"(…) one small cut for a man, one giant issue for mankind"[1]

Why the ruling of the Regional Court of Cologne on religiously motivated circumcision of boys is not convincing

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I. Introduction

The ruling of the Regional Court of Cologne on May 7, 2012 (Ref.No. 151 Ns 169/11) on the question of the criminal law relevance of performing a circumcision on an underage boy with the religiously motivated consent of the parents who are the legal guardians – the first one regarding this issue – provoked a rumbling in the press and despite the summer break revived the political arena.

The reactions to the ruling reach from bitter criticism to strong support. The federal government's reaction was to announce that a clarifying law would be passed swiftly, which would not deem circumcision as subject to prosecution. This demonstrates the fundamental social significance of the issue at hand: nothing less than the relationship between religion and state and to what extent a secular state may interfere with rituals of religious communities or even sanction them with a condemnation in a criminal law sense.

Fritz Werner once labeled administrative law as specified constitutional law. The following article aims to show that *mutatis mutandis* the same applies to family and criminal law, as it seeks to answer the question whether – and if yes to what extent - the complex situation of fundamental rights as stated in Art.2 (2) 1, Art.4 (2), and Art.6 (2) 1 GG has an influence on the question as to the effectiveness of a consent provided by parents for their child.

In the following the reasons for the ruling of the Regional Court Cologne and the lower court are reiterated. Following a cursory glance at the opinions and literature published so far, the legal remarks of the Regional Court of Cologne are objectively examined, exclusively from a criminal and constitutional law approach. The question which is raised is whether parents, with reference to their Jewish or Muslim faith, can consent to the circumcision of their underage son and whether – inversely – a physician, a Jewish or Muslim circumcisor (mohel or tahhâr/sünnetçi) may comply with this wish; a question which due to the ruling led to practical consequences.

This article does not aim to discuss whether the consent can be justified based on other motives which go beyond – or are completely independent of - the religious aspect, such as preventive medical reasons. Already for the simple reason that the question whether a circumcision is appropriate to produce positive effects for the health of the child or that of his future partner, for this is assessed differently.

[1] According to Ingo Way quoted in the Jüdische Allgemeine May 20, 2010

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The other issue which shall not be discussed here – though also increasingly relevant due to the ruling, but to be answered differently - is the question as to when a young man is effectively capable of giving consent to his own circumcision. As the title of the article indicates, this question is not decisive for the view represented here.
Finally, the article will also not address the question whether circumcision, due to social adequacy, is exempt from the facts of a case as listed in Sect. 223 of the German Criminal Code; for the simple reason that this aspect of the issue is also discussed in regard to justification, which shall be part of the focus of this article.

II. Facts and Procedure of the Case

In its ruling on September 21, 2011 the District Court of Cologne acquitted a Muslim physician of a charge of serious bodily harm (Sect.223 (1), 224 (1) 2 var.2 German Criminal Code), for he had circumcised a then four-year-old boy. The procedure was performed *lege artis* and following the wish of the Muslim parents for religious reasons. Since there was post-operative hemorrhage, the parents took the child to the hospital; the office of the district attorney was made aware of this and brought charges against the physician.
In the grounds for the judgment the District Court does not specify whether the case of a bodily injury is to be negated due to the social adequacy and bases the argumentation on the binding power of the justifying consent given by the legal guardians, the parents. The court explains that the given consent is effective because it was given in the interest of the child as intended by Section 1627 (1) of the German Civil Code. The court states, taking into account the required and balanced weighing-off between the right of the child to physical integrity (Art.2 (2) 1 GG) and the right of the parents to the religious education of their children (Art. 4 (1 and 2), Art.6 (22) 1 GG), the effectiveness of the consent to circumcision nominally follows because it prevents the stigmatization of a Muslim boy. Circumcision, according to the court, serves as a traditional-ritual act of recording a religious affiliation to the Muslim community.
The Regional Court then specifically discusses the right of the child to maintain his physical integrity, however it regards the interference with this right as justified based on the preventive effect circumcision can have for particular types of cancer men can develop, as attested by an official expert.
The prosecution appealed to the Regional Court of Cologne against this ruling. However, the legal means in the end were unsuccessful, for with the court ruling on may 5, 2012 (Ref.No. 151 Ns 169/11) the acquittal of the physician was confirmed.
Unlike the previous court, the Regional Court of Cologne sees the fact of a case of bodily injury given; furthermore it confirms the unlawfulness and underlines that the religiously motivated consent by the parents in the name of the child unable to consent, cannot be the basis for a justification. For the right of the child to bodily integrity (Art.2(2) 1 GG) conflicts with the fundamental rights of the parents (Art.4 (1) and (2), 6 (2) 1 GG) as a “constitutionally immanent barrier”. The court deliberately does not specify, whether the unlawfulness of the the religiously motivated circumcision can already be found in Art.140 GG in connection with Art. 136 (1) WRV and explains that the circumcision in question is, if necessary, then

definitely inappropriate, which is stated in the fundamental rights in Sect.1631 (2) 1 Civil Code. A circumcision which is exclusively based upon the religious conviction of the parents, affects the right of the child to decide on his own religious affiliation later in life; the duty of the parents to wait with the circumcision until the child is able to reason is therefore lower-ranking.
It was merely the - questionable – granting of an unpreventable and therefore excusing mistake of law (Sect.17(1) Criminal Code) which saved the defendant from a punishment for premeditated physical injury. At the same time this robbed him of the possibility to have the ruling reviewed by means of an appeal, or after taking all legal measures possible, to pursue the option of a constitutional complaint. The prosecution, who could have pursued legal measures, did not make use thereof – for whatever reasons.
The Regional Court of Cologne justified the unpreventable mistake of law of the accused physician, by explaining that apart from court rulings which did not sufficiently illuminate the legal problematic, there are "additionally voices in legal literature which certainly would answer the question differently than the chamber in question." The "most likely ruling opinion in legal literature" however is opposed to the effectiveness of consent to religiously motivated circumcision.

III. Opinions in Legal Literature

The following sentence to begin with: the ruling of the Regional Court of Cologne has not been made into a subject of discussion in "the" criminal law literature; the majority of authors, therefore, are silent on the issue.

1. *Supporters of Culpability*
A few words to the prevailing opinion, mentioned by the Regional Court of Cologne. So far as is known, Putzke was the first to extensively examine the question of a criminal law assessment of circumcision of underage boys without the capability to reason in Germany, published in the form of a very substantial contribution to the commemorative publication for Herzberg in 2008, which according to Putzke himself was encouraged and supported by Herzberg.
In this publication as well as following articles Putzke comes to the conclusion that the religiously motivated consent given by parents for a circumcision on a boy unable to reason can only be effective if it is not only preventive, but also curative and medically indicated, otherwise the child's rights outweigh the parents' interests. The fact that when making the decision to have their child circumcised the parents felt bound to religious rules, does not in itself suffice. Putzke measures the effectiveness of the justified consent based on whether it is in the interest of the child. He negates this and comes to the conclusion based on a cost-benefit-analysis. Although he explicitly identifies the protection of the child from stigmatization by the – circumcised – environment as a possible benefit, the irreversible and substantial loss of tissue as a cost far outweighs the benefit.
In order to support this result he points to Art.24 of the Convention on the Rights of the Child (CRC) according to which signatory states must take all appropriate measures to ensure that

traditional practices prejudicial to the health of the child are abolished. According to Putzke, circumcision falls into the category of such a traditional practice.
Herzberg even goes a step further by rejecting a weighing-off as Putzke does, for he states that this can lead to a critical weighing-off, which supporters of religiously motivated circumcisions can exploit for results-oriented argumentation. Herzberg supports that parental decisions, which affect the religion of the child, are to be regarded as "neutral towards the interest of the child", and can therefore not argue in favor of the effectiveness of the given consent. What is more, to explain his approach he points to Art.140 GG in connection with Art. 136 WVR. In paragraph 4 the latter norm forbids any enforcement of violence, which is given in the religiously motivated circumcision of a boy who is not yet able to reason. Art.136 WRV also prohibits any limitation of the right of third parties as part of practicing religion.
The reflections of Putzke and Herzberg are shared by Schlehofer – also a student of Herzberg – as well as by Lenckner/Sternberg-Lieben und Jerouschek. The latter offers a historical overview as well as a description of the procedure of the ritual in Judaism and Islam in addition to medical and psycho-traumatologic aspects of circumcision. He then goes on to examine legal aspects of the issue. To begin with Jerouschek presents the unpublished conviction of a Muslim circumcisor for grievous bodily harm due to an unhygienic method of operation by the District Court of Düsseldorf whose "malpractice" he rebukes. He proceeds similar to Putzke, i.e. also weighs off between the fundamental rights of the parents (parental and religious education right as well as the own right to practicing religion) and the rights of the child (physical integrity and general right to personality) as well as the child's own right to practice religion – in any case as of 14 years of age).
Jerouschek rejects deducing the permissibility of circumcision from the so-called "Schächt"-Ruling [shechita ruling] by the Federal Constitutional Court from the year 2002 and explains this with a lacking comparability of the legally protected interests at hand. The cases can however be compared to the extent that state regulations – in view of circumcision here Art.223 and 224 Criminal Code – are opposed to religious rules. The decisive argument in Jerouschek's conclusion is the child's fundamental right to human dignity (Art.1 (1) GG), which in the case of religiously motivated circumcision is affected due to the stigmatizing effect it has.

2. The Opposing Position

The supporters of culpability of the physician and/or mohel and sünnetçi, and parents are opposed by Rohe, Zähle, Schwarz, Fateh-Moghadam, Valerius, and Schramm. Based on the assumption that criminal law is a manifestation of the *ordre public*, Rohe published an article in 2007 in which he examines the influence of Islam on German legislation and in which he briefly explains that the possibility of parents to give consent to the circumcision of their underage boy results from the circumstance that the consequences are minor and do not exceed what is socially acceptable.
This idea of an *ordre public* was taken up by Zähle in a publication in 2009 on religious freedom in regard to practices which result in damages of third parties. He explains that the area of protection as stated in Art.4 GG is opened to include the *forum externum* rituals such as circumcision, if it corresponds with this basic principle. In case of the circumcision of boys he confirms this. A weighing-off between children's rights and religious freedom is therefore

to be done using boundaries. According to Zähle a solution to the conflict between the child's right to physical integrity and the parents' right to religious education can be reached, if the circumstances are given that German physicians' standards are adhered to. A religiously motivated circumcision is not a curative procedure. Yet the considerations regarding curative measures should be applied analogously to this case so that circumcisions may only be performed by a person with medical training and in a hygienic environment.

In his article on constitutional law aspects of religious circumcision published in 2008, Schwarz focuses on the basic rights of parents to practice their religion undisturbed. To begin with, he illustrates the dilemma of the state when determining the area of protection of Art. 4 GG, for on the one hand it must assess whether specific actions or omissions by those who have these rights are permissible, on the other hand it must refrain from judging world views due to the requirement of maintaining religious neutrality in a secular state.

Based on this, Schwarz justifies opening this area of protection in Art.4 GG to include circumcision of boys. Procedures which are a disadvantage to a child and which are justified based on religious freedom are only permissible if they correspond with the *ordre public* – similar to the argumentation by Rohe and Zähle. The case of a religiously motivated circumcision – performed lege artis – therefore does not pose a significant physical maltreatment; furthermore there is hardly ever an intention to harm by the parents.

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In his article from 2010 Fateh Moghadam to begin with demonstrates that Putzke's and Herzberg's method of positively determining the child's best interests by way of weighing off the advantages and disadvantages of a circumcision leads to a "child raising competition" between parents and the state because a parental discretion no longer exists. This interpretation, however, is not compatible with constitutional law, or to be more precise: with the right of parents to care for and raise their child. The state does not assume the role of "parens patriae", but must rather be content with the role of "controlling what is unsound" and can therefore only negatively determine the best interests of the child. The state may only intervene in the right of parents to raise their child in the case of grave breaches of the interests of the child. An evident maltreatment in this sense can only be assumed, if the decision is under no aspect reconcilable with the interests of the child.

The fact that circumcision affects the right of the child to bodily integrity, does not necessarily result in unsoundness in this sense, for upon closer inspection Art.2 (2) 1 GG is in need of elaboration in certain cases which require majority and are therefore a question of values up to the parents to judge. The decision whether a circumcision shall be performed is up to the parents, as is the case with vaccinations and ear piercing.

The limit is therefore not crossed in the case of circumcisions, regardless of the motivation – given that the child does not put in a veto. This right to a veto – which is adapted by Ulsenheimer – goes beyond the capability of the child to reason and takes his right of self-determination into account. Furthermore, circumcision must be performed *lege artis* and may not be accompanied by degrading circumstances.

In the same year Valerius published an article in which he examines cultural moral values considered in criminal law and in which he shows the general possibility of consent given by legal guardians to medically non-indicated procedures which result conversely to Sect.1631c (1) Civil Code. The parents are entitled to decide whether a religiously motivated circumcision shall be performed. This decision must be based on the best interests of the child, which in turn should be "orientated according to the opinions of the domestic legal community". The interests of the child are not solely determined by the physical well-being, but is also dependent on mental and intellectual criteria. Since circumcision is of great significance to the boys in question due to its religious and identity-shaping importance, this purportedly compensates for the comparatively low-risk procedure – as long as it is performed *lege artis* and by a physician. He supports these findings, a contrario to the explicit legal ban on parents consenting to sterilization (Sect.1631c Civil Code), transplantation (Sections 8 et seqq. Organ Transplantation Act), as well as clinical trials (Sections 40 (4), 41 (2) Medicinal Products Act).
Finally, Schramm offers an extensive work on this topic in his habilitation which was published in 2011, in which he discusses the fundamental relationship between criminal law and family. Schramm initially offers a spontaneous understanding for those opposed to circumcision and who seek to reserve the decision for the boy capable of reasoning. He goes on to explain that the child's right of personality is confronted/faced with his fundamental right to freedom of religion, the right of the parents to practice their religion, as well as the fundamental right of parents to care for and educate their child. Religious education is specified as part of parental care in the Law on the Religious Education of Children. Given this weighing-off, the fundamental right of the parents to religiously educating their children outweighs the right of the child to physical integrity and protection of their personality – under the condition that the religion in question entails circumcision as an essential element and that it is performed *lege artis*. Schramm explicitly limits this to religiously motivated circumcision and rejects the further interpretation of parental competence offered by Fateh-Moghadam.

IV. Opinion

During the very first semesters every law student learns that surgery represents the facts of a case of a bodily injury which requires an effective consent. And the fact that in the case of children who are not yet capable of reasoning and therefore giving consent, the legal guardians assume this position, also belongs to the basic knowledge of every lawyer. The same goes for the fact that this given consent, as an expression of the care of the legal guardians, must be in the best interests of the child, in the sense of Sect.1627 (1) Civil Code.
The phrase best interest of the child poses an indefinite legal term and requires specification. Up until this point we agree with Putzke. However, we do not share Putzke's methodological approach to specify this phrase. While Putzke deems a decision to be in the interest of a child as long as the advantages outweigh the disadvantages of the procedure and pits the results against the fundamental rights, we find an argumentation based on constitutional law is due

here. For otherwise one will inevitably land between the fronts of those who controversially discuss the advantages and possible damages – which Herzberg recognized as well.
Furthermore – and this weighs even stronger – the topos "advantage" proves to be arbitrary. This can especially be seen in Putzke's remarks on other medically not-indicated interferences of physical integrity, such as ear piercing. In this particular case he decides against weighing off, for he classifies – in our opinion this classification is assailable - the procedure as minimal, low-risk and hardly painful as well as socially acceptable and clearly in favor of the advantage. Insofar as he sincerely demands that the advantage of a religiously motivated circumcision must be measurable and rationally justifiable, he demonstrates that – he does not succeed in offering a generally binding criterion for defining the best interests of the child – detached from an interpretation based on constitutional law.
It is correct to base the argumentation on the basic rights from the start, namely in their function as an objective system of values, as determined by the Federal Constitutional Court as early as 1958 in the so-called Lüth verdict.
Which basic rights are affected in this matter? At first glance one might think of the fundamental right of the child to physical integrity (Art.2 (2) 1 GG), but also the right of the parents to practice their religion (Art.4 (1) and (2) GG), as well as the care and education of the child (Art. 6 (2) 1 GG). In the case of religiously motivated consent by parents to having their underage boy circumcised, these basic rights collide. All affected rights must therefore be brought into a practical concordance. Only under the condition that one cannot achieve such a concordance, can the idea which Jerouschek proposes at the beginning of his article, namely that there is tension between criminal law norms and the practice of religiously motivated circumcision, be confirmed.
Art.6 (2) 1 GG grants legal guardians/parents the right to care for and educate their child. It thereby determines the relationship between subjects of fundamental rights and therefore assumes a special position among fundamental rights. Art.6 (2) 1 GG grants parents the decision-making power over their child; this is based on the idea that children are in need of held and protection until they come of age and in order to develop into independent people. This does not evidently imply that parents are granted an arbitrary tool of power; this is invoked by Jerouschek's definition of Art.6 (2) 1 GG in light of Art.1 (1) GG. The interpretation leads to a limitation of parental authority. It is placed under the premise of an education conform with the child's best interests, i.e. only in case of a decision in the interest of the child, is the area of protection as stated in Art.6 (2) 1 GG opened up. The phrase "child's best interes"t therefore assumes a de facto constitutional rank.
Without determining the child's best interest, Art.6 (2) 1 GG therefore cannot be invoked. At first glance, then, only the fundamental right of the child to bodily integrity must be weighed off against the right of parents to practice their religion, though the question which arises from the start is how the practice of religion of one individual can justify interfering with the right of a another subject of fundamental rights. Upon taking a closer look a further fundamental right must be considered, which so far has been neglected in the discourse. It is the fundamental right *of the child in question* to freely practice his religion (Art.4 (2) GG). The child is granted this right at birth. He cannot however make use of this right until he reaches religious majority. Up until then the parents assume that role. This follows conversely from Sect. 5 (2) of the Law on the Religious Education of Children. The parents are allegedly

interested in regulating all pending questions until he reaches religious maturity, e.g. the question whether a child should be baptized or confirmed or whether he should attend religion class (see Art.7 (2) GG). What also speaks in favor of this is that Sect. 1666 (1) Civil Code determines that parents are to protect the physical, mental and intellectual well-being of a child.
The question as to what is "pending" depends upon the respective religion. If the legislator were to pass a law in this regards, it would leave the realm of religious neutrality and set itself up as a religious scholar. An example of what could be expected in such a case is offered by Herzberg, who is enticed to reflect as to how Judaism and Islam might bridge the period of waiting time up until the point of a self-determined decision to (reject) circumcision.
The guideline according to which one can determine whether the decision is in the interest of the child, Putzke identifies this, in the end is the environment in which a child is raised. If this is influenced by Judaism or Islam then it would suggest itself to adhere to the rules or recommendations of this religion. If then the parents, in place of their boy, give consent to a religiously motivated circumcision, then they are fulfilling his right to practicing religion and in this point effectively decide, in the name of the child, to forego the right to physical integrity. The situation is comparable to that of a patient's provision. In such a case, given the incapability of the patient to make a decision, the person selected is entitled to make the decision, whereby they are to adhere to the presumed will of the patient. Only in the case at hand parents do not have the possibility of ascertaining the will of the child in advance.

The obligations by parents, as claimed by Putzke, Herzberg, Schlehofer, Sternberg-Lieben, and Jerouschek, namely to refrain from confessions which are irreversible and contain physical effects up until the child has attained the ability to reason, can neither be inferred from a constitutional law point of view nor from non-exclusive law. What is more such an obligation by the parents would interfere with the fiduciary right exercised by the parents until the child reaches religious maturity and would therefore be - from a dogmatic fundamental rights view - be just as intensive in its interference.
Insofar as Putzke, in order to ensure the results of his deliberations, bases his arguments on Sect. 24 CRC, according to which the signatory states must take all appropriate measures to ensure that traditional practices prejudicial to the health of the child are abolished, he on the one hand ventures onto the thin ice of the controversies around the preventive-medical effects of circumcision. At the same time he raises the debate as to the definition of health, which according to the WHO definition, as quoted by Putzke himself, explicitly contains the "social well-being" of the child and which thereby raises the same question as the definition of the best interests of a child.
The same goes for the result of pointing to Sect.1631 (2) 1 Civil Code[3], which the Regional Court of Cologne also invokes, in order to explain the inadmissibility of consenting to circumcision: this poses a vicious circle. What is meant by violence in the sense of the regulation is in need of a – constitutionally conform – interpretation. This also invalidates Herzberg's hypothesis that Art.136 (4) WRV in connection with Art.140 GG leads to an

[3] (2)Children have a right to non-violent upbringing. Physical punishments, psychological injuries and other degrading measures are inadmissible.

inadmissibility of parental consent, as these would prohibit the "enforcement" of partaking in religious acts.
A final word on Herzberg's allusion to Art.140 GG in connection with Art.136 (1) WRV, which the Regional Court of Cologne also contemplated applying to justify the unlawfulness of the parents' consent. The message of Art.136 (1) WRV appears to be clear at first glance: the civil and civic rights and duties are neither determined nor limited by practicing religious freedom. One could therefore draw the conclusion that Art.4 GG cannot affect the rights of third parties, a weighing-off must always result in favor of the latter. However this isolated observation of the norm is undue. For the civic rights and duties should also be pitted against the guidelines of the constitution and interpreted accordingly, only then do they unfold a limiting effect on the practice of religion. This takes us back to the initial question as to what extent Asrt.2 (2) 1 GG and Art.4 (2), 6 (2) 1 GG must be brought into a practical concordance.

V. Conclusion

When reading publications on this issue one is reminded of Gertrude Stein's words, "Rose is a rose is a rose is a rose." Because circumcision is a bodily injury, the consent to the injury is ineffective and the injury therefore liable to legal prosecution. It is not quite that simple, as has been demonstrated. Above all, the decision by the Regional Court of Cologne is irksome. By allowing the unpreventable mistake of law in the core elements of criminal law, the court evaded having to address the issue in more depth and prevented a clarification by the highest court. What remains are uncertain parents, physicians, and clergy.
At first glance what Herzberg and Jerouschek identify as the consequences of their opinions may seem consequent: circumcision tourism is the negative yet unavoidable consequence. Yet when examining - the expected – illegal and possibly more risky procedures than if they were performed in hospitals, it appears that the following continues to apply: *Fiat iustitia, et pereat mundus!*
Whether the announcement by the federal government to immediately offer clarity in this situation will truly be realized remains to be seen, especially in view of the critical voices and the numerous possible variations of a standardization – such as a regulation within patients' rights or in the Criminal Code. Any regulation will possibly have to withstand an examination by a constitutional court.