

Welcome to the New Era: Four Fatal Flaws in the German Bill Legalizing Male Circumcision

As presented by J. Steven Svoboda at the "Promoting Children's Rights in Europe—Recent Developments" conference organized by Genital Autonomy in Keele, UK.

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Germany brings us into a new era. Circumcision is regulated in Sweden and otherwise legal everywhere. Yet familiar issues are evident in the recurring tendencies toward a faulty "balancing of harms against benefits," distinguishing male genital cutting as "nothing like" female genital cutting, the desperate rush to protect so-called religious circumcision that led to the statute, and in the dialectic between an appropriately foregrounded child patient and other mistakenly foregrounded entities such as parents and society. These issues manifest themselves as four central fatal problems with the statute.

The modern German constitution (known as the Grundgesetz (**GG**) or Basic Law) was adopted in 1949, and introducing a new constitutional order in Germany. Seeking distance from the horrors of Naziism, the Basic Law drew deeply upon German tradition to found the legal order on moral and rational idealism, particularly that of Immanuel Kant. Thus, the Basic Law is a value-oriented constitution that obligates the state to realize a set of objectively ordered principles, rooted in justice and equality, which are designed to restore the centrality of humanity to the social order, and thereby secure a stable democratic society on this basis. Clause 3 of Article 79 of the Grundgesetz (called the "Eternity Clause") prohibits amendments that violate Article 1, which protects human dignity.

The Basic Law bears striking similarities with the United States Constitution. Both charters contain a catalog of basic, fundamental rights; a federalist structure of government divided between federal and state authority and a federal government separated into three coordinate branches; a bicameral legislature representing the people in forms of republican democracy; and an independent judiciary with the power of judicial review that includes the ability to declare the concrete meaning of the higher law, potentially trumping democratic determinations to the contrary.

In contrast to the centering of the American constitutional vision around human liberty, the German constitution emphasizes human dignity, consciously referencing Kant's maxim to treat people "always as an end and never as merely a means." A central focus of German rights is preservation of the integrity and security of a person.

In contrast to the American Constitution, the German Basic Law also sets forth certain duties citizens or government must perform. For example, Article 6(2) provides that "the care and upbringing of children shall be a natural right of and a duty primarily incumbent on the parents. The state shall watch over their endeavors in this respect." Amendment of the Basic Law is by design difficult, requiring a law expressly amending or supplementing its text, a two-thirds "supermajority" vote of both houses of Parliament. Barring such a constitutional amendment, no right to practice religion can justify the smallest infringement of another person's rights, including a child's rights.

In June 2012, an appellate court in Cologne, Germany ruled that male circumcision for religious reasons causes bodily harm and constitutes criminal assault. The case arose from the circumcision on November 4, 2010 by a physician of a four-year-old Muslim boy. Complications arose - excessive bleeding - and the boy had to be taken to a hospital for treatment. The physician was prosecuted for having "physically mistreated another person and injured that person's health by means of a dangerous instrument." Two days later the boy was brought to the children's emergency department of the University Hospital Cologne because of secondary bleeding, which was treated successfully. The physician was accused of causing dangerous bodily harm, an aggravated form of battery under § 224(2) no.2 of the German Penal Code for causing bodily harm using a dangerous instrument.

The Cologne appellate decision marked the first generally applicable legal declaration that male circumcision, if not medically necessary, and even if performed properly and with the permission of both parents, is punishable as criminal battery. The court held that doctors doing such a procedure are liable for a criminal offense under the Non-Medical Practitioners Act where an inappropriate and objectionable treatment occurs through which the physical well-being and physical integrity of a person—in this case, a four-year-old boy--is seriously impaired.

The court noted that circumcisions performed for religious reasons are not medically necessary, and that circumcision is harmful, permanently and irreparably changing a child's body. Properly foregrounding the child patient, and emphasizing the procedure's irreversibility, the court stressed that the boy had a right to make his own decision about his body and about his religious affiliation. The court held that children's rights to bodily integrity, self-determination, and freedom from harm supersede any interests their parents may have as caretakers and based on their religious beliefs. The court reasoned that it would not be an unacceptable compromise for the parents to wait until the child himself could decide whether he wanted to be circumcised to mark himself as an adherent of Islam. Accordingly, the court held that the circumcision of a minor for non-medical reasons could be considered a criminal act.

The reasoning of the court concerning the defense of proxy "consent" in the criminal law is remarkably succinct. The Court properly concludes that the parental right to care and custody of the child covers only educational measures that are in the best interests of the child. Against this background, the court comes to the conclusion that "the circumcision of a boy unable to consent to the operation is not in accordance with the best interests of the child neither from the perspective of avoiding a possible exclusion from their religious community, nor in the light of the parental rights in education. The basic rights of the parents under the Basic Law are restricted by the basic rights of the child to bodily integrity and self-determination under the Basic Law.

The Cologne court disposed of the religious and parents' "rights" issues without much difficulty, fundamentally saying that your right to freedom of religion terminates at the boundary of another person's body, even if that other person is your child. The positive law does not otherwise permit the invasion of the bodily and intimate spheres for the purposes of parenting... In fact, Eschelbach notes, the law speaks out against encroachments in the bodily sphere without medical indication as a matter of principle.

Intriguingly, at least two commentators generally opposed to the Cologne decision still find themselves forced to acknowledge the importance of bodily integrity. Even in a

piece that generally denigrates the child's rights and is unsympathetic to the Cologne court's rationale, Mazor states, "Two characteristics of the circumcision decision in particular that significantly strengthen the child's interest in self-determination are (1) the importance and intimacy of the decision and (2) the non-reversibility of circumcision. Banai writes, "While the Cologne court ruling of 2012 included some dubious and even erroneous arguments, it did get one point right. Physical interference for non-medical reasons, of the kind that circumcision is, is incompatible with the requirements of bodily integrity as understood in German law."

The words "penis" and "foreskin" do not appear in the ruling and nothing is said of the value of the foreskin. As is also typically done by US courts, the Cologne Court thus avoided addressing topics not essential to its result despite a wealth of German commentary on the procedure's harms. Walter--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. Nor is there evidence of any hygienic benefit as long as soap and water are available.

Circumcision has been described by German commentators as non-therapeutic and dangerous in that minor complications include bleeding and infection and major complications include loss of all or part of the penis and death. Also, it irreversibly alters the penis and harm all boys and men insomuch as it is painful, destroys normal sexual function, reduced penile length and girth, and leaves a scar. Sound evidence also exists of psychological harm.

Germany passed a statute purporting to overturn the decision. Four core problems—equal protection, custody not criminal law, legally and logically incoherent attempt to incorporate consideration of reason for procedure, contradictions in discussion of anesthetic. The bill violates the Basic Law by placing 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 new circumcision statute also violates Article 1's protection of human dignity and therefore is unconstitutional. Parliament can only amend its own laws, not the Basic Law -- and the Cologne court was careful to emphasize it was basing its ruling on the Basic Law.

The legislation may be open to challenge in the Federal Constitutional Court as violating the same articles that the Cologne court cited in declaring non-therapeutic male circumcision unlawful. If the law were nevertheless to be declared constitutional by the Constitutional Court, an appeal would be likely to be made to the European Court of Human Rights claiming that it violates the European Convention on Human Rights.

Another possible scenario is direct amendment of the Basic Law to allow nontherapeutic male circumcision, which would require a 2/3 vote of both houses of the German parliament. This would however directly violate the Eternity Clause. It would not be subject to review by the Constitutional Court, but could still be challenged in the European Court of Human Rights as infringing the right to bodily integrity.

A difficulty Eschelbach notes with the new statute is what we call equal protection, that is, the "biologically and religiously unjustifiably unequal treatment of the sexes." According to human rights doctrines, to which Germany is of course bound as a signatory state, the requirement of equal protection of genders is enshrined in Article 14

of the European Convention on Human Rights, Article 3 of the Basic Law, Article 2 of the International Covenant on Civil and Political Rights, and Article 1 of the Convention on the Rights of the Child. Article 3--“Men and women shall have equal rights. “No person shall be favored or disfavored because of sex.” Prominent activists in the campaign against FGM have expressed their horror that the Article has not been applied in favor of all children, boys and girls, to strike down the new statute.

The grounds for the bill camouflage the gender discrimination by, as Walter puts it, “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.”

Article 24(3) of the UN Convention on the Rights of the Child (UNCRC) commits states parties to “take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children”. Circumcision for religious reasons, writes Putzke, is such a traditional practice. According to the explanations on health impairment in article 223, paragraph 1, Alt. 2, of the German Penal Code, this traditional practice is harmful to the health of children. The Article applies to children of both sexes and thus protects boys as well as girls from genital cutting. As Herzberg astutely points out, Article 3 of the CRC has already addressed those that would attempt to justify the custom for traditional reasons: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

A second central problem with the legislation is that it is not a criminal law but rather purports to allow circumcision via an extension of the scope of parental custody. This directly contradicts Herzberg, Eschelbach--The discussion of custody to nurture and child’s benefit is misplaced and this section belongs instead in the penal code. Isensee—the legality or illegality of circumcision depends on custody, and therefore also the decision whether or not it constitutes punishable physical injury.

Thus, the operation is also not to be justified through the parents’ freedom of religious practice. Numerous commentators attempt to justify harming the basic rights of the child due to the religious freedom of the parents. (Scheinfeld) But this is to set what Herzberg aptly terms “the normative power of the factual” against law, truth, and justice.

The proxy “consent” of the parents is only permitted – in cases of medical indication – in the interest of caring for the child’s health, not in the interest of upbringing. Eschelbach (statutory commentary by Judge at Federal Court of Justice)—Since the right of genital integrity is sacrosanct, cost-benefit questions play no role.

Herzberg--“The conflict needing balancing does not even arise, because the constitution determines that our religious practice may not infringe in the slightest upon the rights of others, and cannot release us from any legal obligation.” As Herzberg explains it, you can practice your religion as you choose but if the church door is locked, you can hardly legally force entry to the church without committing a trespass.

The Constitution and the regulations allow parents merely to care for the child and to carry out their responsibility to promote the child's wellbeing. The rights and duties of parents to provide "direction" as to their child's exercise of freedom of religion and belief under UNCRC Article 14(2) are safeguarded to advance the child's beliefs, not the religion of the parents. The State is obliged to protect the interests of children even against their own parents. Van Howe points out that since circumcisions are performed for the benefit of the parents and the community, the infant is used instrumentally in violation of Kant. Hornle Huster's attempt to argue for a parental right to education cannot overcome this principle.

Chegwidden agrees that the rights and duties of parents to provide "direction" as to their child's exercise of freedom of religion and belief (UNCRC Art 14(2)) is in protection of the child's beliefs, not the religion of the parents. There is no right to parental "direction" exceeding those restrictions and states have legitimately banned such excesses.

Neither in Judaism nor Islam is circumcision required for membership in the religious community. The practice affirms but does not constitute religious membership. In any event, the religious liberty in question is the child's. Marginalization of the child endangers his well-being; it must be prevented, notes Eschelbach, though means other than a dangerous bodily injury to the child.

Third central problem. According to the new law, circumcision is forbidden if it endangers the best interests of the child, even taking its well-intended purpose into account. This is possible, according to the reasoning of the federal government, if circumcision is sought for esthetic reasons or to make masturbation more difficult, or if it contradicts the will of the child who is (not yet sufficiently) able to reason and decide. While it is true he has the theoretical opportunity to follow a different religion, this is an untenable argument (Fateh-Moghadam and Germann) when chief rabbi Metzger, for example, has made it clear that this is one of the main *intentions* of the practice. as was also true of the origins of the procedure as Maimonides (1135-1204) made clear.

Walter has very astutely distilled the numerous absurdities lurking here not so far beneath the surface. 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. Also, both physicians and judges cannot cope - and lawmakers therefore cannot cope either - with plausibly separating good motives for circumcision from bad ones. The motivation for the action of the parents, which remains largely unverifiable, is irrelevant for the legal assessment of the child's well-being, since the wellbeing of the child is to be judged exclusively from the viewpoint of the child.

Scheinfeld and Merkel astutely point out yet another striking logical problem in the new statute—the apparent permission of anesthetic administration by a mohel. During the first six months of life, circumcisions are allowed by a non-physician circumciser who does not need an official permit, if the religious community selects him in a certain process, and if he has completed a special training. This provision refers to the Jewish "mohel" and the "sünneci" in Turkish Islam. According to the new law, the mohel must be "comparably" trained and skilled, that is, physician-like. Merkel points out that no physician is required for pain treatment because paragraph 2 permits the execution of the whole procedure "according to paragraph 1" and also by non-physicians and thus entrusts the whole to non-physicians. Merkel Putzke--"But is this possible at all with regard to

anesthesia? No, it is not. A non-physician cannot and must not acquire such skills or the respective pharmaceutical substances, let alone apply them to a patient. The German Pharmaceutical Act of 1976 strictly forbids him from doing so.” Eschelbach—Moreover, the combination of a medically non-indicated operation with the requirement that it be implemented according to the rules of the medical profession contains a contradiction, because, by medico-ethical standards, a non-indicated operation is fundamentally out of keeping with the rules of the medical profession and the mandate to do no harm.

Two landmark cases have long held that U.S. law protects religious *belief*, but will not condone potentially harmful religious *practice*. In 1878, in [Reynolds v. U.S.](#), the Supreme Court held that “laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.” To exempt (assertedly) religious acts from civil law “would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.”

Likewise, in 1944 in [Prince v Massachusetts](#), the Court ruled: “The right to practice religion freely does not include liberty to expose the ... child to ill health or death. ... Parents may be free to become martyrs themselves. But they may not make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.”

Your rights stop at the boundary of your child’s body. No right of freedom can authorize a holder of such rights to infringe the freedoms and rights of another. Merkel Putzke--“No conceivable (positive) liberty right, roughly understood as a right to perform certain acts at one’s will, can possibly justify direct physical intrusion into someone else’s body.”

These four contradictions are far from accidental but rather are inherent results of attempting to legislatively authorize a procedure that, as the Cologne court correctly held, is a criminal offense. Herzberg notes that a physical injury that has all the elements of the offense and violates the Basic Law, is being “somehow” tolerated in order to satisfy the interests of *other* individuals. The parents supposedly can only make their religious obligation go away by inflicting bodily harm upon their son. Thus the parents’ “protected interest” is allowed to outweigh the child’s interests. But the law never comes out and says this because it is legally flawed!

Eschelbach--The method by which one starts with a predetermined result and seeks only an explanation to back it up betrays the standards of the accepted juridical method of working. In reality, there is no way to legitimize an irreversible injury to the male genitalia with neither medical indication nor consent subject.

This goes to the root of matters. An attempt is made to draft a new statute that in fact is an exemption to penal law by instead transposing it into civil law. The impulse is understandable—no one wants to criminalize parents or ritual circumcisers; there is a lurking feeling that their behavior belongs to the friendlier realms of civil law. The problem is that under civil law, the right of the parents to consent should be the rule and putting the child’s well-being in danger should be the exception. Only in the case of a child who is unable to assent or exercise judgment does the proxy consent of the parents come into question as a possible ground for justification. Allowing consent to a medically non-indicated operation under another title is legally, ethically, and logically incoherent.

It is often suggested that the current worldwide debate on circumcision is an expression of growing anti-Semitism, anti-Islamic sentiment, or xenophobia. The truth is that since the atrocities of World War II, there has been an increasing emphasis on human rights, combined with a growing awareness that children have the same fundamental human rights as adults. Germany is home to about 4 million Muslims and 120,000 Jews. Jews and Muslims, the Cologne court held, as well as anyone else wanting a nontherapeutic circumcision for their son, have to conform their behavior with the law. There is no question of Germany permitting other practices that have thousands of years of tradition in the history of religion, such as rituals of human sacrifice or the flagellation of a child on Good Friday. The child must be foregrounded—not parents, not society—with respect to a decision affecting that child’s body.

The current bill is an act of desperation flying in the face of the court’s courageous holding. The legal principles enumerated in the Cologne appellate decision are sound. The decision increases the likelihood that American courts and other courts will follow suit and similarly hold that boys have a constitutional right to genital integrity, that there is no parental right to circumcise, and that circumcision is criminal assault and otherwise illegal.

We see the depth of the contortions Germany put itself through. “We are convinced that the sheer act of circumcising an infant would not be tolerable, and would hardly be tolerated, under Germany law, were it not for this peculiar religious background that refers to grave historical guilt.” Merkel Putzke

Putzke: “This decision could not only affect future legal rulings but in the best case it could lead to a change of consciousness among the affected religions when it comes to respecting the basic rights of children.” Herzberg: “Isn’t it high time in the 21st century that the – I say it outright – scandalous violation of children’s basic rights finally ends?”
