

## **The Consistency of Ritual Circumcision of Boys with the UN Convention on Rights of the Child<sup>1</sup>**

The social and academic debate on the permissibility of ritual circumcision of boys, triggered by the ruling of the District Court of Cologne on May 7, 2012, mainly focuses on national law. This debate often overlooks the fact that the United Nations has also committed itself to children's rights, namely under international law. The *Convention on the Rights of the Child* (abbr. CRC), which is largely unrecognized in its significance for the protection and guarantee of children's rights in Germany, is the focus point of this article. An introductory outline of the Convention on the Rights of the Child is followed by an overview of the methodology on the interpretation of treaties under international law as well as a chapter on the applicability of the Convention in Germany. Subsequently, this article briefly looks at the relationship between the best interests of the child and parental rights as brought forth in the Convention on the Rights of the Child, before examining the respective child's rights with regard to the permissibility of circumcision. The article then concludes with a summary of the previous findings.

### **The UN Convention on the Rights of the Child**

The *Convention on the Rights of the Child* was adopted by the United Nations on November 20, 1989 and came into force only a year later, which is an unusually short period of time for treaties under international law. With 193 signatory states it is one of the most widely ratified international treaties. Unlike previous declarations on children's rights under international law, which reach back to the days of the League of Nations, the UN Convention on the Rights of the Child for the first time establishes binding specific children's rights in its manifold forms. The child shall no longer be a mere object of state and parental guardianship. At the core of the Convention is a subject provided with individual rights. In

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this sense the best interests of the child as codified in Article 3 CRC are the main objective of the treaty, which is concretized in the various rights of the agreement.

## **Interpretation of the UN Convention on the Rights of the Child**

The interpretation of the UN Convention on the Rights of the Child as a treaty under international law is subject to the general rules of interpretation as determined in the *Vienna Convention on the Law of Treaties* of May 23, 1969 (abbr. VCLT). According to today's predominant objective view as well as the one codified in the Vienna law of contract treaty, the basis for interpretation is not the subjective will of the signatory parties, but rather the text of the treaty under international law. This is in accordance with Art.31 (1) VCLT "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

What is significant here by way of a dynamic interpretation is the prevalence of the ordinary meaning at the point of time of interpretation. A static reflection on the views upon which the treaty was based is therefore not decisive. According to Art.31 (4) VCLT a term is only given a special meaning, if it is clear that it was intended by the contracting parties. The wording is to be interpreted in light of the objective or purpose of a contract, which corresponds to the principle of effectiveness recognized by international customary law. Accordingly, a contract is to be interpreted so that its purpose is achieved to the greatest extent possible (*effet utile*).

The "context" of a norm in the sense of Art.31 (1) VCLT is set by the regulations of the contract, its preambles and where applicable any annexes, as well as possible additional agreements relating to the treaty made between the parties as stated in (2). Paragraph 3 then takes into account any subsequent agreements or practices regarding the application of the treaty.

Art.32 then lists the supplementary means which may be used in order to confirm or define the interpretation as mentioned in Art.31 VCLT, in case meanings were left "ambiguous or obscure" or if the interpretation could "lead to a result which is manifestly absurd or unreasonable".

According to Art.33 (1) and (2) VCLT the interpretation, in the case of a contract in two or more languages, such as the UN Convention on the Rights of the Child, orientates itself

towards the so-called authenticated and thus authoritative versions, to which the German one, as stated in Art.54 CRC, does not belong. Art.33 (3) VCLT assumes that in the case of contracts in several languages the formulations of the various authentic versions have the same meaning and are equally authoritative, unless divergences were explicitly agreed upon.

## **The Applicability within the German Legal System**

After the Bundestag consented to the UN Convention on the Rights of the Child on January 17, 1992 and ratified it on March 6, 1992, it came into force in Germany on April 5, 1992. As stipulated in Art.59 (2) sentence 1 of the Basic Law (*Grundgesetz - GG*) the Convention assumes the rank of a federal law within the state, which all three branches of government are equally bound to according to Art.20 (3) GG. The statements issued on the occasion of the ratification, which were intended to limit the immediate domestic obligations as called for by the Convention, were retracted by the federal government on July 15, 2010, as promised in its coalition agreement of 2009. The Convention on the Rights of the Child has therefore fully applied since November 1, 2010.

The constitutional principle of interpreting national law in accordance with the principles laid down in international law, which is also reflected in Art.25GG, states that non-constitutional as well as basic rights are “to be interpreted and applied in conformity with the Federal Republic of Germany’s commitments under international law”.

In modification of the general conflict of laws even laws passed at a point in time after the treaty under international law are to be interpreted in light of the latter. Particularly human rights treaties such as the UN Convention on the Rights of the Child are therefore barred from an interpretation contrary to international law.

The objective provisions established by the guarantees in the UN Convention on the Rights of the Child are immediate commitments under international law. These are partly self-executing norms, so far as they are sufficiently determined in their wording, content and purpose in order to be applied without an additional legal act. The pertinent provisions in order to recognize the self-executing-character here are either direct or in connection with the principle of the best interests of the child in line with Art.3 CRC, so that the

enforceability does not depend on whether the norms are ascribed subjective rights of the child.

## **Best Interests of the Child and Parental Right in the UN Convention on the Rights of the Child**

“In all actions concerning children [...], the best interests of the child shall be a primary consideration” (Art.3 (1) CRC). For the first time, the best interests of the child, as one of the “general principles” of the UN Convention on the Rights of the Child, has been comprehensively included in a human rights treaty in the form of Art.3 (1) CRC.

The term ‘best interests of the child’ is mentioned in other treaty regulations, however without being defined. This vagueness and the somewhat varying phrasing in the authenticated versions have led to far-reaching debates pertaining to the interpretation and effectiveness of this principle, which shall only be pointed out here.

Upon consulting the regulations of the Vienna Treaty Law Convention, what matters in an interpretation is that it helps consider and enforce the interests of the child as determined in the various individual rights in the treaty to the greatest extent, for in its entirety it provides a “well-rounded and cautiously worded structure of values, which fills the vague term of the best interests of the child”.

In order to maintain or even enforce the best interests of the child, public or private welfare institutions, courts, administrative authorities and legislative bodies are primarily committed. They must consider the best interests of the child in their decision-making processes and deliberations as a primary aspect. And according to Art.4 CRC they are obliged to take all appropriate legislative, administrative and other measures in order to realize the rights of the treaty and the best interests of the child as a self-executing-norm. The fact that the best interests of the child as stated in Art.3 (1) CRC is not *the* but *a* primary concern, by no means lessens the responsibility to protect, but rather emphasizes the significance of the best interests of the child as an “optimization requirement”.

The UN Convention on the Rights of the Child not only binds the signatory states to guarantee the best interests of the child. Art.18 (1) sentence 2 CRC states that it should be the “basic concern” of parents or legal guardians. In this sense the upbringing and

development of the child primarily rests with the parents. The signatory states “shall render appropriate assistance to parents and legal guardians” ((2)) and shall therefore “respect the responsibilities, rights and duties of parents [...],to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention” (Art.5 CRC). This primary responsibility of the parents to determine the best interests of the child and the perception of these guaranteed rights is a principle of the UN Convention on the Rights of the Child. Conflicts of interests between parents and child must be resolved in the sense of the best interests of the child.

The provisions of the Convention on the Rights of the Child concretize the best interests of the child in two different dimensions. In the sense of a responsibility to protect, it commits states to seize measures to protect the best interests of the child. As a right to freedom this mainly poses a defensive right of the child against the state, which may in no way inhibit the child in exercising these rights and which must also prevent interventions by third parties.

## **Right of Protection of the Child following from the Convention on the Rights of the Child**

### *Right to Health*

Art.24 CRC contains the right of the child to health. Paragraphs 1 and 2 are based on Art.12 of the International Covenant on Economic, Social and Cultural Rights from December 19, 1966 and extends it to include child-specific aspects. Paragraphs 3 and 4 are newly included. Paragraph 1 recognizes “the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health”. The state parties shall “strive to ensure that no child is deprived of his or her right of access to such health care services”. In (2) to (4) the duties as stated in (1) are specified, whereby (2) a) and b) as well as (3) are particularly significant for the question at hand. In (2) a) “appropriate measures” shall be taken to “diminish infant and child mortality”; and b) calls for ensuring “the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care”. According to (3) all signatory

states must “take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children”.

Health in the sense of the Convention is not only the absence of illness, but encompasses the physical, mental and social well-being. Health care services, as stated in (1) sentence 2, should be provided sufficiently and made accessible to everyone. Art.24 (1) and (2) establishes demands for the state to provide medical standards and a health system to allow for every child to enjoy the highest degree of health possible. At the same time the state should diminish health risks which result from a faulty health care system to the greatest extent possible.

One cannot deny that the ritual circumcision of boys leads to a violation of physical integrity and regularly goes hand in hand with a usually minor impairment of the physical well-being. The experience of pain during circumcision depends on whether it is performed with or without anaesthetization. The healing of the wound normally does not take long and if performed correctly, no complications are to be expected, which might result in death or grave health damages. Health, in the sense of the provisions, should not be examined at isolated moments, but should include a broad understanding of future developments. Particularly in the case of circumcisions, regardless of whether medically indicated or religiously motivated, there are health benefits for the boy which will last into the future.

If one counts the social well-being to health, then the condition of being circumcised is of fundamental significance for the integration of a child in a religious community and with it, for his social well-being overall. From this future oriented perspective, the condition of being circumcised is then no longer an impairment of the physical well-being, since the body now conforms to religious commands. This holistic and comprehensive view adheres to the preamble clause 12, according to which the significance of traditions and cultural values should be taken due account of.

In the sense of the best interests of their son, parents must ensure that all possible risks which are involved in a circumcision are avoided as far as possible. These can occur through heavy bleeding, transmitting infectious agents which could result in life-threatening diseases (e.g. herpes, particularly in the Jewish ultra-orthodox ritual of sucking the blood from the wound with the mouth), or by overlooking pre-existing illnesses (e.g. congenital heart disease or hemophilia). An effective limitation can only be attained by adhering to modern day medical standards, particularly by having the circumcision performed by medically

trained persons under hygienic conditions and the guarantee of a thorough post-operative care.

Traumata are likely above all, if the circumcision is performed on older children. These can have disadvantageous effects on the health development of the child, especially if the ritual is performed against his will. To prevent this, parents are compelled to prepare the boy for the imminent event in a manner appropriate for his age so that he can come to terms with the experience afterwards. Above all, the circumcision may not be performed against the will of the boy.

It is questionable whether the ritual circumcision of boys is in violation of Art.24 (3) CRC. It requires signatory states to “take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children”. The paragraph was specifically included to prohibit practices such as female genital mutilation. Numerous declarations under international law strengthen this concern of the UN Convention on the Rights of the Child. In order to achieve this goal, the signatory states are required to “take all effective and appropriate measures” in order to abolish such practices.

Irrespective of whether the religiously commanded Jewish and Muslim circumcisions are to be understood as “traditional practices” in the sense of (3), they would have to be “prejudicial to the health of children” if they are to legitimize a ban. Compared to the circumcision of women and girls, which as a rule is a genital mutilation, the short- and long-term negative consequences for the health of the boy are normally negligible. The phrasing “prejudicial to the health of children” however includes the comprehensive health term and therefore leads to a process of weighing-off. The less such “traditional practices” are purely custom or tradition, but rather a mandatory religious command, the more they are – in respect to the social and physical aspects of health – “useful” and can lessen the harmfulness of the practice and with it the responsibility of the state to undertake something against it. Taking into account that the religious freedom of the child (Art.14 CRC) and the traditional values of its people are awarded a particular significance regarding its best interests (preamb.12), and that even the explicit characterization of the circumcision of girls and women as an example of such a practice could not be enforced, the ritual circumcision of boys is consistent with the terms stated in Art.24 (3) CRC.

For the record, the Convention on the Rights of the Child guarantees each individual child his rights in his specific situation so that in individual cases, such as certain health risks of the

child or specific practices which pose too great a health risk, the state must take measures to protect the best interests of the child, even against the will of the parents.

### *Right to Life and Development*

In Art.6 (1) CRC the signatory states recognize every child's right to life. Paragraph 2 commits them to guarantee the survival and development of the child to the greatest extent possible. Art.6 therefore not only poses a further principle of the UN Convention on the Rights of the Child, but also provides a further foundation for all other rights of the child. Guaranteeing the survival and development of children is primarily the responsibility of the parents, as stated in Art.5, 18 CRC, who are to be supported to the greatest extent possible by the signatory states, in order to fulfill the obligations set down in Art.6 CRC.

Ritual circumcision is no form of killing, so that it does not come down to Art.6 CRC. It can however lead to death in the above mentioned exceptional cases so that it remains to be seen whether it is in violation of Art.6 CRC. According to Art.6 CRC signatory states are merely required to guarantee the survival of children "to the maximum extent possible". This norm protects life as a legal good, however it does not call for perfectionism. There is no requirement that every situation which, hypothetically, could lead to a risk of life - such as the complications of a surgical procedure - must be avoided. Especially in Germany it must be assumed that there is a very low death rate following ritual circumcisions. A possible risk which goes beyond the general risk is not provided for by the norm.

As (2) shows, survival and development build a unit, which the UN Convention on the Rights of the Child protects under the term "life". Apart from the physical-existential dimension, the spiritual and social development of the child is also of significance. Both aspects are to be balanced in the holistic approach of the Convention, without limiting the right to life. The comprehensive idea of health as elaborated in Art.24 CRC should be noted here.

A ban of the circumcision of boys can therefore not be derived from Art.6 CRC. On the contrary, it is consistent with the requirements stated in Art.6 CRC.

### *Protection from Violence in the Family Environment and from Degrading Treatment*

Art.19 par1 CRC states that children should be protected from "all forms of physical or mental violence" committed by those in whose care they are. This central norm of the prevention of violence against children also prohibits any light physical punishment. Despite

the dwindling acceptance of parental violence in the sense of a dynamically interpreted idea of the best interests of the child, one can systematically infer from the regulation, which explicitly lists “maltreatment” and “sexual abuse” that the act must reach a certain intensity and intention against the best interests of the child in order to be classified as “violence”. That is how the norm in the context of Art.24 (3) CRC is to be read. Ritual circumcision, however, cannot be equated with one of these actions, neither in regard to the consequences for the physical integrity, nor its motivations. It therefore is not in violation of Art.19 (1) CRC.

Ritual circumcision does not violate Art.37 CRC all the more as this has an even more limited scope of application than Art.19 CRC. Acts as listed in Art.37 are therefore always prohibited “abuse” as determined in Art.19 CRC. Signatory states accordingly ensure that “no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.”

The wording as such does not rule out that a ritual circumcision in certain cases could be classified as degrading, especially if the circumcision is performed on somewhat older boys who were not properly prepared and whose feelings are offended. However, a comparison with other prohibited acts leads to the observation that the intensity and motivation differ fundamentally to those of a circumcision. Furthermore, this regulation is intended to be applied in the area of deprivation of liberty by official authorities.

Ritual circumcision of boys can therefore not be equated with or classified as either of these prohibited actions.

## **Right to Freedom of Children based on the Convention on the Rights of the Child**

### *Taking the Best Interests of the Child into Account*

According to Art.12 (1) CRC, the signatory states “assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child”.

This participatory right commits the state to ensure that the opinion of the child is considered. This also includes the right to information and the protection from influence on

forming and expressing an opinion by third parties. A minimum age for the capability of forming a view is not provided, for according to the Committee on the Rights of the Child this would not be consistent with the Convention as the wording states that the view should be taken into account, depending on the age and maturity of the child. This way, even an infant's capability of expressing an opinion is recognized. The rule additionally stipulates that the issue at hand must relate to the child. This offers a broad scope and applies to all issues which relate to the child itself and all areas in which it could make an own decision, i.e. above all in the family environment. As is clearly stated in the authenticated English version the term "due weight" calls for the view of the child to be taken into account considering its age and degree of maturity. This then means that with increasing age and depending on the scope of the decision, the expression of the child's view will play a greater role.

In more concrete terms this means that in the case of circumcision, as soon as it is capable of grasping the situation and its consequences, the child's will and view must be taken into account. Based on Art.5, 18 CRC parents, in their responsibility for the best interests of the child as well as the realization of its rights, are therefore particularly committed to this point. The ritual of circumcision may not be performed against the identifiable and expressed will of the child whose age and maturity permits a rational decision pertaining to circumcision. Depending on the age, the same type of an expression of will is to be interpreted differently, since by crying or screaming, an eight-day-old infant, as opposed to an older child, will not make his rejection of the circumcision as a religious act clear, but will rather react out of reflex to the momentary situation. If the circumcision takes place under consideration of the child's view, it is in line with the guarantees stated in Art.12 (1) CRC.

### *Religious Freedom of the Child*

In Art.14 (1) CRC the signatory states "respect the right of the child to freedom of thought, conscience and religion". According to (2) they also respect the "rights and duties of the parents [...] to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child". Paragraph 3 then establishes that "the freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others".

Art.14 CRC contains an own right of the child to religious freedom, which above all is in line with a defensive right against the state. In the view of the United Nations Committee on the Rights of the Child Art.14 CRC also establishes the duty of the state to protect the religious freedom of the child. This responsibility to protect is strengthened by Art.30 CRC, according to which members of religious minorities may not be denied the right to practice their religion.

In regard to circumcision this means that principally a child may only decide whether and when it would like to belong to a religious community. Art.14 (1) CRC therefore puts the right of the child to have its views considered (as set out in Art. 12 CRC) in more concrete terms by taking religious matters into account. At first glance this may allow the circumcision of infants and young children, who are not yet of an age or maturity to decide on their belonging to a religious community, to be in violation of Art.14 CRC.

However, the Convention grants parents the primary responsibility for the best interests of the child in Art.3, 5, 18 CRC. The best interests of the child, in the parents' view, may also include a religious socialization. Since an infant or a young child cannot practice or decide in favor of a religion on its own, the parents, within the scope of their guardianship, exercise the right to religious freedom of the child. With increasing age and maturity of the child, the exercising of this right will progressively give way to purely instructing. Art.14 (2) CRC is to be understood in this way, whereby parents "provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child". Due to the weight which the UN Convention attributes to the rights of the child, the right of the parents is shaped as an accessory right, dependent upon the practice of religion of the child.

In Art.18 (4) of the International Covenant on Civil and Political Rights from December 19, 1966, in which the states parties "undertake to have respect for the liberty of parents [...] to ensure the religious and moral education of their children in conformity with their own convictions" the focus is more on the interests and the right of the parents to the religious upbringing of their children. This however is not a contradiction of the statement in Art.14 CRC, in which the directions parents give their children in practicing religion is guided by the increasing age and maturity of the child and gradually gives way to a self-determined own practice of the child. This is also how preamble clause 3 is to be understood, which places the UN Convention on the Rights of the Child in line with other human rights treaties and thereby establishes a consistent interpretation of all treaties.

The religious freedom of the child can only be limited under the conditions of (3). In the case of circumcision this limitation is pertinent for health reasons, so that consistent with (3) the state may make demands regarding hygiene and medical standards. The state therefore also has the responsibility to interfere, as determined in Art.3 CRC, if the best interests of the child are endangered sustainably. In view of the normally harmless consequences of a circumcision for the health of the boy this is usually not the case, especially not when the mentioned requirements for the performance of the ritual are observed.

## **Summary**

The German debate on the permissibility of circumcision must give more weight to the great significance of the best interests of the child and the appropriate consideration of the child's own view and conviction in all issues affecting the child. The best interests of the child equally bind parents and the state. Putting the children's own claims which correspond to these duties into more concrete terms, in particular in regard to the rights to life, health, religious freedom and freedom of expression, should be done in accordance with the UN Convention on the Rights of the Child, which protects the child as a subject of its own rights.

The analysis has shown that ritual circumcision of boys is consistent with the guarantees for children's rights as set out under international law in the Convention on the Rights of the Child, especially when medical and hygienic standards are observed and it is ensured that the child's will is given due weight. Under these conditions circumcision is especially not in violation of Art.24 (3) CRC.