

**Law on the extent of child custody concerning circumcision of the male child.
About foreskins to be severed and a law that comes too late, yet too early.**

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After the Cologne circumcision judgment, the legislature, in a matter of six months time, inserted a paragraph into the Civil Code that allows the guardian to consent to the non-indicated circumcision of their male child under certain conditions. The law establishes conditions for the legality of the surgery and should thus create legal certainty. It is questionable whether this succeeds. The law and its justifications are contradictory within itself. It turned an unregulated inconsistency into a statutory inconsistency. The debate over circumcision of underage boys is therefore not over yet.

I. The Cologne judgment, discussion, law and intent

Whoever comments on this strange law, can easily get into hot water. Legislative intent, law, individual comments and conclusions are, in part, simply comical. One could start with Montesquieu, who often has to serve in such situations (“Lorsqu'une loi n'est pas nécessaire, il est nécessaire de ne pas faire la loi.” – When a law is not necessary, it is necessary not to make the law), or with the discussions before and after the Cologne judgment, or with the judgment itself. One could write about the relationship between Germans and – here we go again – Jews, who can also be German, or of the state’s self assertion, without immediately mentioning Israel, or on the question of whether Islam belongs to Germany, on misunderstandings, on the German past and mutual accusations. In this essay, all this shall only play a marginal role. I will mainly look at the law’s intent and the law itself, which consists of only 94 words in two paragraphs and, as § 1631 d BGB, is supposed to clarify the legal position in cases of severing the foreskins of male children.

II. God’s laws and human laws

1. Rationally regulating the irrational

In the discussion of ritual circumcision two worlds collide that are so different in nature that a normative compromise compatible with the internal logic of the two systems is either impossible or can only be unsound. If in one system (a) God or Prophet expressly demands an act and gives priority to salvation of an eschatological category nature over (earthly and thus ephemeral) physical integrity, then a secular legislature cannot impose a petty ban that contradicts this divine requirement. On the other hand, in a secular world, in a state where religious freedom tolerates many gods, no one, but the legislature, is entitled to claim an exemption in the area where every human is entitled to fundamental rights (Article 2 II 1 in

conjunction with Article 140 of the Basic Law, Art.136 WRV). The fact that this has happened makes the compromise corrupt – but such things are simply part of societal coexistence.

2. Exclusivity versus concordance

In light of this mutual exclusivity, the principles of practical concordance cannot resolve the conflict. If, furthermore, religion can be unapologetic about its irrationality, the plausibility and consistency of its self-understanding does not even matter. A contradiction is allowed to manifest if on the one hand a parent is permitted to inflict an actual physically indelible mark of religion or culture on the body of a male child, but on the other hand (see § 5 KErzG – law on child education) the parent has to explain to the same child that he could later completely detach from the religion or culture, and to assert that this mark is not establishing the religious bond. For that reason alone, the law could only fail, because with it the attempt was made to regulate an archaic ritual of tribal affiliation, which – now also for preventive medical reasons – is performed upon the body of a person of non-consenting age, using an instrument that has its origin in the idea of the inviolability of the individual.

III. Location and occasion of the law and political compromise

1. Location

Although prompted by a criminal court decision, the legislature has not amended the Criminal Code, which in § 228 limits the justifying consent to personal injury. It placed the new provision among custody law, oddly enough surrounding the right to *non-violent upbringing*, § 1631 II 2 BGB, the obligation to *consideration of abilities and interests of the child* when choosing a career, § 1631 BGB, the prohibition of deprivation of liberty, § 1631 b BGB, and immediately after § 1631 c BGB, which prohibits the (irreversible) sterilization of the child. It justifies this with the “false judgment” ruled by the Cologne court, which had declared that the consent to circumcision goes beyond the limits of parental authority. Had there been a different standard expressed in the ruling, the legislature in its panic would most likely have referred to that one as *sedes materiae*

2. Occasion: The Cologne judgment and the growing minority opinion

It should be remembered that the Cologne judgment only exists because, according to the experts, the non-medically indicated circumcision of a Muslim boy performed *lege artis* had led to complications. Had the district court actually been as wrong as some claim, clarification of the law would not have been necessary. Miscarriage of justice is usually corrected by way of appeal or by the “right” decisions of other courts, and in science, correction occurs through annotations, essays and commentaries. Rather, the decisive factor was that no way was found with any reliable argument from applicable law to counter the increasingly strong opinion, shared by the conviction of 70% of the population, The Cologne ruling suddenly pulled away the veil of legal naivety over a long-known fact and subsumed it under a long-standing standard. Therefore the law comes too late. It should have come into force with the Penal Code, at the latest after RGSt 25, 375 (1894).

3. Political compromise on a millennia old, world-wide custom

The law is based on political considerations, which is legitimate in a parliamentary democracy. This does not mean, however, that it has succeeded from a legislative-technical standpoint; on the contrary.

IV. The regulation in detail

1. Consent to a medically unnecessary measure

a) Circumcision as bodily injury

§ 1631 d I 1 BGB states that custody of the child also includes the right to consent to a non-medically indicated circumcision. What a circumcision is, the law does not state, but arises from the justification and the reference to the rules of medical science, whereby the term “circumcision of the foreskin” is inaccurate when the foreskin is completely cut off. The legislature did not create an offense exemption, as for example in § 218 a StGB, regulating abortion. That would have been the easiest solution and would have more likely corresponded to the religious and cultural conceptions of the purpose of circumcision. What is willed by God, and thus good and right, what makes the man complete in the first place, can be of no harm in the overall balance, even if it involves a minor loss of substance of the man's physical body. Since the legislature has chosen the instrument of consent, it has – rationally and dogmatically – clarified that circumcision is an interference of one's physical integrity and is a legal offence of personal bodily injury. The law has changed nothing about that.

b) Unintended effect – A special right

Nevertheless, the explicit inclusion of circumcision in the law causes the opposite of what was intended. If it were as harmless as claimed, circumcision would quite naturally be equivalent with the cutting of hair and nails, or as medical procedure, with ear piercing or correcting protruding ears. Then it would be justified in the context of custody by consent in individual cases. Circumcision, now singled out, becomes a special case. The legislature did not simply clarify that the consent justifies the act, it has in several aspects – albeit in civil law – created a special offense of assault, including justifications and, in paragraph 2 in conjunction with paragraph 1, established a religious privilege – despite all assurances stating otherwise – although paragraph 1 does not mention any religious or cultural requirement. What is required is only that circumcision *ought to* take place according to the rules of medical science. With this the holder of custody is allowed, for any reason whatsoever, and yes, even without reasons, to consent to a circumcision – for there are practically no restrictions.

2. Limits of consent

These arise seemingly from paragraph 1; sentence 2, which exclude the justifying effect, “if the child's welfare is endangered by circumcision, also taking into account its purpose.” It does not state anywhere when this actually applies. Health itself cannot be meant, because any consent to an intervention that would be hazardous to the health would anyway be ineffective.

The State's guardianship, the primacy of parental education and the "particular circumstances of the individual case" are mentioned as empty phrases, followed by two restrictive reasons, which are circumcision for purely aesthetic reasons and circumcision with the goal to discourage masturbation. This is irritating. Why should parents not be allowed to decide on the form of their boy's penis according to their own aesthetic ideas if the procedure is completely harmless and inconsequential and even less complicated in infancy? How would the child's welfare be at risk – with regard to his penis – in a way that required the State to step in as the guardian of penile aesthetics? The second reason also seems odd. In the section on medical risks and consequences there is only the vague hint that the science is at odds as to how circumcision affects sexual life. If it does not affect the circumcised that way, then it could not serve to prevent masturbation. It would be an inadequate attempt, but harmless. This makes it clear: If we assume that circumcision is almost completely harmless and only because of the (insignificant) substance loss is a personal injury, there are no plausible reasons to restrict it.

3. Practical implications

This regulation will only impact cases where there is a disagreement between the parents, or between them and the physician, when the parents would have to truthfully state why they want to circumcise their son. If they give reasons that the doctor considers being child-endangering, although it is not clear what those could be, he is prohibited from performing the circumcision, because he must view the consent as ineffective. It gets even more complicated when one parent states a "good" reason and the other a "bad" one for the consent to circumcision. What would the physician or the family court make of that? And in such a case what is the risk to the child's welfare? The fact that the concept does not pan out is also apparent if one of the two guardians requires circumcision and the other rejects it. A physician cannot then circumcise. But how does the family court decide? If the child belongs to a religious community that demands circumcision, the court, following the law's rationale, would have to transfer custody right to the parent who demands the circumcision, just as in medically indicated treatments, according to § 1628 BGB. Otherwise, the court would violate the religious freedom of the child, by refusing the initiation and even potentially marginalize the child. But if the court decides in favor of the parent who rejects circumcision, it inevitably places physical integrity above freedom of religion. That's what should be avoided with the law.

4. Lack of capacity to give consent and actual will

a) Time Limits

Even bigger is the problem with the capacities to reason and to consent. Only seemingly does this not apply to the six month old infant, because through his sensation of pain he is capable of a defense reaction, yet only if it is not prevented by anesthesia. Here, the parents always decide alone. But what should happen when a five-, seven-, ten- or twelve-year-old, informed through the Internet, for example, refuses circumcision that the parents demand? If the limit of § 5 KERzG in an "*argumentum a fortiori*" applies here, one would come to the absurd conclusion that younger children, including infants, were unprotected. The legislature ignores this contradiction when it demands that the boy has to be involved in the decision making, as soon as he can express his will, in view of the irreversibility of circumcision. For a younger

child, the procedure is still just as irreversible! And if the boy is expressing his wishes, would he then, as an 8-year-old, have to be educated, as per § 630 BGB, including about circumcision's consequences for his sex life?

b) Useless advice

It's absurd to write that parents "are obliged to deal with an opposing will of the child". What will follow, if they do so and then consider this will irrelevant (rightly or wrongly – and according to what standard)? As it may be in some cases, the opposing will of a boy who is unable to consent might even remain unknown, if he just silently resigns. That, in cases of religious circumcisions, the religious belief of the child must be "respected", is also as empty a phrase as the wording "Details are provided in the Law on Religious Education of Children". There is nothing to be found on circumcision. To want to involve the child at all is already inconsistent, because it indeed does not depend on the consent or refusal of one unable to consent. Even though it shows the idea of protecting the physical integrity and the child's self-determination (or just the bad conscience of the legislature), this remains legally irrelevant.

5. Medical expertise and comparably qualified persons

a) The rules of medical science

To name the rules of medical science as a condition is a rational moment and initially reassuring. At first glance it is about the standard, i.e. the treatment *lege artis*, meaning a clean cut, sterile conditions, and adequate pain and wound care, which usually is ensured in hospitals and private practices. The problem remains, however, that the doctor must only prevent pain and treat a wound, because he himself inflicted them without healing intention and is thus in breach of the medical principle of *nihil nocere* – which is classified as assault. Furthermore, German pediatricians and surgeons reject circumcision without indication. Moreover, a statement of non-American pediatricians, rejecting circumcision without medical indication, was published after the opinion of the American Academy of Pediatrics (AAP) in favor of circumcision was cited in the rationale for § 1631 d BGB. Thus, if one focuses on the standard for medical specialists, what follows from the law is that the physician is allowed to act in a way that a good physician should actually not act, as long as he performs his act *lege artis*. There are also problems to be expected with the disclosure of risks, which the rationale mentions. If the physician describes the risks involved, as they are listed in the statements quoted above, it might be difficult for him to ascribe justifying effect to a given consent. And if a circumcision requires general anesthesia, yet this is too risky for babies, one would have to defer to a later time, because circumcision without anesthesia just does not correspond with the rules of medical science and therefore cannot be justified. But also in other respects this condition is not convincing because it contradicts unrestricted exercise of religion (see above II 1), notwithstanding in the child's favor. Why should circumcision only be allowed with pain management? Why isn't it a culturally commendable reason to let a boy prove that he can stand pain like a man? Why should the Metzitzah B'peh, which is performed by the mohel without anesthesia and with oral blood suction, not be legal, given that its advocates refer to an equally long tradition and duty? Thus, one faces the question of who determines the proper standards of the respective religion. And if circumcision can be performed according to Islamic rite from the seventh day up to puberty, then

religious freedom is restricted by a law that allows a non-medical circumciser to perform it only up to the age of six months.

b) Persons designated by a religious community who are specially trained and qualified comparable to a physician

The wording shows that hereby religious privilege has been granted. While it is welcome that not just anybody is permitted to perform circumcisions, the regulation remains vague and contradictory. There is no requirement named for specific training, or for a specific approval process in the religious communities, and no government approval is required. “Comparably capable”, though meant to be “equally”, is yet actually only comparable in the sense of less equal; the rationale explicitly refers to a set of knowledge and skills, but not with regard to pain treatment. The physician clause of the Pharmaceutical Products Act and the Controlled Substances Act remains unaffected. These Acts exist, because only a doctor is permitted to administer anesthesia for which he is trained accordingly. Apparently, therefore, the religious circumciser does not have these skills. Particularly fascinating is likely to be the disclosures that the religious circumciser is also obliged to provide. He then must also draw attention to the statements professional associations and possible sexual implications. If a treatment contract exists (§ 630 BGB), he must hand over the signed information sheet (§ 630 II BGB s) and must document the treatment (§ 630 f BGB).

6. Exclusively male children

a) Circumcision, Amputation, Mutilation

To allow only male children to be circumcised violates Article 3 I, III in conjunction with Article 2 II 1 GG with respect to boys and Article 3 I, III in conjunction with Article 6 II GG with respect to girls. This follows from the law in connection with the rationale, where it says: “It continues to be prohibited for parents to consent to genital mutilation of their daughter,” as per logic of language it follows that genitals of boys may be mutilated, an impression which the regulation is disguising by declaring both interventions as not comparable to each other and by not allowing any differentiation in severity of female circumcision, which legislation rightly condemns in total. However, female genital cutting is in some areas also based on centuries-old religious traditions, and there are voices that convincingly equate the mildest form of female circumcision with male circumcision.

b) Possible consequences

What should happen if parents intend a full circumcision for their son and the mildest form of circumcision for his twin sister, e.g. a symbolic cut in the outer labia? The medical risk for her would be less than for her brother. Circumcision is not supposed to humiliate or oppress, nor is it exempt from Article 3 GG's requirement of equal treatment! Are the parents now driven into illegality with respect to the daughter? Also inconclusive here is (and in general) the reference to the UNCRC. If the CRC supposedly does not prohibit male circumcision – which is actually not supported by its wording – one would have to quote from the above-mentioned legislative history and not from subsequent documents. It is just as plausible to argue that male

circumcision should not be excluded. And with regard to the asylum law that the rationale mentions, the following question arises: What should happen if two sets of parents are seeking asylum, one because their son is threatened with circumcision and the other because their daughter is threatened with circumcision? The asylum law states as a matter of course that female genital mutilation is a reason to grant asylum and prevents deportation. The imagined case scenario would be bizarre and dramatic. Because the parents of the son had only refused a medically harmless circumcision, which would have served his integration into the community, the reason for asylum ceases to exist immediately, although the parents acted according to the child's well-being.

V. Interim conclusion

The law is questionable in almost every one of its provisional points. It neither identifies clearly what is permitted nor what is forbidden, it establishes conditions which it then does not take seriously, and it allows a gender-based inequality.

VI. Contradictions, inaccuracies and omissions in the justifications

The deficiencies mentioned are even clearer when reading how they are justified.

1. Panorama of factuality

The rationale contains an extensive collection of facts. Yet, what normative consequence does it have that allegedly one-third of all men over the age of 15 are circumcised? The answer is as enlightening as the answer to the question of what follows from the number of obese or undernourished people, or, for example, of circumcised females. The text is meant to paint a picture of general worldwide acceptance, but goes beyond the goal, because it does not make it one iota more evident why circumcision should be permitted only in the now specified manner.

a) Religious and traditional circumcision

The rationale leaves perplexity, even regarding Jewish circumcision. After remarks on the history, the Central Council of Jews cited circumcision as being “essential and constitutive of being a Jew”. Not a word about being born to a Jewish mother. It also states that only a few Jews – numbers are not mentioned – would replace circumcision with a symbolic act. Moreover, the reference to the article by *Netta Ahituv* is argumentatively a disaster. The very notion of Brit Shalom is not found therein, neither are numbers, but all kinds of other information. The title even counteracts the bill. *Ahituv* reports that in a survey, *one-third* of parents said they would have preferred to dispense with the circumcision of their son, 16% had done so for social reasons, 10% for hygienic reasons and 2% for the sake of the grandparents. Next we learn that some parents who have not circumcised their sons wanted to remain anonymous in interviews because they did not want to complicate the integration of their sons. That does not sound like a genuinely free decision. Others report that their uncircumcised sons did not have any problems with their integration. And an uncircumcised Jew declares that he knows that his Jewishness cannot be taken away from him. Islamic circumcision is also outlined as being a duty or tradition that therefore belongs to each Muslim. But, what about the fact that, in rural Turkey,

circumcision is mainly performed without anesthesia because it proves masculinity? The rationale also argues that some Christians and the Muslim Alevi circumcise their sons, whereby religious beliefs and cultural tradition mix. With the latter, it is not mandatory, but a tradition, through which the child receives a sponsor. Ergo, everybody does it.

b) Cultural, social and medical reasons

Even stranger is the reference to Nelson Mandela, who reports that in his ethnic group uncircumcised men cannot inherit property from the father, not marry, not conduct rituals and would not be considered as a man. Here, the modal verb is already wrong: He **may not** (not allowed to). Does referring this very example to § 1631 d I 1 BGB mean that Xhosa parents in Germany are now permitted to circumcise their son, lest he should not inherit in “his tradition”? The rationale also refers to America, where circumcision is practiced for hygienic reasons, or so that no one is or feels excluded. Further irritating in the rationale is the fact that medical reasons, i.e. indications, are mentioned, and that WHO/UNAIDS activities are reported in nations with high HIV infection rates. That’s not what the provision in Germany is about. In addition, the argument that circumcised men suffer less often from penile cancer than uncircumcised men, is not quite convincing, for in men without a penis, this risk drops to zero. Altogether, the rationale tries to create the impression that circumcision is harmless to health, if not even to be recommended for health.

2. Risks and consequences

As to the medical risks, the bill, however, remains very brief. It points to four sources that speak of minimal risk (2% complications, in newborns 0.2%). What follows from these remains an open question. It was not discussed at which rate the risk would no longer be acceptable. How could this rate even be determined? It also remains an unqualified statement that circumcision should remain permissible, as long as it does not cause “unacceptably severe physical or psychological consequences”. It goes on to say that in circumcision the child loses sensitive skin from the penis and nerve receptors. This sentence is framed by two statements that there are diverging opinions among scientists about circumcision’s impact on one’s sexual life. References are missing. Here, the bill proves to be subordinate to the irrationality of its goal, because a detailed explanation of what exactly is removed with the foreskin would have undermined the argument of its medical insignificance. Even vaguer is the reference to “the evidence of normal ways of life”. If this were a compatible argument, even pain treatment could be omitted, because what “abnormal” in men’s lives in the Turkish countryside is as little known as traumata from the millennia in which circumcision took place without being performed in accordance with the current rules of science. But even people with postoperative problems need not lead an “abnormal” life, nor is it self-evident that men publicly discuss their sexual problems. We are talking about men who do not know the healthy alternative, who can’t change what has been done to them, but who would have to turn against religion or tradition, in whose name this sacrifice has been imposed upon them. The fact that not a single statement is included from circumcised men whose circumcision has caused problems makes the rationale one-sided. Data-based evidence could have been obtained with a survey. With good intentions, that would have been possible between July and December, at least to obtain a wider spectrum.

3. Medical Ethics

Even the remarks on medical-ethical aspects are almost insubstantial and redundant, although the rationale points out those non-indicated interventions are particularly in need of justification. “Aspects of medical ethics play an important role [...] especially in information/education as a prerequisite for an effective consent” and the lack of indication enhances “the requirements for disclosure of risks”. That this refers to adults is made clear as the rationale speaks of a “basic religious need”, something that children just do not yet have. The fact that the legislature quotes physicians to refer to the risk of falling into illegality is also not convincing. Criminologists could have been asked on this issue. After all, female genital mutilation is prohibited, despite the danger of illegal (underground) practice.

VII. Effects: relativization, cognitive processes, outlooks

1. Relativization

One can lament the inconsistencies of the law that here sacrifices for the political peace of a society the inviolability of its weakest (male) members, yet, consequently, this should also be done with other inconsistencies. § 218 ff StGB has already been mentioned. After all however, unlike in that section, here the child as an interested party may express himself later. Perhaps then he is very happy with his circumcision. If he is not, one will only be able to answer him that there is nothing to be done about that and that his parents had decided for him, because they considered it best for him. Then he has to hold them responsible, as everyone would have to regarding their childhood. If one expands the view, previously directed only to the bodily injury, one finds everywhere only fragmentary protection. Although it does not invalidate a single argument against circumcision, the fact is that parents are able to interfere with the life of their child in non-medical ways, also below the limit of § 1666, that cause lifelong sexual dysfunction, or religious resentment, or other unhappiness and even mental disturbance. Parents can influence their child during childhood – even reproachably so – that the child becomes impaired for life in his relationship to diet, physicality, sport, art, culture, religion and politics, resulting in a difficult or even failed life. If one would peruse a set of possible criminal offenses and would concede to children the same personality right as is granted to adults, curious results would emerge. Do parents coerce their daughter if they force her, when she is happily immersed in play, to accompany them to church against her expressed will? Or is it only coercion when this happens throughout her entire childhood? Is it a case of unlawful detention if a child who is not tall enough to reach the doorknob, is put to bed behind closed doors by the parents because they want to watch TV alone? Is it an injury if the child wants to have hair like Rapunzel, but the parents cut it again and again because it's easier to maintain? Does a childhood spent as a passive smoker fulfill the prerequisite for the offense of assault? Do parents commit a breach of trust if they do not spend the full amount of the monthly child allowance provided by the State, which is the child's income, on their child? Using the magic word of social adequacy, one has to remember, circumcision was indeed also declared admissible. Incidentally, road traffic with its many annual deaths is also socially adequate. One can rightly hold against these examples that not everything is explicitly justified by law. And with that the question is also answered of how the legislature should have responded. At most it should have excluded culpability. Even if this would have resulted in further “circumcision victims”, circumcision would not have become a right of parents, but only a tolerated act.

2. Cognitive processes

Until recently there was no discussion about circumcision because the vast majority only had their sons circumcised in medically indicated cases. In Germany, the fact that Jews and Muslims circumcised their sons was brought to the awareness of most people only through the Cologne judgment. Thus, the judgment and also the law show that Jews and Muslims belong to Germany and are integrated because their children, too, are actually to be protected. And if it has finally been recognized after thousands of years, and the rationale expressly states, that infants do feel pain (and that violent upbringing is in fact violence), sometime in the future the risks and consequences of circumcision will also be reviewed appropriately.

3. Outlooks

a) In the short term

For the time being, circumcision can be performed with impunity. The law will not affect circumcisions where the parents are in agreement and where, in addition to the loss of the foreskin, no further consequences arise. Only if there is a realized risk, or an alleged violation of the rules, or disagreement between the parents, or between them and the physician (see above IV. 3.) will this law come into play. It will have its first test in a case in which the Berliner *Tagesspiegel* reported on March 4, 2013: “As the mohel has pulled up the foreskin of the tiny penis it is removed in seconds with a single cut. The little boy screams violently now. [...] A few drops of wine, given to him previously into the mouth by the mohel, will soon make him sleep”. This may correspond to the traditional circumcision rite, but not to the rules of medical science. A criminal complaint was filed.

b) In the long run

It is the essence of enlightenment and progress, that each has no regard for traditional values, even if they are justified on religious grounds. And it lies in the nature of followers of the tradition to defend it. It can be said with certainty that eventually one will look back on this law and upon male circumcision as the majority of people today look back, for example, on the right to corporal punishment, female genital mutilation and the criminalization of homosexuality. Then one may say, “That’s how it was back then...”, from which it follows that this “back then” is today. It would be embarrassing for the German legislature only if, sometime in the future, Muslims or Jews declare that they have said goodbye to this archaic circumcision custom and only extreme hard-liners would come to Germany for it.

VIII. Conclusion

The law is only provisionally final. But the legislature’s attempt to pull the veil of legal ignorance or innocence over the issue at hand has become transparent. The utter inconsistency of this law shines through and gives rise to further discussion, which ended with the adoption only on the parliamentary level. For this reason, the bill was not only too late, but also too early. And

therefore I finish with *Montesquieu*: It would have definitely been better to adopt no law; than to adopt this one.

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