel, member of the German Ethics Council (Merkel, 2012b and Stehr, 2012a). But the majority of parliamentarians would not listen to them at that time. Rather, they trusted the already above-mentioned authors' collective of Fellmann, Müller and Graf, who praised the application of EMLA® ointment despite the availability of a study with contrary results. We know that effective pain treatment with EMLA® ointment is not specifically guaranteed – thanks to the remarkable tenacity of the anesthetist Birgit Pabst (cf. Schulte of Drach , 2013) – ever since the manufacturer had to remove corresponding reference to infant circumcision from the package label because it was based on a blatantly deficient study. Therefore, the use of EMLA® ointment for neonatal circumcision is a so-called off-label use, and as such, an unauthorized application.

Looking back, one has to say: hardly ever before has there been such a manipulation of parliamentarians in the form of misinformation and trivialization. It does not take Abraham to recognize that §1631d of the Civil Code would never have been adopted in its current form, if all the facts had been known and appreciated objectively.

Without the use of EMLA® ointment, previously and erroneously deemed suitable, the possibilities of an »effective pain management« are drastically reduced. Only a local anesthetic in the form of a penis root block could possibly ensure it. However, experts agree that such a local anesthetic in infants is difficult to control, and even when administered by specialists, it often fails (Zernikow, 2012).

What almost necessarily results from this is the following: Effective treatment of pain associated with infant circumcision is an illusion, beyond general anesthesia, which is too risky. (cf. Hartmann, 2012). Even an effective education cannot change this. Because parliamentarians who agreed to §1631d BGB assumed the opposite after following wrong advice, they still made effective pain treatment as one of the main conditions, yet we have a frustration of purpose of §1631d BGB with regard to infant circumcision, which makes the law to this extent unconstitutional.

Purpose of Circumcision

Circumcision shall also be inadmissible under §1631d paragraph 1, sentence 2 BGB if the child's wellbeing is endangered, even under consideration of its purpose. This is the case, according to the explanatory memorandum if, for example, parents want to have a circumcision for purely aesthetic reasons or with the goal of making it more difficult to masturbate. To reduce any risk of liability, a surgeon should therefore inquire about the motivations of the parents prior to a medically unnecessary circumcision. Because of the clear position of professional associations, circumcision should also be rejected if parents want it as a supposedly health preventive measure. In any event, a child circumcision has no direct medical benefit that could offset the risks. No serious scientist will dispute this today, save for some completely rabid fanatics and propagandists, one of whom is Brian J. Morris (eg, Morris et al., 2012) teacher of Molecular Medicine at the University of Sidney, who inserts into low-impact magazines crude pamphlets, hell-bent on praising circumcision – completely detached from generally accepted medical and ethical evaluation criteria and scientific minimum requirements.

It has to be ensured that all persons entitled to custody grant consent. Equally, the affected boy – depending on his developmental stage – questioned alone and in a child-appropriate manner to learn whether his will may be opposed to the surgery. If he expresses disapproval in words or behavior, the procedure is strictly to be avoided, because his veto invalidates the (parental) consent. Both the motivating situation and the actions undertaken to ensure the affected boy's development-related veto, shall be documented.

Juridical Perspectives

Among legal scholars, the judgment of the District Court of Cologne is controversial.

StGB-Commentary

If one looks at the criminal standard comments, a clear picture emerges.

Already in 2010, Lenckner and Sternberg-Lieben wrote in the commentary to Schönke/ Schroeder (to § 32 para 41.): »Unless one views the child's wellbeing is maintained [...] from the viewpoint of preventing exclusion within the respective religious and socio-environment, there is probably no way around the necessity to exercise the government's guardianship role (Article 6 II 2 GG) by deeming parental consent ineffective [...] Parental rights under Article 6 I GG are duty/right-provision related to safeguarding the child's welfare [...]; the far-reaching interpretation of the primacy of parents with regard to the child's welfare [...] just like the right to religious freedom of the parents (Art. 4 I II GG) find their constitutional limits in the child's right to bodily integrity (Art. 2 II) and the general personality right of the child (Article. 2 I in conjunction with 1 I GG), which also includes self-determination regarding membership in a religious community[...]«.

In 2011, Zöllner came to the following conclusion in Attorney Commentary (§223 para 22.): »Circumcision of boys who are unable to consent is unlawful assault under §223 of the Criminal Code, because consent given by the holder of custody does not correspond to the child's wellbeing and thus is ineffective as justification.«

The judgment of the LG Cologne was significantly influenced by Schlehofer's contribution also published in 2011 in Munich Commentary, (preamble to the §§32 ff 143 Rn. F.). It says (here only quoted in part): »Boundaries are drawn in child custody cases with regard to consent to a circumcision. As far as parents wanting them performed in the context of religious education, their authority to consent is denied by §§1627 S.1, 1631 Section 2 Sentence 1 BGB. According to §1627 S. 1 BGB parental custody rights cover only educational measures that serve the interests of the child. But education through violence is not one of them under §1631 paragraph 2 sentence 1 BGB. It explicitly gives the child the right to a

non-violent upbringing. As religious education measures are not excluded, the prohibition of violence applies to these measures too. This right cannot be cancelled by Article 4, Section 1, 6 §2 of the Basic Law, because [...] Article 2 Section 2 Sentence 1 of the Basic Law draws a constitutionally intrinsic limit even to the fundamental rights of parents, such as the right to religious freedom under Article 4, Section 1, 6 §2 of the Basic Law.«

After the judgment – and with reference to the first outline of a circumcision regulation – Paeffgen took the following position in Nomos-Commentary in 2013 (§228 para 103c-d.): »It seems more than doubtful whether parents' right to religious heteronomy towards their own children can reach as far as exposing the child to the – albeit very small but undeniable – risk of permanent damage, in order to introduce him into their own religious community. Incidentally, the vehemence with which large sections of the media, but also the politically ruling class, defended the position into which they were hoodwinked by circumcision advocates, is diametrically opposed to the grandiose defense of not only a non-violent, but also pain and anxiety-free education. The fact that a circumcision, especially one without anesthesia, but even after the anesthesia effect wears off, is painful, is doubted the most by those who hold this as a religious necessity. [...] That is why even the minimal consensus, to which the German Ethics Council has agreed, remains far from an appropriate solution. In short: On the merits, non-medically indicated circumcision is an unjustifiable bodily injury.«

The proponents of boys' genital mutilation were particularly fond of referring to another standard commentary to the Criminal Code, one which may take claim for always having been and continues to be of great practical influence: the comment by Fischer from the series »Beck's short commentaries«, published in 2007, in its 54th edition under the name »Tröndle/Fischer« There, with regard to paragraph 3a to §223 of the Criminal Code, it was stated, without even the slightest justification claims, that religious circumcisions fall outside the scope of any elements of offense. This was of course attributed to commentator Herbert Tröndle, however, not to the present chairman of the 2nd Criminal Division at the Federal Court, Thomas Fischer. The latter now sees the matter fundamentally different. In the 60th edition published in 2013 it reads (§223 para 44a et seq.): »The argument that circumcision is an act of exercising religion is incorrect, because from Article 4 of the Constitution no claim can be deduced that practicing religious beliefs can justify medically unnecessary and, in individual cases, risky mutilations of other people« (Rn. 44a). In Rn. 50a Fischer unmistakably formulated his result: »A justification based on the religious beliefs of persons holding custody was rejected by the previous law. This applies not least in the context of §1631 II BGB [...]. No unconstitutional restriction of religious (Muslim or Jewish) way of life would be connected to a prohibition of ritual mutilation of children who are unable to consent«.

Primary constitutional opinions

In the same way, Ralf Eschelbach takes a position in Beck's online commentary (§223 para 35.2, 35.3.): »In principle, the law already speaks in Art. 2 para. 2 S 1 of the Basic Law, §223 of the Criminal Code, but also in §1631 para. 2 BGB (Czerner ZKJ 2012, 374, 379) against interference with the body sphere without a medical indication. A medically unfounded interference with the private sphere is, according to article 1 paragraph 1 GG, never allowed (Art. 79 para. 3 of the Basic Law). Thus, the finding stands that declares the objective existence of facts constituting an offense, because also §1631d of the Civil Code is unconstitutional, as well as irrelevant for reasons of endangerment of a child's wellbeing. [...] The freedom rights of parents under Art. 6 para. 2 S 1 GG (paint ZKJ 2012, 336, 338) do not give authority to interfere with the child's right to physical integrity under Article 2, paragraph 2 S 1 GG [...].«

Among the constitutionalists, expert Josef Isensee from Bonn formulated clear criticism of the Berlin Act (2013). On the other hand, the smartest and most thorough defense of the law so far, has been presented by Hoernle and Huster (2013). The criterion they worked out, however, leaves virtually nothing of §1631d BGB's circumcision permission - as Herzberg convincingly demonstrates in this book (to Hoernle and Huster see also Scheinfeld, 2013, p 271, and in greater detail in this book). Parental right to the child's education only covers circumcision if it is »essential for membership in the religious community.« That is not the case in Judaism, and certainly not in Islam. Because belonging to these two religious communities is completely independent of the act of circumcision; children of Jewish or Muslim parents become Jews or Muslims at birth. The foreskin amputation is – as Alan Posener appropriately formulated (2012) – only an act of early childhood indoctrination, by which religions propagate.

Others, such as canonist Michael Germann, operate below this level, which shows already in the insolent ways he devalues his opponents and their contributions. He writes for instance that the remarks of penologist Rolf Herzberg were »less based on constitutional norms than on intuition and value politics« (Germann, 2013, p 413 footnote 4). Claims of this kind may be made, just as all kinds of unqualified assertions about all sorts of things. Those who know the contributions of Herzberg, one of the most prominent criminal jurists of the present day, realize quickly that canonist Germann obviously does not measure up to Herzberg.

Germann attests that the judge at the Federal Supreme Court, Ralf Eschelbach, the Regensburg criminal law professor, Tonio Walter, and others suffer from »fundamental rights-dogmatic deficits« (Germann, 2013, p 416 footnote 20); in other words, gross ignorance. Such deficits could certainly be diagnosed in a person who campaigns for a parental right, which is limited by a child's wellbeing, the extent of which parents can determine themselves, even in case of severe physical interference. But yet, Germann ups the ante by stating that Ralf Eschelbach would be confusing criminal law with constitutional law. However, anyone who knows their way around churches better than the Federal Constitutional Court, should perhaps hold back a little with such criticism. Unlike Michael Germann, Ralf Eschelbach was a longtime research fellow at the Federal Constitutional Court. Germann does not understand that criminal law as applied to constitutional law may also have significance for the meaning of the interests protected by constitutional law. However, this requires the correct detection of the facts, which cannot be said about Germann's text to any extent. His statements are misrepresenting facts and are unrealistic.

Nor does it make the best impression if one reveals, as early as the second footnote, how little one understands or wants to understand. There Germann writes that, among other things, I »would have demanded punishment of Jewish and Muslim circumcision of boys without regard to the fundamental right of religious freedom.« I think I would know of a such a demand, if it would exist. It never has. What I have done was reasoning that non-medically necessary circumcision of boys, including religiously motivated ones, constitute, based on the existing applicable law, a criminal assault. Germann does not seem to be familiar with the difference between demand for punishment and scientific reasoning of grounds of criminality.

What canonist Germann has come up with, only takes those seriously who cannot understand and want to believe in what he writes. Those who do not interpret constitutional law as canon law – and by extension that shall be the majority of reputable constitutional jurists – will reject or simply ignore his remarks (see the profound examination by Herzberg in this book)

Also the statements made by Kay Windthorst (2013) far from meet scientific standards. While he boldly condemns the Cologne Regional Court for its decision, he praises the legislature to the skies: The balance found between parental rights, freedom of religion and the physical integrity of the child »has been justified in an exemplary way.« This is a bold thesis, something that certainly cannot be said about the legislative intent nor about Windthorst's comments. There – apart from the factually wrong assumptions and mere assertions – is not a single argument to be found. That is too little, even for a »study commentary«.

Windthorst reproaches the Cologne district court with having misunderstood »substantial constitutional guarantees« but he misconstrues essential real facts. Thus, he claims: »According to Jewish belief, circumcision of a boy on the eighth day after birth [...] is an essential requirement [...] that [...] is constitutive to belonging to the Jewish community« (Windthorst, 2013, Rn . 54). With all due respect, this is just utter nonsense. It is generally recognized that the Brit Mila is not a condition sine qua non for the attribute of being a Jew. Based on this false assumption, all of Windthorst's conclusions are nugatory. If gross errors already occur in fact-finding, the ability to adequately answer constitutional questions is lacking.

Terrifying are his remarks on the treatment of pain. To this end, he writes: »On the need for anesthesia, the doctor or circumciser [...] must decide based on the circumstances of each case. In older children – no younger than 6 months – a medical anesthetic is indicated, according to lege artis.« (Windthorst, 2013, No. 55.). In view of this one must ask whether Windthorst has ever seriously engaged in reading §1631d BGB and its exegesis. Even in the resolution of the Bundestag there was talk that circumcision should only be admissible if performed »without unnecessary pain«, and the legislative history contains the call for an »effective treatment of pain.« (German Bundestag, 2012, p.7). Now, one may briefly consider whether Jewish circumcisers must act with »effective treatment of pain« (which is to be answered in the affirmative, as has already been mentioned). That medical doctors must adhere to this is clear and requires neither legal studies nor great mental effort. It is stated in paragraph 1. How does Windthorst arrive at the notion that in children under six months »the individual case« decides whether the foreskin amputation takes place with or without anesthesia? If he means that there may be cases in which anesthesia is contraindicated, then his statement would be accurate, yet remain nebulous, because anesthesia would then be the rule. Just as had been the legislature's intention.

Certainly, there are cases in which the condition of the child prohibits any effective anesthesia. But then it also forbids circumcision, because it would constitute torture and as such be incompatible with the rules of medical science. It goes without saying that §1631d BGB would not allow such cruelty. Apparently, Windthorst sees this differently and wants to allow parents for the first months of the child's life to torture rather than to refuse circumcision; an absurd and scandalous understanding of the law.

Either Windthorst assumes indifference towards children's suffering or he has never observed a child compassionately, when its foreskin is being amputated without anesthetic. There is no other way to explain the absence of any empathy as he declares anesthetic-free circumcision of infants to be the rule. Windthorst lets his thoughts run free. In his own interest, it would have been wiser had he engaged himself more intensely in the subject matter and facts.

This group also includes the Cologne expert in constitutional law, Wolfram Höfling. He finds fault with an article by Grams (2013), which recognizes the violation of dignity and personal rights through circumcision of boys, because Grams had not cited a »single voice from the constitutional (commentary) literature.« (Höfling, 2013, S.463). Höfling should have applied such criticism to his own contribution because it is more important to consider the counter-arguments than the citation of constitutional law experts. Unlike Grams, Höfling does not take into account that the act of circumcision intrudes into the child's private sphere and that it robs the child of an erogenous zone. He does not make it plausible to the reader why incising the labia majora shall by no means be covered by parental rights, yet the removal of the penis foreskin is supposed to be very well covered by the parents' rights. Nor does his reader learn why Christian parents are not allowed to put a crown of thorns on their sons on Good Friday but they do have the parental right to amputate their sons' foreskin. In the face of such omissions, what Höfling writes must be seen as more than just legally under-complex.

Conclusion

The District Court of Cologne has convincingly declared religiously motivated circumcisions of boys to be unlawful. It does not correspond to their well-being to irreversibly amputate a healthy body part without medical necessity. Circumcision subjects them to pain and unnecessary risks and the procedure does not provide any health benefits, at least in childhood.

German politicians could have sent a clear message: Our constitution does not allow genital mutilation – neither in boys nor in girls! Politics have caused the opposite. The bodies of infant boys in their most sensitive area have been excluded from state protection. This fact is not changed by § 226a of the Criminal Code, especially created to silence the conscience by explicitly criminalizing the practice of female circumcision as genital mutilation. Instead, the inconsistency has only deepened: §1631d BGB and §226a StGB are incompatible. How can a boy's circumcision be allowed and at the same time all female circumcisions, even if less severe, be punished? This is a blatant violation of the principle of equality.

By now, this contradiction has also been noticed by some circumcision apologists. This point shows the power of the equality argument: It demands equal treatment of boy's circumcision with mild forms of female circumcision. Until now, most have shied away from drawing this conclusion. Steinbach might be one of the first who, like it or not, acknowledges that: »It is difficult to deal with ›mild‹ forms of religiously motivated circumcision of the clitoris, which are comparable in terms of their impact, and circumcision of the penile foreskin. This issue was obviously not on the legislature's regulation agenda. For these cases, the new §1631d of the Civil Code may be applied by analogy« (2013, p.10). Does Steinbach actually mean by ›mild‹ circumcision of the clitoris the partial removal of the externally visible part of the clitoris, in other words, the so-called clitoridectomy? One reads and can hardly believe the consequences that academics are prepared to endorse, let alone are ready to approve, just to save §1631d BGB constitutionally. Whoever warned that §1631d BGB would pave the way for girl circumcisers must now necessarily feel vindicated.

Not least, such developments show: The state would have been obligated to protect all children from medically unnecessary circumcisions and to permit them only when the decision can be made in a self-determined manner. Of course, this also applies to religiously motivated foreskin amputations. Religious tolerance ends when the bodily integrity of children is irreversibly violated for no more than an insignificant medical reason, especially when the intimate area is affected. The fact that the legislature has allowed such interventions is a »fall from grace of the constitutional state« (cf. Merkel, 2012a).

But a pessimistic conclusion would be mistaken. The discussion has been very successful both in the public as well as among many Muslim and Jewish parents, who are unfamiliar with the parents who have practiced the ritual uncritically due to a lack of background knowledge, the suffering of the children involved, and the risks to which they are exposed. I still receive letters, especially from Jewish mothers. Some of them have proudly told me that they successfully resisted the bloody ritual because they realized what a cruel tradition it is. The Brit Mila is a cruel tradition. There are many such parents and there are more and more. They recognize that children and their bodily integrity are worthy of protection, and that a symbolic act replacing the bloody symbolic ritual in no way impairs religious self-image. For today's world no longer corresponds to that of Abraham. What was right then is mostly wrong today. This applies in particular to medically unnecessary circumcisions of boys.

Sooner or later, genital mutilation of boys and girls will be a thing of the past. Religious leaders who support genital violations of children as a non-negotiable ritual, despite the existence of religion-compatible ritual, will not stop this civilization process. Legislators have not succeeded in using the circumcision clause to legalize medically unnecessary circumcisions of boys – and certainly did not decree acceptance or even silence. On the contrary: §1631d BGB has perfectly failed and is an unconstitutional foreign body in our legal system.