

Dear Friends,

I am very happy to announce that the European Institute of Istanbul Bilgi University has now published the third issue of the Germany Brief. Dr. Peter Widmann, who is a member of the Department of International Relations and the European Institute, is continuing to up-date us about the recent debates in Germany. These briefs are being circulated to our e-mailing list in English and Turkish, and also accessible online in our website (<http://eu.bilgi.edu.tr>). In the third issue, Dr. Widmann is discussing various approaches about the ruling of the Cologne Regional Court about the circumcision. In this issue you will find the details of this popular debate in Germany, which also has repercussions in Turkey.

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## **A Court Decision and Its Political and Social Impacts:**

### **Germany debates children's rights, religious freedom and circumcision**

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Decisions of district courts rarely get more than regional attention. In June a verdict became an exception to the rule in Germany. The Cologne regional court (Landgericht) ruled that a doctor who had circumcised a four-year-old boy according to the wish of his Muslim parents had violated the child's physical integrity. The decision aroused heated discussions in Germany and beyond its borders, since the judgment was based on the view that an essential religious tradition of Muslims and Jews does not comply with the German constitution.

The judgement argued that different basic rights come into conflict in the case: The child's right to physical integrity, the parent's right to decide on the upbringing of their children and the freedom of religion. It concluded that the child's right to physical

integrity was the most central among them, since it could be expected from the parents to wait until their son can decide on his own if he wants to be circumcised. Nevertheless the doctor was acquitted of the charge since the judge conceded to him that he could not know he was doing something illegal. The acquittal was the technical reason why the defending lawyer could not appeal – this would have been only possible after a conviction. As a consequence a case on a far-reaching question did not go to a retrial before a higher court.

The decision alarmed Jewish and Muslim organisations, but many others as well.



The former President of Germany's Constitutional Court, Hans-Jürgen Papier

Although the judgement does not bind any other German court, and although prominent experts in law like the former President of Germany's Constitutional Court, Hans-Jürgen Papier, assess it as an isolated misjudgement that in other cases would be overruled by higher courts, there is something to worry about: The decision has shown a legal uncertainty.

Nobody knows how other courts would decide in similar cases - an unacceptable situation for doctors, Turkish *sünnetcis* and Jewish *mohels*. To end this, an overwhelming majority of the German parliament has called upon Angela Merkel's government on July 19 to table a draft law until autumn and ensure the legality of religiously motivated circumcisions.

### Jurisprudence, spin-doctoring and the media

There are two ways to read the story. The first and obvious one takes the event as another sign for the problems Germany and other European countries have in coping with the diversity generated by globalisation, migration and social change in the past decades. This reading is plausible but incomplete. A second reading can show how a small number of stakeholders managed to influence public discussion by skilful stage-managing, how mass media mechanisms were used to transform a regional court decision into an



Jost Müller-Neuhof, law journalist of the Berlin daily "Tagespiegel"

international media hype.



Professor Holm Putzke , University of Passau

The story started with a delay of six weeks. The Cologne court decided the case on May 7, but the public discussion erupted not until June 25. On that day the Financial Times' German edition published an exclusive article on the ruling that became the starting point of the public discussion. Jost Müller-Neuhof, law journalist of the Berlin daily "Tagespiegel" tried to find an explanation for the late reaction. According to his account not the court informed the press but a law professor from the University of Passau, Holm Putzke. In 2008, Putzke had started a legal discussion on circumcision and physical integrity with a number of academic articles. The debate remained in a limited

circle of legal experts, and until May 2012 it had no influence on the few court cases on circumcision that were mainly about the disbursement of expenses, compensation or medical malpractice.

In his articles Putzke argued that circumcisions are not in the child's best interest

unless they are medically indicated. Hence the parents' consent to a religiously motivated circumcision would not save a medical doctor, a Jewish *mohef* or Turkish *sünnetci* from being sentenced under the provisions of §223 of the German penal code that refers to physical injury. The Cologne district court's judge was the first to adopt Putzke's position. Due to the lower level of the court the trial was conducted by only one professional judge and two lay assistants. The judgement explicitly referred to Putzke but conceded that there are different opinions in the academic legal literature.

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Jost Müller-Neuhof accused Putzke of lying to the public, since he first claimed that he did not know who informed the press, but, according to the “Tagesspiegel”, finally had to admit that it was him. Obviously it was the intentionally exaggerated significance of a low-level decision that determined the tone of a debate. Putzke successfully created the impression that his position is the prevailing opinion among legal experts. He could raise the claim easily since only a limited number of academics had been involved in the discussion at all.

Meanwhile there are other voices. Hans-Jürgen Papier, former President of the German Federal Constitutional Court, is one example, another one is Hans Michael Heinig, professor for public law and Church law and head of the Institute for Church law of the Evangelical Church in Germany, who considers the decision a misjudgement and accused the judge of “carelessness”.

Papier and Heinig both argue that the court did not balance the basic rights of religious freedom and parental care correctly against the right to physical integrity. They argue that for Jews and Muslims circumcision concerns essential beliefs, whereas a circumcision is a surgery of a minor nature. These and other expert voices make it probable that the Cologne decision would have remained an isolated case, even without the expected legislative clarification by the German parliament. Nevertheless it is understandable that doctors, *sünnetcis* and *mohels* do not want to operate on a basis of a probable legality but expect certainty.



Hans Michael Heinig, head of the Institute for Church law of the Evangelical Church in Germany

## Reactions

Reactions corresponded to the huge media response triggered by the Financial



Aiman Mazyek, The chairman of the Central Council of Muslims in Germany

Times' interpretation. The Central Council of Jews in Germany called the decision an "unprecedented and dramatic intrusion into the right of self-determination of religious communities". The Conference of European Rabbis considered it to be the "most serious attack on Jewish life since the Holocaust". Its president Pinchas Goldschmidt said that the ruling challenges the future of Jewish communities in Germany. He categorized it as one incident in a series of attacks on religious minorities in Europe entailing the ban on minarets in Switzerland, the burka ban in France and the ban on ritual slaughter in the Netherlands.

The chairman of the Central Council of Muslims in Germany, Aiman Mazyek, said that the freedom of religion must not be a "plaything of a one-dimensional jurisdiction". Germany's Turkish Community (Almanya Türk Toplumu) warned of a "circumcision tourism" to other countries. Christian representatives criticised the decision as well, most prominently the Catholic German Bishops' Conference that called the decision "disconcerting" and demanded a legal clarification to ensure religious freedom.

Supporters of the decision argued that there were good reasons for giving physical integrity a high importance. Several children's rights activists criticised that children who cannot give a legally valid consent are subjected to a procedure that changes their body in an irreversible way. The education researcher and publicist Micha Brumlik, one of Germany's most prominent Jewish voices, commented that the credibility of some discussants would be higher if they had taken a stand for children's rights before the debate focused on Jewish and Muslim communities. Considering the data on the state of neglect of children in many families or the lack of equal opportunities in the

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country's education system, there would have been many occasions to put children's rights higher on the agenda in the past.

## Political elites

The emotional public discussion created considerable nervousness among Germany's political elite. Against the backdrop of Germany's Nazi past the prospect that Jewish communities might not be allowed to comply with a central rite of their religion unsettled political representatives since it could have raised doubts if the country really has learned its lesson after the Holocaust. In mid-July, Chancellor Angela Merkel said in a meeting of the Christian Democrats federal executive board that she does not want to be Germany the only country where Jews cannot follow their rites. Participants of the meeting reported her saying: "Otherwise we would make ourselves a laughing stock among nations." On July 19 the German parliament, following a motion of the Christian Democrats, the Liberals and the oppositional Social Democrats, passed a resolution requesting the federal government to table a draft law in autumn 2012 that shall guarantee the legality of circumcisions for Jews and Muslims. In this context the vice chair-woman of the Turkish Community in Germany, Ayşe Demir, said in an interview with Germany's public broadcasting network ZDF, that she doubted that reactions would have been that quick if the decision had an effect only on Muslims and not on Jews as well.

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## Jurisprudence and politics

Jurisprudence and jurisdiction are not operating in an academic ivory tower inhabited by experts isolated from society and its ideological conflicts. The ivory tower doesn't even exist in a country where according to most observers legal authorities as well as academic jurisprudence work correctly and are above all suspicion of being politically

influenced. Even correctly applied professional rules provide a space in which value-based interpretation, ideology and attitudes come into play.



Necla Kelek

The present case exemplifies that. In a press interview Professor Putzke was asked why he had started investigating the question of circumcisions at all. In his answer Putzke mentioned a chapter from a not quite scientific but popular book that ranked among the best-selling examples of political fear mongering in the last decade: “The

lost sons” (2006), written by the Istanbul-born German-Turkish author Necla Kelek who accuses liberal parts of German society and migration researchers of being not pride enough to defend democracy and freedom against the “power of the Islamic world view”. With this term Kelek does not primarily characterise the ideology of political extremists, but the common every-day religiosity of many German-Turks. Her success as a writer and commentator in centre-right papers rests on her claim of being a crown witness who intimately knows Turkish family life “from inside” and unveils what she sees as its barbaric secrets to a shocked public.

Kelek’s book uses sweeping generalisations to describe the character of “the Muslim man”. It brings together impressions from interviews with male German-Turkish pupils and prison inmates as well as autobiographical accounts of her family who migrated to Germany and broke apart after inner conflicts. One chapter describes the circumcision of her sister’s two sons in a locality near Kayseri as a traumatic event for the boys that Kelek characterizes as a “kind of rape”. These and other impressions are framed by her claim that Western Christian morality is superior to Islamic or Jewish moral teachings. She writes: “Whereas the Old Testament and the Koran tell stories of blood and violence, the New Testament is a message of love and hope.” The

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schematic juxtaposition revitalises a classical European anti-Semitic motive and transfers it into an anti-Muslim context.

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Holm Putzke repeatedly quotes the book in his academic articles. Beyond that his comments in the debate correspond to the pejorative perspective on religion Kelek offers in her writings. In an article for the "Legal Tribune Online" Putzke called circumcision an "archaic ritual" that amounts to "religiously motivated violence" – a phrasing that associates the tradition with fundamentalist terrorism. In the same article he ridiculed opposing views as a "knee-jerk outrage". He suspects German politicians who want to keep circumcision legal of being timid and fearing to be criticised for being anti-Semitic or antireligious. In his public self-staging as a courageous taboo-buster he imitates the populist standard rhetoric. The ideological undertone in Putzke's articles and public statements was audible from the beginning and had its effect on his academic positioning that obviously derived not

only from an analysis *sine ira et studio*.

At the same time a familiar mass-media mechanism came into play. Like in previous mediatised conflicts, those who provoked the debate subsequently acted as quasi-neutral commentators in it. In TV talk-shows and magazines Holm Putzke acted as an unchallenged representative of legal expertise. In like manner Necla Kelek reappeared as a self-appointed expert on Islam and characterized circumcision as a "useless sacrifice for Allah" in the centre-right national daily "Die Welt". Like in other cases the mediatised debate developed its own dynamics: The scriptwriters also wrote the reviews. A closed loop emerged that allowed protagonists to become bigger-than-life celebrities in the popular clash-of-cultures genre.

## **Between inclusion and demarcation: A European cleavage**

The stage-managing of the discourse could only be successful because the vibrations were amplified in the resonance chamber of popular emotion. The

crescendo did not emanate from the Cologne court room, nor did it originate from an academic debate among a handful of experts on penal and medical law, or from concerns about children's rights. A greater framing inflamed the passions. Protagonists and observers took the debate as one battleground in a larger struggle that divides European societies since the 1990s. As data from many scientific attitude surveys show, the social change caused by globalisation and an increasing cultural diversity created a basic antagonism between segments of European societies that tend towards two opposing visions. A liberal perspective that favours inclusion of minorities and marginal groups stands against a traditionalist and nationalist one, aiming at demarcation and the preservation of existing power relations within the societies.



The General Secretary of the Central Council of Jews, Stephan Kramer

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Muslim and Jewish communities are aware of this, that is why reactions from the majority society, results of opinion polls after the judgement, letters from readers in the press, or the hate and contempt against both communities visible in some internet forums caused at least as much concern among them as the judgement itself. The General Secretary of the Central

Council of Jews, Stephan Kramer, described a "frightening" atmosphere and interpreted the decision in a broader European context: "Many Europeans see themselves as free of anti-Jewish prejudice, but are not ready to accept the existing Jewish community in reality (...). A tolerance that tries to wipe out difference is not a real one."

Navid Kermani, a prominent German writer, publicist and academic specialist in oriental studies with Iranian family background, senses a radical, fundamentalist stream among those who strive for demarcation. He sees its basis in a "vulgar rationalism", a "striking lack of understanding for anything that is deduced from other than this-worldly motives". In hate-mails he received in reaction to his press

comments he found what he describes as an ultra-secularist fundamentalism: “There is an aggressive tone of self-certainty I know very well from Egypt or Iran”. Kermani sees the discussion as a turning point. Even though there were many reasons for uneasiness among minorities in the past, like the neo-Nazi murders that were ignored by the security services for years, Kermani said in a press interview, the law until now remained as a “bulwark against an absolutism of the majority”.

### **Who is “We”?**

One of Navid Kermani’s best known books from 2009 is entitled “Wer ist Wir?” (“Who is We?”). The debate brings the question up again. A constitutional order can only be stable if as many parts of the society as possible can recognize it as their order and can find themselves in a pluralistic “We” that democratic societies need. In coming autumn the German parliament will decide about more than a legal question; it will decide if German Muslims and Jews can see the German constitution as their constitution and the laws based on it as their laws.

As things stand the German government and parliament will do everything to secure the free practice of religion for both Muslim and Jewish communities. However, there will be a bigger challenge than legal technicalities since nationalists and populists, anti-Semites and Islamophobes will spread all kinds of conspiracy theories about the alleged pressure of “the Jewish lobby”, “the Islamic world” or “multi-culturalist leftist elites”, phantasies about alien powers that force Germany to water down its laws. Representatives of Germany’s parties will have to explicate to some segments of their own voters what they consider to be the foundations of the pluralist constitutional state.