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The draft legislation on circumcision - criticism and criminal law alternative

The draft Circumcision Act (*Beschneidungsgesetz*) adopted by the German Federal Government on October 12, 2012 is - apart from other faults - unconstitutional because it discriminates against boys solely on the basis of their sex. Moreover, it seeks to end a discussion that has only just begun. It would be better merely to amend criminal law, consider religious motives alone, and place a time limit on the entire legislation.

I. Auschwitz, minarets and feminism - a background

Since the judgment by the *Regional Court (Landgericht, "LG") of Cologne*¹ concerning circumcision of young boys, the discussion on this ruling and its subject matter has been rousing not just jurists, religious scholars, politicians and cultural columnists, but almost everyone. Primarily impacted are members of the Jewish and Muslim faiths because they consider it - at least in most cases - a religious duty to have their sons circumcised. Orthodox Jews refer to Genesis 17, 10-13, where Yahwe, i.e., God, advises the tribal ancestor of the Jewish people, Abraham, as follows:

"This is my covenant, which you shall keep, between me and you and your offspring after you: Every male among you shall be circumcised. You are to undergo circumcision, and it shall be the sign of the covenant between me and you. For the generations to come every male among you who is eight days old must be circumcised, including those born in your household or bought with money from a foreigner—those who are not your offspring. Whether born in your household or bought with your money, they must be circumcised. My covenant in your flesh is to be an everlasting covenant."²

A much less common quotation, though well worth citing, is the following:

"Any uncircumcised male, who has not been circumcised in the flesh, will be cut off from his [the Israeli] people; he has broken my covenant."

Other translations also say "wiped out" instead of "cut off". While Muslims are not given any similar instructions in the Koran, they also refer to Abraham, whom the Koran recommends as a role model in Sura 3:95, as well as to the Sunna, a collection of rules of faith and conduct in which circumcision is expressly prescribed. They also have to consider that, according to tradition, their Prophet Mohammed was born without a foreskin (or with only a very small one) - another reason to regard this state as something to look up to. The degree to which Muslim parents feel obligated to have their sons circumcised also depends on the faith (school) that they follow.³

There are also other motives for the circumcision of young boys apart from the religious ones. The most important one is the medical indication in the case of a pathological non-retractability of the foreskin (phimosis).⁴ Moreover, some parents cite aesthetic considerations, i.e., they find a circumcised penis more aesthetically more appealing or hygienic; they then believe that it is easier for a circumcised boy - and later man - to maintain an acceptable level of genital hygiene, or that this is indeed only possible for such males. The belief that circumcision has a prophylactic effect and reduces the risk that the circumcised male will be infected or will infect sexual partners with certain diseases follows in the same vein; this is a belief for which one US Physicians' association claims to have found empirical evidence, whereas practically all other medical organizations in the world - and German ones, in any event as far as Germany is concerned - reject it.⁵ Another motive has played an important role historically, namely, that of later preventing the boy from masturbating or at least making it more difficult. This motive is hardly mentioned today.⁶ Yet how often this applies on an unspoken basis is unknown. Finally, circumcision is widespread in African cultural circles as an initiation rite.⁷ There, parents have their sons circumcised while still a boy, deliberately doing so without anesthetic. The fact that he has to bear the pain is the price of admission for joining the men's ranks.

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² *LG Cologne* dated May 7, 2012 – 151 Ns 169/11 = JZ 2012, 805 with citations *Rox*.

³ Quoted in the German version using the standard translation published at the order of the Bishops of Germany from, *inter alia*, a copy from 2006.

⁴ See Ilkiliç, Circumcision of underage boys from the Muslims' perspective; lecture held at the plenary session of the German Council of Ethics on August 23, 2012, available under <http://www.ethikrat.org/dateien/pdf/plenarsitzung-23-08-2012-ilkili.pdf>, last accessed on October 14, 2012

⁵ See *Stehr/Putzke/Dietz* DÄBl. 2008, A-1778 *et seq.*

⁶ Most recently, see the opinions, first of Deutsche Akademie für Kinder-und Jugendmedizin e.V. (http://www.dakj.de/media/stellungnahmen/ethische-fragen/2012_Stellungnahme-Beschneidung.pdf), second, that of The German Association for Pediatric Surgery (<http://www.dgkic.de/index.php/presse/189-pressemitteilung-juli-2012>), third, that of the Professional Association for Pediatricians and Adolescent Medicine (<http://www.kinderaerzte-im-netz.de/bvjk/aktuelles/show.php?id=4233&nodeid=26>), fourth, the German Association of German Urologists via its press officer (http://www.focus.de/gesundheit/ratgeber/maenner/news/tid-26514/beschneidung-ist-koerperverletzung-ohne-medizinische-indikation-keine-beschneidung_aid_781114.html), all last accessed on October 10, 2012.

⁷ See *Darby*, The Masturbation Taboo and the Rise of Routine Male Circumcision: A Review of the Historiography, in: *Journal of Social History* 36 (3), 737 *et seq.*

⁸ See *Aliade/Culiann*, *Handbuch der Religionen*, 1995, p. 37 *et seq.*

The religious motive has well and truly played the main role in the German discussion and raises two other questions apart from the one involving parental rights (i.e., what action may parents take against their children?) and which add even more fuel to the fire: what action may Germans take against Jews? And: what action may Germans take against Muslims? These questions have been deliberately formulated in an unpleasant way that distorts reality, since the majority of Jews living in Germany are of course Germans. The same applies to numerous Muslims residing in Germany, and it is specifically our task to eliminate the differences between Germans/Jews and Germans/Muslims in the interests of a culturally and religiously open society. But only those who remain focused on those topics that are also discussed under the table in the circumcision debate understand why the matter is argued so vehemently - and why it is important to answer these questions with the greatest circumspection when it comes to law-making. It is not just a question of parental rights, but also the holocaust and the integration debate. Figuratively speaking, it is also about Auschwitz and minarets.

It even concerns a third major socio-political issue, namely gender equality and feminism, in this case expressed in the form of the question: to what extent do boys and girls have equal rights? This is because the discussion focuses solely on the extent to which the cutting of a young boy's genitalia might be permitted, while it is agreed that cutting the genitalia of a young girl - no matter where and how - is always a crime. Such an asymmetrical taboo attracts defenders of the rights of men and boys and also activates the gender discussion. Thus, we are conducting four debates in one: we are arguing about the powers of parents over their children, whether Jews should or must be allowed special rights due to the holocaust, how far Germany should go to integrate Muslims and, lastly, how much equality our society really needs.

Given this background, the German Lower House of Parliament (*Bundestag*) requested the Federal Government on June 17 to "submit a bill this fall, which ensures that the medically professional circumcision of boys without unnecessary pain is generally permitted".⁸ The grounds are:

"Jewish and Muslim religious life must remain possible in Germany. The circumcision of boys is of central religious meaning for Jews and Muslims. It is one of the fundamental elements of the Jewish faith. In Islam circumcision also remains essential. [...] The *Bundestag* believes a clear position is required, enabling, in particular, our Jewish and Muslim citizens to freely exercise their faith."

II. The Bill

The *Bundestag* then adopted a bill on October 10.⁹ It wants to insert a new section § 1631d into the German Civil Code (*Bürgerliches Gesetzbuch*, "BGB") with the heading "Circumcision of the male child" and the following language:

- (1) Custody also includes the right to consent to circumcision of a male child who lacks capacity, which circumcision is not a medical necessity, provided such procedure is to be performed in line with the rules of medical practice. This shall not apply if the child's interest is put at risk by the circumcision, even taking its purpose into account.
- (2) In the first six months after the child's birth, persons designated by a religious community may also perform circumcisions in accordance with paragraph 1 if they are specially trained to do so and, without being a medical doctor, have similar qualifications for performance of the circumcision.

III. The Faults in the Bill

1. Breach of Article 3 (2) of the German Basic Law (*Grundgesetz*, "GG") or: from religious tolerance to gender discrimination

a) Statutory gender discrimination

The *Bundestag*'s decision had a clear motivation: "Jewish and Muslim religious life" is to continue to be made possible in Germany. This was also the lone issue at the forefront of the debate in the *Bundestag* and the reporting. It is therefore all the more astonishing to now find that the license to perform circumcisions is not to depend on the religion of the child and his parents at all. The grounds for the bill also expressly state: "a special right for religiously motivated circumcisions alone would unfairly exclude other potential motivations for circumcisions." Instead, permission now depends solely on the sex of the child: male children may be circumcised, female children may not. There are no provisions for levels based on the type of circumcision. Thus the most extreme form of male circumcision is also permitted for young boys, whereas the least invasive form of circumcision is prohibited for young girls.

At this juncture, an examination of the forms of circumcision might be useful, since they differ considerably¹⁰ for both sexes yet barely any distinction has been drawn in the discussion to date. For men and boys, the spectrum ranges from so-called radical circumcision through to forms where the external or inner foreskin and/or so much skin is left on the penile shaft such that the glans is

⁸ BT-Drs. 17/10331.

⁹ Available on the Internet together with the grounds under http://www.bmj.de/Shared-Docs/Downloads/DE/pdfs/RegE_%20Gesetz_ueber_den_Umfang_der_Personensorge_bei_einer_Beschneidung_des_maennlichen_Kindes.pdf?__blob=publicationFile, last accessed on October 14, 2012.

¹⁰ In this regard, see WHO, Eliminating Female genital mutilation, available under http://www.whqlibdoc.who.int/publications/2008/9789241596442_eng.pdf (p. 4, 23 *et seq.*); [German] Wikipedia, search term "Klitorisvorhautreduktion", <http://www.wikipedia.org/wiki/Klitorisvorhautreduktion>; search term "Zirkumzision", <http://www.wikipedia.org/wiki/Zirkumzision> (under "Beschneidungsstile und Formen", all last accessed on October 14, 2012.

or may be covered by a greater or lesser section of skin when not erect, whereas it is permanently and fully exposed with other forms, especially radical circumcision.

As far as women and girls are concerned, the term "circumcision" evokes the image of a screaming girl whose clitoris is cut out with a shard of glass in an African desert. The equivalent with a boy would be amputation of the glans; this is not the issue. The cutting off or sewing together of labia is also not an issue to be considered here. However, there is also a procedure that anatomically equates to circumcision of a man or boy, so-called clitoral foreskin reduction: like the glans (glans penis), the clitoris (glans clitoridis) has a foreskin, and this foreskin also has the same function as with the man, namely, protecting the highly sensitive clitoris/glans. As with male circumcision, the skin may be fully or partially removed for circumcision (reduction) of the female foreskin. In western countries, adult women permit such procedures mainly for two reasons: first, for cosmetic needs, and second, in order to increase the ability to stimulate the clitoris and pleasurable sensation during sexual activity. Among some ethnicities, especially in Arab and African regions, there is also a cultural (initiation) rite of circumcising girls' foreskin.¹¹ The mildest form is the simple and one-time nicking of this foreskin.

Two years ago the *American Academy of Pediatrics* suggested legalization of this "ritual nick" as a compromise in order to allow certain ethnicities in the United States to continue performing a circumcision rite, but to prevent more serious forms of circumcision of girls. However it had to withdraw this proposal following vehement public protests.¹²

Returning to our bill, it can be said that it permits circumcision of male children indiscriminately (in terms of the form) and indiscriminately prohibits circumcision of female children; the converse conclusion is that the latter was never a matter of dispute and this is once more expressly emphasized in the bill (quotes in b below, at the end)

With the planned provision, the State is thus depriving particularly weak and defenseless people of protection of their physical integrity in a highly sensitive area - based on their gender. This is something new, and the question arises as to how this is compatible with Article 3 (2) sentence 1 GG: "Men and women have equal rights." And with a shrug of its shoulders, the bill seems to want to add "But not boys and girls". However, this is neither the letter nor the spirit of our constitution.

b) Can discrimination be justified?

Generally speaking, it is possible to justify statutory discrimination between boys and girls. Since there is no constitutional requirement of the specific enactment of a statute (*Gesetzesvorbehalt*) for an interference with other persons' fundamental rights, conflicting constitutional norms could come into consideration¹³, which would in any case supply the strongest possible argument. Such conflicting constitutional norms have always been thrust into the foreground in the discussion surrounding circumcision: parental rights under Article 6 (2) of the German Basic Law in conjunction with religious freedom of parents under Article 4, which may apply to the critical issue of how far parents' rights extend (although it is not possible to pit parents' religious freedom directly against the child's physical integrity: religious freedom never creates a right to interfere with the physical integrity of third parties).

Thus the bill deliberately disregarded Article 4 and religious freedom. Certainly, in paragraph 2 of the planned § 1631d of the German Civil Code, the religious communities are mentioned. There, "persons designated" by such communities are also granted permission to circumcise boys under certain conditions, even if these persons are not medical practitioners (mohel clause, see 3 below). However, this only concerns the performance of the procedure, and religious convictions and communities are completely irrelevant to the central statutory permission under paragraph 1. I dispute the notion that a mere reference to parental rights is sufficient to subordinate the physical integrity of boys to that of girls.

This is all the more the case to the extent the bill provides for direct discrimination, i.e., it expressly ties the permission to inflict personal injury to the sex of the child (whereas with indirect discrimination, one sex is preferred or disadvantaged over the other only on a *de facto* basis) Now, one might say that the issue here is a problem that, "by its nature", could only arise with male children, meaning that it is impossible not to make the male gender a criterion for permission.¹⁴ And it is indeed the case that circumcision of the penile foreskin can only be a matter for debate in the case of male children. But this argument is taking the easy way out. This would open the way for a return to the old criteria for grievous bodily harm in § 226 (formerly § 224) of the German Criminal Code (*Strafgesetzbuch*, "StGB"), i.e., that of the destruction of the victim's ability to procreate in the sense of "fathering a child" (*Zeugungsfähigkeit*) instead of the current criteria of "infertility" (*Fortpflanzungsunfähigkeit*). In this case, the ability of women to conceive and give birth would again be declared less important than males' ability to father a child. Based on this logic, this could be justified by arguing that by its nature only men are capable of fathering a child and that the discrimination between men and women in the law is thus based on a natural difference between the sexes. And, in this respect, the anatomical-biological difference between fathering a child and conceiving and giving birth to one is considerably greater than that between the male and female foreskin.

How, one might ask, could a law on circumcisions according to Jewish and Muslim faiths ever have been able to avoid distinguishing between boys and girls when only boys are circumcised in these religions? For the answer, one must first keep in mind that our bill does not distinguish solely between boys and girls for circumcisions of Jews and Muslims, but has no regard to religion at all: the

¹¹ See Leonhard, Female circumcision in southern Chad: Origins, meaning, and current practice, in: *Social Science & Medicine* 43 (No. 2), 255 *et seq.*

¹² See MacReady in: *The Lancet*, Vol. 376 (No. 9724), p. 15 (on the Internet under [http://www.thelancet/journals/lancet/article/PIIS0140-6736\(10\)61042-2/fulltext](http://www.thelancet/journals/lancet/article/PIIS0140-6736(10)61042-2/fulltext), last accessed on October 14, 2012).

¹³ *BVerfGE* 92, 91 (109); *Jarass*, in *Jarass/Pieroth*, GG, 11th edition 2011, Art. 3 margin note 93

¹⁴ See *BVerfGE* 92, 91 (109); 85, 191 (207).

parents may in principle have their sons circumcised radically and for any reason (more on this below); the genitalia of daughters, on the other hand, remain absolutely taboo irrespective of the motives of the parents. Moreover, one must consider that a gender-neutral formulation is certainly possible, which *de facto* affects only boys. This would at least be a symbolic difference. Considering the fervor with which lawmakers seek to avoid linguistic sexism in other legislation, it can hardly be claimed that such symbolic non-discrimination is unimportant. Primarily the bill must be criticized for the fact that it places the physical integrity of boys at the parents' disposal across the board as far as circumcisions are concerned, and in any event goes well beyond the parameters of its mandate in breach of the constitution.

The grounds for the bill camouflage this by strictly employing those three rules of rhetoric that apply to the circumcision of girls and women. First: one must call it "genital mutilation" in all its forms, never "circumcision"; the reverse applies for boys. Second: for circumcisions of girls and women, no distinction between the forms and motives is permitted; the nicking, indeed scratching of the female foreskin is just as drastic as cutting off the labia and clitoris. It is always a crime and therefore always - third rule - fundamentally different from anything that circumcisions of boys could ever be.

Some quotes from the grounds of the bill: "The mutilation of female genitalia [...] is fundamentally different from male circumcision"; the "performance of any form of mutilation of female genitalia" is a "grievous violation of fundamental human rights. [...] In no case may consent by the custodian serve as justification"; even if the procedure "is performed in compliance with all rules of medical practice. [...] In this respect, no distinction may be made based on the type of mutilation either" (the last two quotes come from German Supreme Court (*Bundesgerichtshof*, "BGH") (*BGH NJW 2005*, 672 [673]) and are cited approvingly in the grounds).

Incidentally, another argument in favor of legalizing the circumcision of boys, which plays on the imagery of female genital mutilation, must be questioned. Here I mean the thoughtful consideration of sparing boys the horror of illegal circumcision, which proponents maintain they would inevitably face otherwise. Keywords; back room, razor blade, etc. That sounds humane on its face. However, anyone who offered this argument in favor of legalizing even the symbolic circumcision of girls (nicking of the female foreskin) would be met with absolute outrage; the American Academy of Pediatrics has already had this experience (see above). So why is this argument so readily accepted for boys? No misunderstandings: the circumcision of girls should remain prohibited in all its forms. But there is no justification for categorically treating the circumcision of boys differently from the outset.

2. The term "child's interest" is abused, or: parents' will instead of child's interest

If one skims over the text of the planned § 1631d, it might be tempting to find solace in sentence 2 of the first paragraph. There it says that the license to perform circumcision does not apply if "the child's interest is put at risk by the circumcision, also taking its purpose into account." The question arises, however, as to what this is supposed to mean. The authors of the bill are not exactly sure either. They give a total of three examples, albeit leaving the back door open, and - if one does not avail oneself of this door - with an unfortunate result. The following language appears in the grounds:

"In assessing a child's interests, the purpose of the circumcision must also be considered (for example, in the case of a circumcision for purely aesthetic reasons or with the aim of making masturbation more difficult). Similarly, the opposing will of a child who does not have capacity to understand or assess the situation may have to be considered."

This means: circumcision might be prohibited (or maybe not) if the child refuses it or the parents want it only for aesthetic reasons or in order to make it more difficult for the boy to masturbate. The first case is complicated enough: how old does a child have to be and in what form and how often does he have to express his refusal? The first case can be dispensed with altogether; it is irrelevant when it comes to circumcision according to the Jewish rite, because newborns cannot express themselves with any clarity anyway, and among Muslims, too, it is likely rare that a boy would openly oppose his parents in front of a third party (the doctor).

Yet the second and third examples are remarkable, because they carry the original proposition of the bill to an absurd conclusion. This proposition, we recall, is that a "special right" for religiously motivated circumcisions might "unfairly exclude other potential motivations for circumcisions". In other words, the bill does not wish to differentiate between the purposes of the parents' wish for circumcision. But this is precisely what it does in order to define the child's best interest. This is because at least two purposes should - potentially - be contrary to the child's interest: a purely aesthetic purpose and the purpose of making masturbation more difficult. Four objections must be raised against this: first, the other conditions that are supposed to prevent a circumcision where the purpose is suspect remain hazy. Second, the child's interest and the parents' motive are two different things. Third, both physicians and judges cannot cope - and lawmakers therefore cannot cope either - with plausibly separating good motives for circumcision from bad ones as soon as one leaves the field of religious circumcisions. Fourth, in practice such a distinction only results in the parents citing one of the accepted motives and concealing their real one (if it is different).

The first point requires no explanation. Concerning the second, it must be said that from the sole perspective of the child and based on today's medical knowledge - in Germany - a circumcision that is not medically indicated is *never* in the child's interest, because it involves a range of health detriments and risks, and at least results in desensitization without any proof of a prophylactic benefit.¹⁵ Nor is there evidence of any hygienic benefit as long as soap and water are available.

The only conceivable benefit from the child's perspective might be if he is otherwise - i.e., uncircumcised - later discriminated against in his own social group or even excluded from it. For this prognosis, however, it would have to be sufficiently foreseeable in which

¹⁵ For details on the detriments and risks of circumcision, with extensive evidence, see *Putzke* in: Commemorative Text for Herzberg, 2008, p. 669, 688 *et seq.* Further evidence in *Putzke* MedR 2012, 621 (623 in footnote 31)

social group the boy will grow up, that circumcision is immensely important in this group, that circumcision –being circumcised - is checked, and that those who are not circumcised can reckon with major negative consequences (which of course might be of a purely psychological nature). However, this scenario is by no means so probable among Jews and Muslims in Germany that it can be safely assumed. Rather, there are most certainly uncircumcised Muslim and Jewish boys who lead a perfectly normal life. Striking is one newspaper article, which thankfully states the following in its full title: "Even in Israel, more and more parents choose not to circumcise their sons"¹⁶. There is also evidence in the German press that circumcision is by no means undisputed among persons of Muslim and Jewish faith living here, that it is by no means practiced wholesale, and that those who are not circumcised by no means have to lead a life as a pariah in their social group. Correctly, *Stephan Kramer*, General Secretary of the Central Council of Jews in Germany, stated as follows in an interview on ZEIT-online:

"Naturally it is said that a Jew who is not circumcised cannot marry, cannot read from the Torah and cannot take part in a Seder night [the evening before Passover, where the family/community commemorates specific customs from the exodus of the Israelites from Egypt]. But I have never seen a case where the genitals are checked at the synagogue door."¹⁷

Therefore, from the standpoint of a reasonable third party, it is improbable overall and *out of the question* outside of social groups practicing circumcision that circumcising a young child without any medical indication is in that child's best interest. If the parents absolutely want the circumcision, for whatever reason, this might boost their personal sense of wellbeing. But this has nothing to do with the child's best interest. Just as a further note, under German domestic relations law, the parents' motives generally cannot serve as a justification for § 1666 of the German Civil Code (BGB) if an act or circumstance puts the child's best interest at risk.¹⁸

Which brings us to the third point: how are physicians and judges, indeed anyone at all, supposed to determine in a generally binding manner, outside of religious rules, what qualify as good or bad parental motives for each circumcision? How can this be done when it is clear that circumcision - at least in Germany - can have no hygienic or other medical-prophylactic justification? Just looking at the examples already cited in the grounds for the bill is enough to make the head spin: there, it says that an aesthetic motive is (probably) inimical to the child's best interest, i.e., bad, whereas a "cultural rite" is fine. Does this also apply to African initiation rites? And what if the motive for the "cultural rite" is specifically the aesthetic values of its adherents? Or the belief that this will make masturbation more difficult, which, however, is classified in the grounds for the bill as (probably) a reprehensible motive *per se*? At this point, unfortunately there is again no getting around the fact that, except where there is a medical indication, there is *absolutely no* reasonable motive for circumcision of boys from the standpoint of an informed and discerning third party.

Fourth point: if the issue of whether their child is to be circumcised is supposed to depend on the parents' motives, in practice the only deciding factor will be the stated motives, i.e., what the parents put on the record. As in the times when people sought to avoid military service, there will then be websites where parents can find formulations that the physician will accept. The result then is that male children will in fact be approved for circumcision without limitation.

3. The mohel clause does not work

The second paragraph of the planned § 1631d BGB contains a mohel clause; the bill seeks to continue to allow Jewish circumcisers - singular mohel, plural mohelim - to ply their trade. The prerequisite is that they have "similar qualifications" to those of a medical practitioner. To be on the safe side, the bill expressly requires that they must have been "specially trained" for circumcisions. The Central Council of Jews in Germany has already announced that it wishes to establish personnel requirements.¹⁹ Nor should this be a problem. However, the whole plan is thwarted by paragraph 1 of the planned statute. This is because it requires that the operation be performed in accordance with the rules of medical practice. These, in turn, require the use of an effective anesthetic. This has not gone unrecognized in the grounds of the bill. What they do fail to recognize: the pain of a circumcision and the subsequent pain from the wound can only be effectively prevented by general anesthesia supplemented by a peripheral nerve block, i.e., through additional local anesthetic by injection.²⁰

There are still two catches to this. First, general anesthesia and nerve block anesthesia may only be administered by a medical doctor and only a medical doctor can obtain the anesthetics required; the legislation does not want to modify even the latter requirement (the grounds of the bill read: "If there are individual medical concerns under special legislation [for example, pursuant to the German Law on Narcotics (*Betäubungsmittelgesetz*) or the German Medicinal Products Act (*Arzneimittelgesetz*)], these shall remain unaffected). The only means that mohelim may use to ease pain are salves and suppositories. However, these cannot "even begin" to prevent pain, as the President of the Professional Association for Pediatricians and Adolescent Medicine (*Berufsverband der Kinder- und Jugendärzte*), *Wolfram Hartmann*, recently emphasized once again in an interview.²¹ Thus according to the rules of medical practice,

¹⁶ *Ahituv* in: Haaretz dated June 14, 2012, <http://www.haaretz.com/weekend/magazine/even-in-israel-more-and-more-parents-choose-not-to-circumcise-their-sons-1.436421>, last accessed on October 14, 2012

¹⁷ See <http://www.zeit.de/gesellschaft/zeitgeschehen/2012-10/beschneidung-gesetzentwurf>, last accessed on October 14, 2012.

¹⁸ See *Coester* in: *Staudinger*, BGB, 2009, § 1666 margin note 66.

¹⁹ See the statements by *Josef Schuster*, Vice President of the Central Council with *Bigalke*, *Süddeutsche Zeitung* dated August 27, 2012, p. 5 (Article "Fear of strict requirements").

²⁰ See for example the press officer of the Professional Association of German Urologists, *Wolfgang Bühmann*, in Focus-online under http://www.focus.de/gesundheit/ratgeber/maenner/news/tid-26514/beschneidung-ist-koerperverletzung-ohne-medizinische-indikation-keine-beschneidung_aid_781114.html; see also the guidelines of the German Association for Pediatric Surgery for phimosis operations http://www.awmf.org/uploads/tx-szleitlinien/006-052_S1_Phimose_und_Paraphimose_04-2008_12-2012.pdf, both last accessed on October 14, 2012.

²¹ With the *Tageszeitung*, see <http://www.taz.de/1103381/>, last accessed on October 14, 2012.

the mohelim would be obligated to procure an anesthetic, yet they are not authorized to do so even after additional training. The second catch: orthodox Jews refuse any anesthetic (except for "a drop of sweet wine").²² In short, it can therefore be said that the bill is contradictory in relation to mohelim and ultimately does not allow them to continue their trade. The only remedy for this would be an additional rule stipulating that a qualified anesthetist must always assist the mohel.

4. The draft seeks to end a discussion that has only just begun.

The current bill is an act of desperation. It is a desperate attempt to end a discussion while the shot from the starting gun still rings in our ears and the sound waves set in motion are already travelling beyond German borders to foreign shores. The country's political elite, many thinkers left of center and thus those who fall within the spiritual catchment of the major churches, had expected after the judgment by the *Regional Court of Cologne* that it went without saying that the circumcision of boys was an undisputed and harmless rite in Judaism and among Muslims, which had to be permitted if for no other reason than because prohibiting it would be interpreted as being anti-Semitic and anti-integration. It was also taken for granted that the majority of the non-Jewish and non-Muslim population would also see things this way, and that only a few troublesome lawyers who had lost touch with reality had come up with the outlandish idea of questioning the circumcision of boys.

Yet consider this: by no means is the majority of the population of this view, on the contrary. Even under the thundering cannons of propagandistic broadsides immediately loosed in support of religiously motivated circumcisions, more citizens have supported their prohibition than legalization in surveys.²³ And also consider this: by no means are all people of the Jewish faith or all Muslims thrilled about the support that top German politicians are giving, as a virtual reflex, to the orthodox and traditional circumcision practice of their religions. Rather, it can be seen that in Judaism, even in Israel, and among Muslims, there are many men and women who by no means feel that they are doing God a favor by inflicting something upon their sons, who can neither defend nor express themselves, and which would be labeled genital mutilation in the case of their daughters. Moreover, there have long been individual rabbis who believe that their god's commandment is satisfied by merely performing a symbolic act on the eight-day old newborn, for example by touching the genitals with a knife, and that the actual circumcision should be postponed until the boy can decide for himself.²⁴

Even Jews who wish to uphold traditional circumcision are at least now asking the question: "We have abolished so much of what is written in the Torah - why not this as well?" This is again a statement by *Stephan Kramer*, the General Secretary of the Central Council of Jews.²⁵ And he adds: "Most of the arguments do not really convince me: it supposedly fosters identity and it has been done this way for more than 5000 years. This alone cannot be a satisfactory justification." One need only look at the Torah verse following the circumcision requirement in order to see that today people of the Jewish faith in fact by no means consume everything with the same gusto as it is served up in the Torah (see I above). Thus one can see a shift in Judaism. To top it off, it has become increasingly clear in the discussion with medical practitioners and affected individuals, as well as from a detailed evaluation of the data, that circumcision of boys is by no means the charming, risk-free, inconsequential, even useful trifle as previously thought.

All these voices and findings are overwhelming for those who initially supported circumcisions. The current bill is an attempt to escape the situation. In point of fact, however, it is a futile measure that does not end the discussion, does not solve the problem, but makes tempers flare.

IV. The (interim) solution must be anchored in criminal law

In the grounds for the bill, it reads as usual "Alternatives: none": This is a particularly poor joke in this case. There would even be several legislative and administrative alternatives; they simply were not considered. In administrative terms, the justice ministers of German states could agree to instruct their public prosecutors to stop pursuing circumcision cases. Theoretically, however, this could create the view among strict public prosecutors that the instruction is non-binding because it obligates them to commit a crime: obstruction of justice in an official capacity by failing to act (§§ 13, 258a StGB)²⁶. Thus legal uncertainty would remain, and the

²² See the statements by the rabbi *Yona Metzger* in Spiegel-online under <http://www.spiegel.de/politik/deutschland/israels-oberrabbiner-yona-metzger-ueber-die-beschneidung-von-juden-a-851210.html>, last accessed on October 14, 2012.

²³ In a Emnid survey, 48% of those surveyed were against legalizing circumcision of boys, 40% were in favor (12% had no opinion), see http://www.focus.de/politik/deutschland/beschneidung-essentieller-glaubensinhalt-mehrheit-der-deutschen-lehnt-beschneidungsgesetz-ab_aid_785174.html; in a YouGov survey, 45% were in favor of a ban and 43% for legalization (13% have no opinion), see <http://www.yougov.de/news/2012/07/19/Umfrage-fast-die-halfte-der-deutschen-fur-beschnei/>. The Cologne judgment is considered correct by 56% and only 35% consider it wrong according to an Emnid survey (10% have no opinion), see http://www.focus.de/politik/deutschland/verbot-der-beschneidung-juden-und-muslime-fordern-korrektur-des-urteils_aid_775212.html.

²⁴ See for example *Breitbart*, Brit ohne Schnitt, in: *Jüdische Allgemeine* dated August 8, 2012, <http://www.juedische-allgemeine.de/article/view/id/13858>; see also the initiative by attorney *Eran Sadeh*, founder of Protect the Child, under <http://www.pro-kinderrechte.de/statement-von-eran-sadeh/>, both last accessed on October 14, 2012. In addition, *Kreß* MedR 2012, 682 with additional citations. In Germany, there were already Jewish voices in Germany, including rabbis, who opposed traditional circumcision of boys, see *Hödl*, Die deutschsprachige Beschneidungsdebatte im 19. Jahrhundert, in: *Aschkenas*, Volume 13, book 1, p. 189 et seq.; *Wolff*, Medizinische Kompetenz und talmudische Autorität, *Jüdische Ärzte und Rabbiner als ungleiche Partner in Der Debatte um die Beschneidungsreform zwischen 1830 und 1850*, in: *Judentum und Aufklärung: Jüdisches Selbstverständnis in der bürgerlichen Öffentlichkeit*, published by *Arno Herzig* et al, 2002, p. 119 et seq. On the rabbi and Talmud-related circumcision debate from an historical perspective, *Wolffsohn*, Nicht die Beschneidung macht den Juden, in: *Die Welt online*, under <http://www.welt.de/debatte/article108845278/nicht-die-beschneidung-macht-den-juden.html>, last accessed on October 14, 2012.

²⁵ As in footnote 17.

²⁶ See *T. Walter*, in: *Leipziger Kommentar zum StGB*, 12th edition 2012, § 258a margin note 11 et seq.

removal of legal uncertainty is precisely the goal of the Federal Government and the *Bundestag*. Therefore a legislative solution is preferable.

1. Guiding thoughts

One thing should not be at issue here, although it is naturally an underlying question: whether circumcision of young boys when it is not medically indicated should be legalized in the first place. In principle, I share the view first substantiated in detail by *Holm Putzke*,²⁷ in other words, I believe this should not be done. At the same time, however, I think it is out of the question – in Germany of all places – to criminally prosecute people of the Jewish faith and Muslims for observing commandments imposed upon them – from their perspective – by their faith. It is also the stated intent of the *Bundestag* to continue to enable such religious life in Germany. Therefore in my view it must be about finding a compromise solution that makes clear the concerns of a secular, informed and humane society regarding male circumcision, without labeling those who subjectively fulfill their religious duty as criminals; and this is a duty that was not conceived by a sect, but that has its roots in two world religions. However, it should become clear that male circumcision is not approved of, rather tolerated, and that discussion on the matter is not considered at an end; a discussion that must be conducted, above all, in the religious communities, i.e., among Jews and Muslims. On this basis, lawmakers should adopt two maxims:

a) Restraint

The first is restraint, because the debate on the pros and cons of male circumcision, as stated, has only just begun, including within the religious communities, and it is not the lawmakers' task to pre-empt its result and end it prematurely (more precisely: to try to do so; lawmakers cannot end a debate of this scale). Again *Stephan Kramer*: "I think we can, indeed must, discuss a great deal."²⁸ That they should: Jews, Muslims, Christians, atheists - and anyone else who might be affected. Apropos affected: there are even circumcision support groups for patients whose procedure did not go as smoothly as normal; "No one listens to them" is the correct conclusion of *Wolfgang Hartmann*.²⁹ There is now an opportunity for this as well – and the opportunity should remain.

Therefore the lawmakers' approach should be minimally invasive, and the flames should be extinguished only where the fire is actually burning. There is no fire around custody rights under the German Civil Code, but rather in criminal law. Physicians, mohelim and Jewish and Muslim parents fear that they will be criminally liable if they obey the subjectively mandatory commandments of their faith or, from the physicians' perspective, comply with the wishes of the parents. This fear – nothing more – should be taken away from them. To this end, lawmakers must take steps under criminal law.

Under criminal law, there is also a means by which the threat of sanction can be limited on a value-neutral basis, namely, by excluding the relevant action from criminal liability. More precisely, these types of exclusions are exceptions, specifically formulations that expressly limit the criteria for an offense. They are value-neutral because they can arise in two forms and, regarded *per se*, never reveal which form they take: those rules that limit the offense *despite* the fact that the conduct otherwise remains unlawful under civil or public law, or those rules that limit the offense *because* the conduct is *lawful*, i.e., it does not give rise to any public or civil law concerns.³⁰ In the first case, the exception is an expression of what *Binding* calls the fragmented character of criminal law³¹: not everything that is unlawful has to be subject to criminal sanction. One well known – albeit disputed – example is § 218a (1) StGB (abortion after consultation), while another, lessor known example is the "educator's prerogative" under § 131 (4) StGB (provision to minors of texts that glorify violence by the custodian).

In the second case, the conduct as a whole is of no legal concern – even if it causes offense – and therefore most certainly cannot be subject to criminal sanction. One example is § 131 (3) StGB. This provides for an exception to the offense of depicting violence if "the act is for reporting on current affairs and historical events". Such reporting is permitted as a whole, indeed desired. It is most certainly not criminal. This can be seen from a glance at the rest of legal system, and the situation is the same with the other type of exclusions, for example § 131 (4) StGB (see above). Considered *per se*, an exemption is thus not to be regarded in terms of whether it represents the boundary between lawful and unlawful, or merely the boundary of criminal law. Therefore an exemption is suitable for removing criminal liability if one wishes to leave the question as to how the conduct is otherwise viewed in legal terms unresolved.

a) Solve only the problem at hand

The *Bundestag's* decision actually made it perfectly clear: the main issue now is to take Jews and Muslims out of the firing line of criminal law. If the issue concerned only people of Jewish faith, the best thing would be a provision expressly for them. The fact that it is not permitted to create a special right for a single religious community would, exceptionally, not be a cogent argument in their case. In light of German history, Judaism *does* hold a special position and this will not change for the time being. Criminal law takes this into account in § 130 (3) StGB ("qualified Auschwitz lie").

However, a provision for people of Jewish faith alone would be untenable politically and under constitutional law because precisely the same physical injury is involved for Muslims and they also have a religious motive. But the law can and must at least restrict itself

²⁷ As in footnote 15.

²⁸ As in footnote 17.

²⁹ As in footnote 21.

³⁰ In this regard, see also *T. Walter*, *Der Kern des Strafrechts*, 2006, p. 64 *et seq.*

³¹ *Binding*, *Lehrbuch des Gemeinen Deutschen Strafrechts*, Special Section, Volume 1, 2nd edition 1902, p. 20

to this religious motive. Only this way will lawmakers be concentrating on the problem that needs to be solved. Only this way can the constitutional law weight of Article 4 GG be brought to bear. And efforts should also be made to keep private faiths out of the provision by limiting it to circumcisions that are required by religious communities. Whether a religious community does so can, in case of doubt, be decided by an expert, and if this expert considers this view to be reasonable given the basic tenets of that religious community, the benefit of the doubt would have to be given to the religious community under criminal law. While it must be kept in mind that Muslims in Germany represent only around 20% of members of religious associations or communities,³² it is nevertheless proper to demand such membership: it makes it plausible that the religion is in fact the parents' motive and that their son is growing up in an environment that can give rise to peer group pressure.

There is no need for a special criminal law provision for mohelim. There, it is sufficient – but necessary – for the rules of medical practice to be made binding. What they stipulate has been stated above (III 3). Then it is same whether a doctor operates alone according to professional standards or assists a mohel who does so.

2. Proposal for an amendment to the German Criminal Code (§ 223 StGB)

These considerations give rise to the following proposal for a new paragraph 3 of § 223 BGB:

Paragraph 1 shall not apply to circumcision of children who lack capacity to understand or assess the situation if their religious community and that of their custodians requires circumcision. The rules of medical practice must be complied with. If the children have capacity to express their will in a comprehensible manner and should they consistently refuse the circumcision, the family court shall decide. [optional addition: circumcision means removal of the foreskin, in whole or in part.]

Sentence 1 limits the offense under § 223 (1). The formulation “shall not apply” is one of several standard ones,³³ and in my view the most appropriate. The fact that only children who lack capacity to understand or assess the situation are considered is in line with the old draft legislation. All other children therefore have a right of veto. Sentence 3 provides for another veto option. This is also drawn from the old draft legislation, but more precisely: the child must have capacity to express himself in a comprehensible manner; orally, in writing or in sign language. Screaming or thrashing about are not sufficient for this purpose. And the refusal must be consistent, i.e., the child must reiterate his refusal if he is asked again. Naturally no impetus should be given to “working on” the child until he stops resisting. The only issue is to prevent any utterance of a “no” from rendering the operation immediately unlawful. In order to guarantee both and not to make excessive demands of medical practitioners, the new draft provides that in such critical cases a family court will rule on the circumcision. The family court is an independent instance and familiar with decisions of this kind and child clients. Since such critical cases are rare and an important interest is involved, it is both practical and reasonable to impose a requirement of a judicial ruling.

In order to ensure that the law concentrates on the Muslim and Jewish rite and that sects and individual quirks are in any event omitted, there is no reference to “religious motives” etc.; rather, the child and the custodians must belong to a religious community and this community must require circumcision. In order to allow a degree of flexibility, the new draft deliberately does not say “mandatorily requires” (which would in any case be tautological). It suffices if an instruction to support circumcision can be inferred from the religious code of the relevant religious community.

The provision ends with a legal definition of circumcision. It is not absolutely necessary. However, if one decides in favor of such a definition, it must – as in the proposed formulation – be gender-neutral. That effectively only boys are affected is not a decree of the lawmakers, rather a consequence of the rules that the religious communities give to themselves. Should a religious community actually exist – *Putzke* refers to the Shafi‘i³⁴ – which requires that a young girl’s clitoral foreskin be circumcised, this can only become a problem according to the language of the new provision if this religious community, first, is to be considered a religious community within the meaning of the Act and, effectively more important, if a physician can be found in Germany who is willing to perform this operation in accordance with the rules of the medical profession. In my opinion, lawmakers can place this eventuality in the hands of practice. Should it ever come to this, practice will be able to rely on the fact that, at all times during the legislative process, leaving the absolute prohibition on female circumcision in place was not a matter for dispute.

3. Limited term

Laws may be given a limited term, and this has already occurred in criminal law.³⁵ A limited term indicates that lawmakers are not giving the final word, but wish to monitor how things develop. There is every reason to do this with male circumcision: the discussion has only just begun and there is a growing number of skeptics and opponents even in religious communities that traditionally practice it. Therefore the exclusion proposed above should initially be limited for five years. This would have to be done in the associated

³² *Haug/Müssig/Stichs*, *Muslimisches Leben in Deutschland*, commissioned by the German Islam Conference and published by the Federal Department for Migrations and Refugees, 2009, p. 167

³³ For further detail and variations, see *T. Walter* (footnote 30), p. 64 *et seq.*

³⁴ *Putzke MedR* 2012, 621 (623 *et seq.*).

³⁵ For procedural law, mention must be made of the “leniency rule” (Article 4 of the Amending Act to the Penal Code, Code of Criminal Procedure and the Law concerning Possessions and Assemblies and for Introduction of a Leniency Rule for Terrorist Offenses (*Gesetz zur Änderung des Strafgesetzbuchs, der Strafprozessordnung und des Versammlungsgesetzes und zur Einführung einer Kronzeugenregelung bei terroristischen Straftaten*), BGB. 1989 I p. 1059). Under substantive criminal law, there may be legislation limited by time pursuant to § 2 (4) StGB (temporary laws). In practice, these arise in the form of temporary regulations that refer to criminal offenses such as § 34 (4) of the Foreign Trade Act (*Außenwirtschaftsgesetz*, “AWG”) in conjunction with embargo regulations; see *Dannecker*, in: *Leipziger Kommentar zum StGB*, 12th edition, § 2 margin note 117 *et seq.*

amending act (to the German Criminal Code). When the five-year limit expires, it would of course be possible to extend the validity, and this would probably be necessary as well. However, lawmakers would have made it clear that they are noting the discussion in the religious communities of the Muslims and Jews and remain open to taking any change in their religious views into consideration.

V. Compromises are essential – conclusion

It is rare to hear so many and such committed voices raised on an issue as in the debate surrounding circumcision of young boys. Nor is this surprising considering the fact that it does not just involve a “small cut”, but rather a range of fundamental issues (I above). In addition, there are weighty arguments on both sides, which are also important in constitutional law terms and almost equally strong in view of the number and esteem of their proponents. In this situation, lawmakers would be ill-advised to try to push through the position of one side without making any accommodations. They must seek compromise. The Federal Government's bill is no such compromise. Instead it goes to the detriment of the children and, unconstitutionally, even goes beyond the actual dispute in that it effectively seeks to permit circumcisions without giving any consideration to the parents' motives. The alternative proposed here will never find universal acclaim. But that's the way it goes with compromises. And some day we will have reached the point where no more compromises will be needed.