

# COMMENT

## *Explaining the Cologne Circumcision Decision*

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The decision of the Cologne Regional Court<sup>1</sup> (*Landgericht Köln*)<sup>2</sup> on religiously motivated circumcisions allegedly banned those circumcisions in Germany—or at least a part of Germany. The opinion of the court was discussed worldwide and was continually misconstrued as a broader signal emanating from Germany that reflects potential discrimination and ignorance of important religious groups and their needs. The author was the spokesperson of the court for this case, a judge himself at the Cologne Regional Court at the time. He explains the legal and factual background as well as the reaction of the German legislature to the decision. He clearly rejects the notion that this decision is discriminatory in nature. On the contrary, it shows a remarkably liberal approach, although references from its holding may indeed limit religious communities in practising circumcisions.

For the English reader this Comment provides an illustrative presentation of the fundamental differences between the civil and common law legal systems, an introduction to the German criminal law and therefore a distinction from *Gillick v West Norfolk and Wisbech Area Health*

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1 Regional Courts (*Landgerichte*) in Germany have chambers for criminal and civil law cases, both as court of first instance and as court of appeals. In this case, the chamber acted as a court of appeals. *Landgerichte*, often translated also as 'District Courts', are intermediate courts, which have superior courts above them and lower courts below them. However, in order to distinguish them from the 'District Courts' in terms of the US-American legal systems, it should be noted that German Regional Courts are state courts (not federal courts), which nevertheless apply and enforce federal German law, like the German Criminal Code (StGB) or the German Civil Code (BGB) for instance.

2 The Cologne Regional Court is one of the largest Regional Courts in Germany. It has jurisdiction over more than two million residents in its district and about 150 permanently employed full-time judges.

*Authority*,<sup>3</sup> the leading case in the UK regarding consent and its necessity for medical actions on minors. In the *Gillick* case, the House of Lords held that minors can in some circumstances validly consent to medical treatment without additional consent from their parents and that ‘parental rights’ are not an obstacle to this as they exist only in a sense to be a safeguard to the best interests of a minor. This Comment shows that there is a tension between this and the current German approach. Obviously, the German understanding of ‘parental rights’ goes distinctly further.

## **Initial remarks**

### *Judges and spokespersons*

The author is *not* the judge who decided the case. As judges are appointed and not elected in Germany, and therefore not dependent on their personal standing with the public, it is commonly understood that the judge concerned should never explain or even defend his or her decisions in public. As judges rarely do so, every German court has at least one spokesperson whose duty it is to present and explain the courts’ decisions to the public and the media. The author is one of three spokespersons of the Cologne Regional Court, to whom the cases are allocated. However, even as spokespersons, their role is limited: it is not the spokesperson’s task to defend the decision or to take a certain position in the discussion about religiously motivated circumcision. Thus, the objective here is to explain to an international audience the facts and law behind the decision and the action that the German legislature has subsequently taken as a response to the decision.

### *The reputation of Germany in the international community*

Every now and then the judgment of the Cologne Regional Court has been perceived as indicative of a new emerging exclusion of people who believe or think differently in Germany, regarding their roots or religion. It is to be regretted that this could be understood as arising from this decision. Modern Germany actually is interested in being a country with an integrating, tolerant, cosmopolitan and liberal-minded society. Hopefully, this will be also the reader’s conviction, after having learnt how the court came to its findings. Its mere outcome may be construed as exclusionary on the surface, though a more rigorous examination illustrates how the court’s approach was orientated toward protecting important individual rights.

## **Should judges decide critical and complex socio-political questions?**

The topic at hand concerns a deeply religious question and invokes quite complex socio-political issues that have fundamental moral and ethical implications. This begs the question: why are judges involved? In principle, is a court (in Germany) in a position to decide these questions?

<sup>3</sup> [1986] 1 AC 112, [1985] 3 All ER 402.

This leads to the even more fundamental question, whether judges are destined to decide these complex political questions. At first glance, these questions seem to deal with such important and basic rules of communal life that they must be reserved to the Parliaments for that reason alone. It is truly the conviction of most German judges that elected representatives have to decide these questions. However, the role of judges in Germany is quite different from the role of judges in the common law. They are not lawmakers (or only in rare circumstances); in principle, judges apply the law—mostly given by statutes—to the case before them, after they have found the respective facts on trial. As German judges typically do not decide what the law is, but simply apply the law given by statutes—in their own interpretation of the relevant provision, this may result, such as in the case under consideration, in judges having to decide moral and ethical questions quasi as an attachment to the question of law before them. German judges are completely aware of this fact and of the important consequences which derive from it. They consider such moral and ethical questions carefully and with a great sense of their responsibility when they apply the law, and they are mindful of the possible impact that their opinion of the law may have.

The fact that courts in Germany are in a position to decide these questions derives from the state principle of separation of powers. The judicial branch has the monopoly on authoritative interpretation of the statutes. Courts are bound to interpret the law and ultimately decide any case that comes legally before them: there is no way out, like a doctrine of juridical self-restraint,<sup>4</sup> for first instance courts—if the case comes up, it has to be decided. If it is sought to change the results of judicial decisions, the lawmakers—the Parliaments—have to change the law by amending the applicable statute.

### **The case history of the circumcision decision**

The defendant doctor, who performed the circumcision, in this case was charged with causing bodily harm to another person by using a dangerous instrument under ss 223 and 224 of the German Criminal Code (*Strafgesetzbuch* (StGB)). The basic findings of fact for the Cologne Regional Court were these:

The defendant performed a circumcision on the then four-year-old [boy],<sup>5</sup> in his medical practice in Cologne on 4 November 2010. He used a scalpel and the boy was under local anaesthesia. There was no medical indication for the procedure, which was requested by the parents of [the boy]. He sutured the wound using four stitches and visited [the boy] at home for aftercare in the evening of the same day. On 6 November 2010 the child was brought by his mother to the children's A&E department of the University Hospital Cologne because of secondary bleeding, which was treated there.

4 Though, this doctrine is found in the jurisdiction of the Federal Supreme Constitutional Court, see BVerfGE 36, 1.

5 The original decision states the boy's first name.

The Amtsgericht<sup>6</sup> Cologne acquitted the defendant in its judgment of 21 September 2011 (docket no. 528 Ds 30/11) and ordered that costs and expenses be borne by public funds. The prosecution appealed against this judgment in due form and in time. The appeal fails.

German media were most concerned with the fact that this issue was actually notified to the police and that the case was later brought to court by the local prosecutor's office in the city of Cologne—a city, which is generally regarded as being very liberal. The reason why this case was investigated cannot be understood without the knowledge of the case history, in which there were extraordinary and unusual circumstances.

Cologne is in many ways known to be a very liberal-minded and integrating city, with a population of one million people. Traditionally, it has a large population of immigrants and therefore contains a mixture of different cultures and religions, which have lived in a common space with a great degree of harmony. Cologne has a synagogue and some mosques, which are among the largest in Germany. As it has large Islamic and Jewish communities, many religiously motivated circumcisions have been carried out in Cologne on a daily basis. Cologne is moreover well known for its acceptance of its large gay and lesbian community, which has been embraced as a part of Cologne's localist pride. While this is not directly related to the circumcision issue, it contributes to a picture of the general attitudes of the people and local culture of Cologne. And according to their open-minded attitudes and their life motto 'to live and let live', under normal circumstances a circumcision is an ordinary event nobody would even make a fuss about.

However, in this particular case, the circumstances ultimately derived from the fact that the 'offence' was reported: a passer-by in the city centre of Cologne encountered the mother of the boy who had been circumcised. She seemed to be disorientated and confused. She was carrying her baby daughter, and the circumcised boy was bleeding heavily from the wounds of his operation. The passer-by called an ambulance, which brought the family to the University Children's Hospital in Cologne. Because the mother's language skills were limited to Arabic and French—she spoke almost no German—there was a terrible misunderstanding and/or misperception in the emergency room. The doctor on duty understood that the circumcision was carried out in the family's living room by usage of ordinary scissors and without any anaesthesia. Moreover, the doctor had the impression that the mother and her son were kept from medical assistance for three days despite his seriously bleeding wounds. He also had the impression that she was not allowed to leave the family apartment to seek medical advice. Suddenly, serious crimes like unlawful imprisonment and aggravated offences of causing bodily harm were not an unreasonable suspicion. The doctor at the children's clinic therefore reported the incident to the police—

<sup>6</sup> *Amtsgericht* translates as local or magistrate court. It is, in criminal cases, the court of first instance for minor and medium crimes and the court below *Landgericht*-level.

absolutely correctly from his point of view at the time—and the police investigations began. That is why the criminal investigation proceedings were actually opened in this case. However, it is important to stress that these allegations were cleared during the trial as can be seen from the fact-findings of the court shown above. The medical expert at trial found that this operation was carried out following the rules of the medical profession.

## The decision

### *Proceedings*

In its trial of the doctor who had carried out the circumcision, the Cologne local court (*Amtsgericht Köln*), as court of first instance, found that he had performed the circumcision *lege artis* (according to the rules of medicine) and that the medical operation was justified by the consent of the boy's parents. It acquitted the accused doctor.

The prosecutor's office subsequently appealed this decision to the Cologne Regional Court (*Landgericht Köln*).

The Cologne Regional Court, by its 'Small Chamber No. 1' (consisting of one professional judge and two lay magistrates) gave its decision on 7 May 2012.<sup>7</sup> The decision became effective on 15 May 2012, because the prosecutor's office did not file a further appeal (a so-called 'Revision'<sup>8</sup> according to the German Criminal Proceedings Code) within a one-week deadline,<sup>9</sup> although this would have been possible. For this and other reasons, legal review by Germany's supreme courts (criminal and constitutional) is not achievable. Oddly enough, there were vociferous claims from 'experts' in the media, even from law professors and former Supreme Court judges, that there should be judicial review of the decision by the Federal Constitutional Supreme Court. Such review, however, is not possible. The statutory requirements for review by the Federal Constitutional Supreme Court are simply not fulfilled.<sup>10</sup> The acquitted doctor, in particular, cannot bring it to constitutional review, because he is not affected by a decision to acquit. Neither can the prosecutor's office, because it would have to invoke an infringement of basic rights to which a representative of the state power is not entitled, because basic rights are exclusively designed to protect citizens against (undue) state power.

7 The full text of the decision deciding the appeal can be found online on [www.nrw.de](http://www.nrw.de) (jurisdiction database) (file reference 151 Ns 169/11). The full English language text (translation by Mr Aumüller as stated in the asterisk footnote above) is available at <http://www.dur.ac.uk/resources/ilm/CircumcisionJudgmentLGCologne7May20121.pdf>, accessed 21 October 2013.

8 See ss 333 *et seq.* StPO (German Criminal Proceedings Code). 'Revision' is an appeal on points of the law only: see M. Bohlander, *Principles of German Criminal Procedure* (Hart Publishing: Cambridge, 2012) 260 ff.

9 See s. 341 para. 1 StPO.

10 One of the rare possibilities to achieve review of a judicial decision by the Federal Supreme Constitutional Court is the *Verfassungsbeschwerde* ('constitutional complaint'), which under tight prerequisites can be raised by 'everyone', see ss 13 Nr. 8a and 90 *et seq.* BVerfGG (the statute regarding the Federal Constitutional Supreme Court).

### *The law on medical operations*

To make the law underlying the decision understandable, it is necessary to take a closer look at the German criminal law doctrine regarding medical operations. In principle, German jurisprudence understands a medical operation as an offence of criminal assault when it fulfils all the elements of s. 223 of the German Criminal Code (s. 223 *Strafgesetzbuch* (StGB)).<sup>11</sup> Section 223 para. 1 StGB states:

Whosoever physically assaults or damages the health of another person shall be liable to imprisonment not exceeding five years or a fine.

Where an instrument—such as a scalpel—is used to cause bodily harm, the crime may even be qualified according to s. 224 para. 1 of the German Criminal Code, which states:

Whosoever causes bodily harm ... by using a weapon or other dangerous instrument ... shall be liable to imprisonment from six months to ten years, in less serious cases to imprisonment from three months to five years.

However, medical operations are not, of course, routinely subject to prosecution, if the alleged assault is justified. This justification is regularly found (except for emergency measures) in the justifying consent of the patient (or his or her legal guardian). The German jurisdiction on the matter of consent is wide and difficult in its details, which are ultimately not relevant to the circumcision decision. In any case, a declaration of consent is only to be found valid if the patient was able to make an informed decision after the doctor provided a substantial explanation regarding the course of the operation or treatment, the possible and likely risks and side-effects, and alternatives for the offered operation or treatment.

### *Contents of the opinion*

In the opinion, the chamber of the Cologne Regional Court applied the law in the circumcision case as follows:

First, it held that all the elements of s. 223 para. 1 StGB were fulfilled ('causing bodily harm') by the circumcision of the boy by the doctor. With this interim result, the court generally considered a religiously motivated circumcision a criminal assault.

Secondly, the court made clear that s. 224 para. 1 StGB was not fulfilled. A scalpel in the hands of a doctor does not, in normal use, constitute a 'dangerous instrument' within the meaning of the section—in accordance with the constant jurisdiction<sup>12</sup> of the Federal Supreme Criminal Court in this respect.

Thirdly, it held that the assault was illegitimate because it was not justified by the consent of the boy's parents. The consent of the parents

11 Constant jurisdiction of the Federal Supreme Criminal Court (*Bundesgerichtshof*): BGH, Urt. v. 22.12.2010, Az. 3 StR 239/10, NStZ 2011, 343; Fischer, StGB, ss 223, Rdnr. 9 *et seq.*

12 As court decisions in Germany are not universally binding, a greater reliability on the consistency of the interpretation of a certain statute derives from the fact that a supreme court has decided a question of the law repeatedly the same way in different cases. This is known as a 'constant jurisdiction'.

had been given, but it could not be held as explicit consent and was implied in the parents' commissioning of the doctor to carry out the circumcision on their son. The court considered that the consent of the parents was invalid for reasons of the law. Generally, parents have the right to give their consent to medical operations. Care and custody encompasses the right to do so (see ss 1627, 1631 para. 1 BGB (*Bürgerliches Gesetzbuch* (BGB) (German Civil Code))).<sup>13</sup> As this is a medical operation of 'substantial importance' for the child within the meaning of s. 1628 BGB,<sup>14</sup> both parents have to agree. If they do not, the jurisdictional family court will decide in accordance with s. 1628 BGB. In fact, the right to give such consent derives not only from statutory law: regarding their right to consent for a religious motivated circumcision, the parents may invoke fundamental rights deriving from the German Constitution, the *Grundgesetz* (GG) ('the Basic Law'). They may, indeed, invoke Article 4 para. 1 or 2 of the German Basic Law (freedom of religion and its practice) and Article 6 para. 2 of the German Basic Law (parental rights). However, the court found that these constitutional rights on the side of the parents (and so their statutory rights derived from the BGB) are themselves limited by Article 2 para. 1 and Article 2 para. 2 cl. 1 (right of self-determination and right of bodily integrity) on the part of the child. This ultimately led to a weighing up of conflicting constitutional rights in the sense of the principal of proportionality.

The wording of the relevant provisions from the German Basic Law is as follows:

Article 2 para. 1: 'Every person shall have the right to free development of his personality . . .'

Article 2 para. 2: 'Every person shall have the right to life and physical integrity . . .'

Article 4 para. 1: 'Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.'

Article 4 para. 2: 'The undisturbed practice of religion shall be guaranteed.'

Article 6 para. 2: 'The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them . . .'

The chamber deliberated on these basic right positions:

The principle of proportionality must be taken into account when striking the balance between these rights. The infringement of bodily integrity caused by a circumcision for purposes of religious education is unreasonable in the sense of proportionality, even if necessary to that end . . . [T]he circumcision changes the child's body permanently and irreparably. This change runs contrary to the interests of the child in deciding his religious affiliation independently later in life. On the other hand, the parental right of education is not unacceptably diminished by requiring them to wait until their son is able to make the decision himself whether to have a circumcision as a visible sign of his affiliation to Islam . . .

13 Palandt-Diederichsen, BGB, 72. ed. München 2013, § 1627, Rdnr. 1, § 1628, Rdnr. 4. However, parents never can legally consent to a sterilisation of their child, see explicitly s. 1631c BGB.

14 Palandt-Diederichsen, above n. 12 at § 1628, Rdnr. 4.

The view of the chamber shows that religious interests and rights have been regarded. The court's weighing up of them simply ended in favour of the individual rights of the child. This is the core of the decision. As can be seen from the quoted part of the opinion, the court saw religious needs of carrying out circumcisions on children, but held that these religious interests should take a back seat behind the stronger individual rights of the child. The court basically declared that it is not unreasonable for the parents to wait until their child can make an informed decision himself as to whether he wishes to be circumcised in order to express his affiliation to a religious community. As a matter of course, this holding was attacked in the main by the religious societies, because it seemed unacceptable from their point of view. Although Islamic doctrine seems to be relatively flexible as regards the timing of the circumcision (as long it is carried out during the childhood of the boy), according to Jewish doctrine, circumcision must in any event be carried out within eight days of birth to enable the boy to enter the Abrahamic covenant—an indispensable prerequisite to becoming a member of the Jewish community. As stated at the outset, this Comment will not take a position for either side. However, it seems important to stress that the train of argument in the chamber is at least comprehensible: the state's duty to protect the bodily integrity and right of self-determination of young children can outweigh religious interests and parents' rights to order circumcisions, especially in a society that understands itself as secular in nature. Stressing the individual rights and freedoms of a young child seems to be a profoundly liberal approach. The question remaining (which will not be answered here) is—if the grant of such a wide individual freedom unduly undermines indisputably important needs of generally accepted religious societies, what aspects of their existence and religious practice will still be guaranteed as constitutional rights?

It was held that carrying out the circumcision by the doctor was a criminal assault and that it was not justified by the consent of the boy's parents. An essential question therefore remains: why was the doctor nevertheless acquitted? The court applied s. 17 StGB. Section 17 StGB states:

If at the time of the commission of the offence the offender lacks the awareness that he is acting unlawfully, he shall be deemed to have acted without guilt if the mistake was unavoidable.

If the offender acts 'without guilt', this leads to an acquittal under German criminal law doctrine.<sup>15</sup>

The ground rule in German law is (not unlike the common law) that a person simply has to know the law; errors will not exonerate a defendant, unless the error is unavoidable.<sup>16</sup> In German practice, the defence of non-awareness or mistake of law is rarely used, and is successfully used even less often. This is obvious on its own terms: invoking the defence of non-awareness basically means that a person

15 Bohlander, above n. 8 at 115.

16 *Ibid.* at 119.



could rob a bank and subsequently say that he or she did not know that it was illegal to rob a bank. Therefore, the rule of thumb that students learn in German law schools is that s. 17 StGB is 'never' applicable in the field of practice. Nevertheless, with the following reasoning the court applied s. 17 StGB to this case and found the mistake in law unavoidable:

During the trial the defendant stated credibly that he subjectively acted with a clear conscience. He firmly believed that as a devout Muslim and trained doctor he was allowed to perform the circumcision of the boy for religious reasons in accordance with the wishes of the parents. He was also convinced that his actions were lawful.

This mistake of law by the defendant was unavoidable. Although he did not obtain legal advice, this cannot be held against him in these circumstances, since it would not have resulted in a clear opinion. An unavoidable mistake of law arises in the case of questions of law if these are not answered unanimously within the literature, especially in cases in which the legal position is unclear as a whole. This is the case here. The question whether a circumcision for religious reasons at the request of the parents is lawful is not answered uniformly in the case law and literature. As mentioned before, there are decisions in which the courts, without discussing the question in detail, assumed that a circumcision performed by a doctor in a professional manner was permissible; furthermore, some voices in the literature do, not unreasonably, answer the question contrary to the judgment of this chamber.

As a consequence, the chamber held that the defendant had to be acquitted.

### **Binding effect and legal as well as practical consequences of the decision**

After holding that religiously motivated circumcisions may indeed be the criminal offence of assault and confronting the fact that the defendant was only acquitted for an extraordinary excuse, the question of the range of the decision came to occupy centre stage.

The judgment of the Cologne Regional Court is a decision pertaining to a single case. It applies only to this unique case. Unlike the common law, under the German legal system, court decisions are not binding beyond a specific case, even if given by a superior court. German court decisions are only binding *inter partes*, between the parties involved in the single and specific case. There is only one important exception to this general rule. According to s. 31 of the Statute Regarding the Federal Supreme Constitutional Court (*Gesetz über das Bundesverfassungsgericht* (BVerfGG)) decisions of that court are binding and some of them 'come down with the force of law'. Section 31 BVerfGG states:

(1) The decisions of the Federal Supreme Constitutional Court shall be binding upon Federal and State constitutional organs as well as on all courts and authorities.

(2) In cases pursuant to Sect. 13 (6), (11), (12) and (14) above decisions of the Federal Constitutional Court shall have the force of law. This shall also

apply in cases pursuant to Sect. 13 (8a) above if the Federal Constitutional Court declares a law to be compatible or incompatible with the Basic Law or to be null and void . . .

It is therefore a fundamental difference between the German legal system (civil law) and common law that the courts' decisions are not binding beyond the single case for which they have been made. They do not count as precedent, especially not in the sense of *stare decisis*. Statutes are binding; they bind every aspect of state power in the terms of the separation of powers. The courts are bound by the statutes and have the monopoly of interpreting their provisions authoritatively. However, decisions of the supreme civil and criminal courts with regard to statutory interpretation do have a signal effect and give good guidance. Although the lower courts and their judges are not under any duty to follow the supreme courts in the interpretation of the law, the lower courts usually do. They may, by all means, decide a case the other way round. However, without good reason, it does not make sense for the lower courts to decide a case adversely: in civil law cases this would only drive the respective parties into higher costs for unnecessary appeals to achieve their goals from the superior courts. Even worse, in criminal cases, advocating an interpretation of the law that is not consistent with the view of the supreme court would lead the supreme court to vacate the lower decision and remand the case for a new trial. This would result in very inefficient, if foreseeable, redundant work for at least two courts, rising costs and the need to confront difficult questions of continuation of custody. If a German jurist, a court or a judge invokes or refers to a 'precedent', he or she usually refers to the good guidance and signal effect of a decision of a superior court that was widely accepted by German jurisprudence in the sense of being the same position of other courts and scholarly literature.

This also means that every prosecutor and judge responsible for a given case is not only allowed, but, rather, is bound to determine the case at his or her own discretion, if he or she considers a religious circumcision in each particular case a criminal offence, by assessing the specific facts of the case and according to his or her personal interpretation of the law ('law' in the sense of the applicable statute, in this case s. 223 StGB, and the law on the consent issue).

This, of course, raises the question as to whether the decision of the Cologne Regional Court actually marked the end of religiously motivated circumcisions in Germany from a legal and later from factual point of view. From the legal perspective, this must be highly doubted. As there is no binding effect, and as respective judges and prosecutors are still free in their determination, if they were to consider a religiously motivated circumcision to be a criminal offence within the meaning of s. 223 StGB, it would be more likely that as many cases would be brought before the courts as there were before the Cologne decision—i.e. zero. What basically led to a temporary moratorium on religiously motivated circumcisions was another aspect—legal uncertainty amongst the medical profession. After all, one German Regional Court had declared circumcisions for religious reasons a criminal offence. Although

actual imprisonment would never be at stake for a circumcising doctor (rather a fine), it is easy to understand that medical doctors would prefer not to risk a criminal indictment if they continued to carry out circumcisions based on religious motivations. It was not a surprise therefore that the medical associations recommended a moratorium on religiously motivated circumcisions until the legal situation was again clear. This reaction is completely understandable. On the other hand, it must be taken into account that the likelihood of doctors actually being charged with an offence following a religious circumcision was very low.

This allows us to turn to the factual question of whether the decision marked the end of religiously motivated circumcisions in Germany. Again, this is very unlikely. First of all, there was no interest or even zeal of the German prosecutors to investigate hundreds of religiously motivated circumcisions in Germany. German prosecutors are bound to investigate a case (*Legalitätsprinzip* (principle of mandatory prosecution)<sup>17</sup>) when they become aware of a potential crime, but there is still an extremely miniscule likelihood that the police or prosecutors would be notified of religiously motivated circumcisions—those directly involved (parents, doctor, child, celebrating family members and friends in the Muslim or Jewish community) simply have no interest in doing so. Only a few other people outside their circle would even know about a performed circumcision, and those people would not usually bother to take any action. All other ways to investigate or to receive evidence of religiously motivated circumcisions appear almost inconceivable. Beside a remarkable lack of interest, German police are currently much more occupied combatting far worse criminality and simply have no personnel and financial resources available to raid paediatricians' clinics in order to find operation reports on circumcisions, which have been deemed socially adequate for at least 2,000 years. Moreover, such a raid would require a search warrant granted by a judge. According to the German Criminal Procedures Code, such a search warrant would not be granted. It is a consensus in German jurisprudence that the mere and abstract likelihood that one or more considered illegal circumcisions have been carried out in a clinic would not justify a search warrant, because the suspicion derives from a mere likelihood and is not based on concrete facts.<sup>18</sup>

However, the decision was perceived completely differently by the public. It was understood to have allegedly banned religiously motivated circumcisions in Germany completely. That is, as shown above, only true in terms of the medical professionals' reaction to the resulting uncertainty of the law. Apart from that, it must be assumed that media reporting probably combined with a lack of knowledge about the law and the binding effect of German courts' decisions, altogether resulted in a much more significant impact of the ruling than it actually had on its own.

17 Above n. 15 at 25.

18 '[M]ore than the proverbial "hunch"' is necessary: *ibid.* at 82.

Certainly, there is a potential signal for the subsequent application of s. 17 StGB in other cases. The error in law in respect of non-awareness should have been avoidable.

As the decision of the German Regional Court found that a religiously motivated circumcision is punishable as a criminal assault, subsequent defendants will not be able to invoke the defence of non-awareness within the meaning of s. 17 StGB. After this judgment and its media coverage, for a subsequent defendant in a circumcision case, an alleged error in law can no longer be deemed 'unavoidable', because everyone now is able to and must take the unlawfulness of religiously motivated circumcisions into account.

## **Reactions to the court**

The wide and international media reporting of the case led to countless submissions to the Cologne Regional Court including telephone calls, e-mails, letters and fax messages. During the six months after publication of the decision, the court received various submissions regarding the ruling on a daily basis. There has been a remarkable decline in the last three months. Surprisingly, the majority of these submissions were endorsements of the decision, but, naturally, there were also several rejections of the judgment. There have been a few very strongly worded rejections of the decision, although there have never been any venomous tirades, fanatical diatribes or even personal threats. In essence—except for a few exceptions—a rather objective and sophisticated public debate on the matter has been observed in Germany.

## **Reaction of the German legislature**

In response to the decision, the German federal legislature (*Bundestag* and *Bundesrat* (Parliament and representatives of the states))—after a heated debate in the House, within the parties, and in German society more generally—passed a new statute<sup>19</sup> regarding the legal position on circumcision in Germany on 12 and 14 December 2012. In the German Parliament (*Bundestag*), 434 Members of Parliament voted in favour of the Bill, with 100 against and 43 abstentions.<sup>20</sup> Presumably, this has been the fastest reaction from the federal legislature to a lower court ruling in German legal history. The statute inserts a new section, s. 1631d, into the German Civil Code (BGB). Under this provision, parental care and custody basically allow parents to give their consent to

19 Bill of the Federal Government, see BT-Drs. (Federal Parliament printed matter) 17/11295 (5 November 2012). All 'printed matters' of the Federal Parliament (*Bundestag*) are available at <http://www.bundestag.de/dokumente/drucksachen/index.html>, accessed 21 October 2013.

20 Plenarprotokoll des Deutschen Bundestags, 17. Wahlperiode, 213. Sitzung (plenary protocol of the Federal Parliament, 17th parliamentary term, session 213), 17/213, 26110; 'Abstimmung: Bundestag beschließt neues Beschneidungsgesetz' ['Vote: Bundestag approves new circumcision law'], Spiegel Online Politik, 12 December 2012, available at <http://www.spiegel.de/politik/deutschland/bundestag-beschliesst-neues-beschneidungsgesetz-a-872547.html>, accessed 21 October 2013.

non-therapeutic circumcisions, not only those that are religiously motivated, if conducted in accordance with medical practices (para. (1)) or if carried out within six months of the birth of the child by persons appointed for such purpose by religious communities who are comparably trained to carry out circumcisions (para. (2)). The section entered into force on 28 December 2012.

Alternative Bills (circumcisions only for boys older than 14 and with their explicit consent,<sup>21</sup> adding an authorisation for the Federal Ministry of Justice to specify further prerequisites for a circumcision,<sup>22</sup> respecting an expressed adverse will of the child<sup>23</sup> or shortening the deadline in which the circumcision may be carried out by a non-doctor<sup>24</sup>) could not gain a majority.

Section 1631d BGB provides:

§ 1631d Circumcision of the male child

(1) Care and custody encompasses the right to consent to a circumcision which is not necessary on medical grounds of a male child incapable of reasoning or making an informed decision, if it is to be conducted according to the rules of medical practice. This does not apply if the well-being of the child is jeopardised by the circumcision.

(2) In accordance with the provisions of Section 1 of the above Act, circumcisions may be carried out within six months of the birth of a male infant by persons appointed for such purpose by religious communities providing such persons have been particularly trained and, without being qualified as medical doctors, are comparably qualified to carry out circumcisions.<sup>25</sup>

Here, it is highly remarkable that not only religiously motivated circumcisions have been expressly legalised, but also circumcisions of any kind. This means that based on the current legal situation in Germany, parents are allowed to consent to any circumcision of their child, whether it is necessary from a medical standpoint or not, and regardless of their motivation. In fact, parents may now have their child circumcised just for aesthetic reasons. In plain language: because they think circumcised looks better. This was highly criticised subsequent to the act of law, and it must be highly doubted if such an approach does justice to the inalienable rights of the child to self-determination and bodily integrity. In the author's opinion, the family courts will have to find an interpretation of s. 1631d BGB which conforms with the Constitution in the sense that the parents' wish to have their child circumcised shall be reasonable and comprehensible.

## **Reception in the German population**

Following a representative survey, 70 per cent of Germans oppose the new statutory regulation. Only 24 per cent of the 1,000 citizens polled on 18 and 19 December 2012 expressed their approval for the new

21 BT-Drs. 17/11430 (8 November 2012).

22 BT-Drs. 17/11815 (11 December 2012).

23 BT-Drs. 17/11816 (11 December 2012).

24 BT-Drs. 17/11835 (12 December 2012).

25 Not an official translation; translation by the author.

regulation.<sup>26</sup> This clear refusal should by no means be interpreted as a sign of intolerance or discrimination of important religious traditions and religious societies. Germans consider themselves as a secular society in which the importance of individual freedom rights may outweigh religious interests.

It may, on the one hand, derive from incomprehension that the new statute now allows any circumcision even without a religious motivation and, on the other hand, from the fact that circumcision has no tradition in Germany beyond the religious communities or for medical reasons. Internet research does not produce reliable data on the prevalence of circumcision, though they offer rough estimates: while worldwide 25 per cent to 33 per cent of all men are circumcised,<sup>27</sup> the number in Germany is estimated at about 15 per cent.

## Outlook

It is to be expected that the passing of this statute will not put an end to the debate. As shown above, the debate amongst the general public continues in Germany, although it will likely take a back seat behind the current media sensation of day-to-day politics.

The legal debate will also continue. It is most likely that a judicial review of the new statute by the Federal Supreme Constitutional Court will take place in the near future. Although it is rather unlikely—due to the wide consensus in the Parliament—that constitutional review will be requested by the political bodies through a so-called *abstrakte Normenkontrolle* (abstract review of a provision), which can be initiated by the Federal government, any government of a state or a quarter of the members of the Bundestag. It is more likely that constitutional review will be achieved by means of a *konkrete Normenkontrolle* (concrete review of a provision), see Article 100 of the German Basic Law, which can be initiated by every judge or court. Article 100 entitles every judge, who has to decide a concrete case (therefore the name ‘concrete review of a provision’) before him or her, to send the case directly to a ‘concrete’ constitutional review by the Federal Supreme Constitutional Court, if he or she is convinced that the applicable statutory provision, on which the outcome of the case must depend, is unconstitutional. Such a case can come quite easily before a German family court. As seen above, consent to a medical operation (and therewith circumcision) is a question of care and custody in which both parents must agree. If they do not, a family court makes the final decision. This court can only replace the parents’ missing consent by its judicial consent, if the authorisation (by new s. 1631d BGB) is valid. It may be invalid, if it unlawfully infringes on the child’s rights of self-determination and bodily integrity guaranteed by the German Constitution. If the court is convinced that this is the case, it is not empowered to declare invalid and void the statutory provision

26 See ‘Infratest Poll: Majority of Germans against circumcision law’, available at <http://www.spiegel.de/politik/deutschland/studie-mehrheit-der-deutschen-gegen-beschneidungs-gesetz-a-874473.htm>, accessed 21 October 2013.

27 See <http://de.wikipedia.org/wiki/Zirkumzision>, accessed 21 October 2013.

itself; it has to seek the stated constitutional review by the Federal Supreme Constitutional Court—the only court in Germany that is empowered to declare federal parliamentary statutory law invalid and void. As is clear from the above, the potential outcome of this judicial review is anybody's guess because the Federal Supreme Constitutional Court will perform exactly the same balancing exercise described above between the conflicting constitutional rights. Which rights outweigh the others in the opinion of the Federal Supreme Constitutional Court justices cannot be foreseen.