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Circumcision of male children as a criminal law issue

A. Wish and Introduction

Hans-Heiner Kühne, the esteemed colleague to whom I extend my heartfelt congratulations on his seventieth birthday, wrote a series of critiques that lay out the outline of the “criminal law problem.” He who includes the “myth of rationality” in the title of an article will neither wonder at pseudorationality, irrationality and “vulgar rationalism” in a criminal-law-political debate nor become excessively upset about it. And he who gives himself the task of bringing “new social challenges” into harmony with “old criminal law structures,” will also be interested in the challenges facing traditional criminal law in light of new or newly discovered cultural and religious diversity.

B. The “criminal law issue” of circumcision

The criminal law issue of “circumcision of infants” – shortened for readability henceforth as “circumcision” – can be described in completely different ways. The levels at which the issue can be argued (and really must be argued if one does not wish to deny the issue’s true complexity) will first be introduced in outline before being elaborated in more detail.

To begin with, the obvious questions of punishability require specific answers and must be considered in light of the Cologne decision and the legislature’s reaction to it. Then the constitutional background questions need to be understood. These questions are hardly debatable in criminal law without (at least) giving some consideration to the *actual* questions of circumcision and its effects as well as its embeddedness in religious traditions. If one doesn’t want to artificially limit oneself to the questions of rights, then political and social aspects also come into play.

I. The dogmatic questions of criminal law

1. Survey

The practitioner of law as well as the legal scholar know to not immediately adopt the sensational viewpoint that a behavior which (from the perspective of the federal government) “was always allowed in Germany ... as far as can be seen – is permissible in all other countries and – according to the applicable legal concept – also in Germany according to the applicable law [was] allowed,” was suddenly declared punishable by a district court. Instead, in a constitutional state, which is also a state that rules by laws and is to this extent bound by criminal law, the clarification of the question of punishability begins not with the question of culpability of a subject, but rather with the question of factual findings and unlawfulness of the behavior. The allegedly easy to answer question is whether circumcision represents punishable bodily harm.

Religiously motivated circumcision (even if it's performed by a doctor) is not a treatment. If one frees oneself from the inviting formulation of the historical legislature, which designated the first modality of action of bodily injury as "bodily mistreatment," one cannot be liable to any doubt with regard to the subsumption of circumcision under the elements of bodily injury. Circumcision could, at most, be excluded if one views it as "socially acceptable."

The established answer to this was indeed up until a few years ago, "circumcision of infants for religious reasons is, according to the prevailing opinion as a socially acceptable action, ... [not a relevant] matter of fact." What the author of the above quote, *Fischer*, described in 2008 as "zw", was, in 2012, no longer the "prevailing opinion," and in fact appeared barely arguable: "There is no reason to exclude circumcision (...) as a socially acceptable practice from consideration as constituting the elements of an offence." However, whether it is supposed to (!) be [excluded when one speaks of] "children [being] (...) justified through consent of the legal representative", will – without evidence of this opinion at this juncture, but under reference to limited and adverse opinions – be decided.

The most recent layer documented is how a *question* of criminal law has become an *issue* of criminal law: From *one* margin number, fourteen have been born, in which primarily the legal-political and constitutional questions and considerations are argued, which, on the one hand, concern the right to self determination and bodily integrity of the child and, on the other hand, the right of upbringing and religious freedom of those entitled to custody.

Fischer grasps the legal position before the revision subsequently in numerous voices in the literature – some of them several years old – and in the verdict of the district court in Cologne on May 5, 2012 with the words (causing the above quoted opinion of the federal government to appear in a rather peculiar light), a "justification (scilicet that of the circumcision, which realizes the elements of the offense of bodily injury) on the basis of religious convictions of those entitled to custody was, according to previous law, to be rejected."

2. The Judgment of the Cologne District Court from May 7, 2012

The "practice of actually tolerated circumcisions," which jurisprudence regards rather *en passant* as socially acceptable or at least justified, and the non-Jewish or non-Muslim German society and the majority of their lawyers barely apprehend as a matter of fact let alone as a problem, is *practiced* on the children of many Jewish and Muslim families in Germany in connection with traditions that are thousands of years old. That was only tolerable as long as "only" jurists and medical practitioners scrutinized this practice and its endorsement or tolerance.

With the Cologne District Court judgment of May 7, 2012, the (actual or supposed) legal quietude 'before Cologne' was over. With a certain delay, for which the "public" was blamed, and which illustrated the extent to which not the events themselves, but rather the reporting of the events tips the scales (this didn't first come to be the case because of today's media society, but this present condition does make it easier to perceive), a heated, emotionally charged, controversial discussion about the boundaries in Germany quickly flared up.

Three weeks later, on July 19, 2012, a “large majority” of the members of the German parliament requested that the federal government submit a bill “during the autumn of 2012” that would, with due regard to the fundamentally legally protected interests of the child’s well-being, bodily integrity, religious freedom, and the parents’ right to upbringing, ensure that a male circumcision performed according to the proper medical standards without unnecessary pain is fundamentally permissible.

The media characterized what one might confidently describe as squaring the circle as a symbolic decision, whereby – justifiably – the legally non-binding nature of the decision as well as its (at least) symbolic appeasement of the protests in the Jewish and Muslim communities should be addressed.

3. The legislative attempt to break the “Gordian knot”

Only five months later, on December 20, 2012, the German parliament resolved, in the tradition established by the *ban* on corporal punishment in § 1631 par. 2 BGB, to settle questions of culpability from bodily injuries in the family in terms of personal custody law in the newly inserted § 1631d BGB.

a) The new provision of § 1631d BGB

§ 1631d par. 1 s. 1 BGB explicitly permits those entitled to custody to consent to the medically unnecessary circumcision of a (male) child as long as it is performed according to the standards of the medical profession. A religious motivation for the circumcision is not mentioned in the law; hence it is not a requirement. Sentence 2 limits this law – in a somewhat enigmatic formulation – for the cases in which the circumcision endangers the well-being of the child “even with due regard to its aim”.

§ 1631d par. 2 BGB acknowledges that the politically desired provision without mention of the (specific) religious background is not fully possible, and, therefore, permits the people to whom the task of circumcision is given within religious communities to perform circumcisions as long as they are performed within the first six months of life and as long as the practitioners are specially trained for the task and are as competent as a physician.

One can sum up the *criminal-law-dogmatic* state of affairs according to the hurried and perhaps impetuous action of the *civil-juridical* acting criminal lawmaker as follows: firstly every (not only religiously motivated) circumcision meets the elements of an offense within the meaning of § 223 par. 1 StGB, but is justified and thereby not subject to prosecution when it is performed *lege artis* (of medicine); and secondly, in cases of children under six months old, religiously motivated circumcisions are also justified when they are not performed by physicians, but with due regard to medical standards.

b) The critique of the new provision

The provision is criticized on the one hand fundamentally as misguided, and on the other hand – beyond this fundamental criticism – as dishonest, leaving important questions open and technically and linguistically sparsely successful. The critique should and can only be intimated here.

Only briefly, the fundamental criticism, which impinges itself on the “remaining allowed” or “being allowed” of circumcision, should be explored. This critique is essentially based on the proposition that the (parents’) right to upbringing cannot justify the irreparable injury to the bodily integrity of the child even when it is reinforced by the parents’ right to religious freedom. This verdict is sometimes portrayed as the result of *abstract* considerations between the rights and freedoms of the parents (right to upbringing and the right to religious freedom) and the rights and freedoms of the children (right to self determination and freedom and protection from injuries to bodily integrity, and it is sometimes buttressed by concrete factors that have an influence on the abstract considerations (intensity, viz algesia, permanence of the bodily and psychological sequelae, and dangerousness of circumcision.) § 1631d BGB is also occasionally criticized as unconstitutional in light of the differing treatments of male and female children.

Less fundamentally, but nonetheless emphatically, it is criticized that a provision that is evidently tailored to the features of *particular demographic groups* is developed as a *general* provision. Independently of the evaluation of religiously motivated circumcisions, the provision of § 1631d par. 1 BGB, which forgoes mention of the religious-cultural background, is unsettling; this takes effect properly only when par. 2 of the provision brings the religious-cultural background back into question, so the carefully avoided special provision is indeed introduced.

A legislature that is bound by the constitution, which permits those entitled to custody of persons to have *arbitrarily* motivated or *fully motiveless* circumcisions performed, leaves a group which appears to be especially in need of and deserving of protection unprotected with regard to definite threats to their right to self determination and their bodily and psychological health. That § 1631d par. 1 s. 2 BGB, an extremely vague provision, could be suitable to declare such circumcisions inadmissible, seems hardly plausible.

Naturally, it is not to be overlooked that the legislature evidently (and for understandable if not convincing reasons) wanted to avoid making a special provision for the circumcision of Jewish and Muslim boys. To want to avoid such special provisions – *horribile dictu*: “German special right for Jews” – betrays historical sensitivity and makes provision for foreseeable polemics. However, nothing can hide the fact that a special rule, which would be unproblematic were it not for the current excitement, was intended.

Special rules that hide the fact that they are special rules are either bad due to being *deceptive* or bad due to overshooting their intended goals. Exposing all male children who have not yet developed the ability to consent to the potential caprice of the arbitrary will of their parents by supposedly enabling the continuance of Jewish and Muslim life in Germany by allowing

circumcision is bad law for the latter reason. § 1631d par. 2 BGB, the more relevant provision in view of the Jewish circumcision tradition, which allows circumcisions to be performed also by non-physicians (who are designated by the religious communities and specially trained), incidentally foils the attempt to portray the circumcision rule as a universal rule.

II. The constitutional background questions

The criminal law *problem* of circumcision is due to the “embeddedness” in constitutional background questions, namely the conflict between bodily integrity and the self-determination of the child and freedom of religion of the parents, that is, between apparently affected constitutionally protected valuable interests. If it were not a matter of religiously motivated circumcisions, there would be no discussion. The concrete and current problem can only be understood and appropriately discussed if one is mindful of the fact that the affected values and interests for actual as well as evaluative reasons are, to a special degree, in flux.

1. The affected values, interests, and people

Across from each other there are – for all to see – the right to self determination of the child (over his body, but also with regard to religion), his welfare (the “welfare of the child”), that is his bodily integrity, and his bodily and psychological development on the one side, and on the other side the parental rights, their religious freedom, but above all also the comprehensive right to set the course for the child without the patronizing concern of the state.

When one describes the relevant interests thus, it is clear to everyone that it is certainly not a case of the “range of constitutional guarantees that is at most of theoretical interest”. Conversely, one could quickly come to the conclusion that these interests are irreconcilable, that compromise, which in a pluralistic society is invariably welcome, is as little in sight as the “mediating opinion” that is so beloved in our legal culture. Because if “one allows” the circumcision of the small child, the heteronomous injury to his bodily integrity is irreparably fait accompli. And, conversely, it is certain that a prohibition of circumcision makes a central aspect of the religious practice of the parents impossible. The more fundamentally, the more theoretically one approaches this question, the more conclusions seem to impose themselves that are suitable to designate the problem as aporia and dilemma (in the original sense of the terms): tertium non datur: a constitutional non-liquet considering the rank of the affected interests, and every solution harms central fundamentally legally protected interests in ways that are hardly acceptable!

2. Aporias, dilemmas, and the (also linguistic) discourse on them

He who works with aporias and dilemmas is well advised, not to yell “eureka” too quickly. In order to isolate the abstract and concrete aspects of the consideration, one must consider them in isolation and see them in their social context and in their historicity.

Of this difficult “business,” there is little to read. Where uncertainty and honesty would mean steadfastness in judgment, one finds above all voices, which purport to be able to know or to have to know what the appropriate answer to the relatively suddenly emergent, but also seemingly urgent question is. With dubious self-confidence, one postulates, pleads, and judges where self-confident doubts are announced.

Here *Putzke*, who in 2008 meritoriously initiated the discussion on whether one can, without question, assume the impunity of circumcision any longer, asks in a publicized interview about the *religious* themes centrally affected circumcision law to the polemic “which *devil* the legislature rode to thus trample the bodily integrity of children and their right to self-determination underfoot.” Conversely, *Josef Joffe* predicted – in either involuntary pathos or involuntarily (and inappropriate) humor – the Cologne verdict would fail before “the final judgment.” And the former justice minister *Zypries*, who was, mind you, in 2006 being considered as a candidate for the Federal Constitutional Court, seconded with the witty injunction to leave the “church in the village” alone “and the mosque and the synagogue as well.” He who wants to forbid circumcision belongs to the part of the (otherwise well-regarded) German jurists, who are “sometimes derided” because they “miss the forest for the trees,” she opines, and she turns this position into ridicule by equating circumcision with the “wetting of infants with baptismal water.”

To prevent misunderstanding: Naturally the legislature should be critiqued boldly and with good arguments – and (not only) *Putzke* can produce good arguments against the circumcision law. And conversely: naturally the legislature is allowed to and indeed must consider that circumcision is a “religious practice that goes back millenia” and is commonly practiced, and which, beyond religious reasons, is recommended by the WHO and UNAIDS as a protective measure against HIV infection and which – as far as can be seen – is performed with impunity worldwide. But in times in which on the one side great importance is attached to the protection of children, in times, on the other hand, in which the Cologne decision is met with indignation and fear and the circumcision ban is identified with a “new Shoah ... this time through spiritual means,” language must be used carefully.

3. The theoretically necessary and difficult considerations

Careful language can and should not prevent the examination of markedly difficult considerations. It is worth it, however, to not let go of exactly what the considerations require.

Prima facie it appears to be a matter of the trade-off between the bodily (and psychological) autonomy of the children and the religious freedom of the parents. Precisely this juxtaposition dominates a part of the input to the discussion. At the base, it suggests, indeed nearly prejudices, the result of the assessment. Because who would truly be ready in a secular state to inflict irreparable harm on a child only to insure the parents’ right to religious freedom? According to the rationale for the law, the legislature is not. Since, in accordance with the case law of the Federal Constitutional Court, in the case of a conflict between the parental interests and the well-being of the child, the precedence of the child’s well-being is recognized. And

although it is assertively repeated that the (widely uncontended) care of the person encompasses “provision for the health of the child as well as ... the determination of the religious upbringing of the child,” the “general boundaries in childhood rights” are pointed out, which, for example, would be specified through the determination of § 1631 par. 2 BGB about the permissible means of upbringing. Unambiguously, “If the bodily, mental, or psychological welfare of the child ... is endangered and the parents are not inclined to or capable of averting the danger, the Family Court has the official authority to take measures to avoid the danger.”

Thereby it is proved that the legislature did not balance the well-being of the child (concretely instantiated in his bodily integrity) against the religious freedom balanced and give preference to the latter. On the contrary, the interests are only named in order then to “decree” that circumcision as a religious practice of the parents does not clash with the well-being of the child, so a trade-off is not required.

4. Deficits of rationality and consideration

Against this backdrop, the pseudo-rationality in the debate is clear: While it had the appearance of being about “nothing less than the relationship between religion and the state and how extensively the secular state is allowed to intervene in the rituals of religious communities even with a criminal value judgment”, while this was philosophized about, the jurists stood “before the nearly intractable task of bringing religious freedom, parental right, and the well-being of the child into harmony,” and to the uneasy and alarming, thus daunting, question of whether “Jewish and Muslim life in Germany” is possible, the federal government grandiloquently answered: “Circumcision of boys remains allowed” and “religious life in Germany possible.” “Therewith Germany again gives proof that it is and remains an open-minded and tolerant land. Jews and Muslims are welcome,” not earnestly posing the question of the extent to which circumcision affects the well-being of the child.

At this point we should pause. Does this scolding of the legislature not go a little to far, has it not – prepared through expert deliberations and parliamentary hearings – earnestly tried to set forth that the well-being of the child is not endangered? The impression can arise, because, in fact, experts were consulted, the Ethics Counsel concerned themselves with the issue, and experts from the parliament’s Legal Committee were ultimately heard. But the critique of the actions of the leading (Justice) Ministry is, without reviewing their material authority at this juncture, sharp edged, and cannot be simply neglected. The complaints about the fact that existing critical voices did not have a chance to be heard at the presentation of the Justice Ministry’s key points nor at the Legal Committee hearing, might one yet want to give an account of the – admittedly objectionable – conventionalities of the political establishment. That, however, the content that was brought forward by critical voices, and which should have been addressed in a fair legislative procedure, did not come up for discussion, is a painful professional blunder of the legislature that can still have dire consequences – namely in a thoroughly conceivable lawsuit before the Federal Constitutional Court. Traditions that are millennia old, worldwide practice, and also the commendation of the WHO are naturally to be kept in mind; but they do not, taken by themselves, constitute medical-scientific arguments even if one adds to them a thoroughly

dubious paper from the American Academy of Pediatrics. Grave questions about the risks of the procedure, about its (bodily and psychological) long-term effects, about the issue of the prevention of unnecessary pain, about the guarantee of important hygienic requirements, were, as it appears, not posed and answered with the requisite deliberateness. It appears especially questionable how the legislature dealt with certain points critical to circumcision, namely the risks of circumcision as such, the effects on the sexual experience of the persons concerned and their partners, as well as the possible traumatization of circumcised children. The quantitative significance that is attributed to these aspects is indeed disconcerting. From the parliament, which is tasked with submitting a bill that considers the (also) “fundamentally legally protected interests of the child’s well-being and bodily autonomy,” not more than a half a page of the ten pages of the general part of the reasoning for the law is devoted to these aspects, the history and practice of circumcision is allotted six times that amount of space; the passage titled “differentiation of circumcision female genital mutilation,” which attends less to differentiation as to *depiction* of circumcision of girls, takes twice as much space as the deliberations about the possibly affected well-being of the male children.

Furthermore, there are astonishing deficiencies in rationale and consideration: Because the federal government contents itself to assess the risks and to evaluate: There are complications, but circumcision is regarded as “rarely resulting in complications”, with regard to its effects on sexual experience of the affected persons and their partners, there are “various assertions” and with regard to possible traumatization there are no “verified discoveries”. There isn’t a single word about why it is allowed that the children are expected to put up with the risk of such bodily and psychological complications and long-term effects, also not a word – as *Reinhard Merket* rightly harshly criticizes – about the outlandish augmentative load distribution, with which the legislature rather free-handedly treats arguments for and against a circumcision prohibition.

If above there was the finding that the legislature wanted to inspire with the circumcision law the impression of having not made any trade-off between the well-being of the child and the rights of the parents, because circumcision doesn’t affect the well-being of the child, then it would become obvious upon closer consideration, that implicitly – and this means likewise clandestinely und without regard to considerations, which – for example would be undertaken by the Federal Constitutional Court in comparable cases – would very probably be considered: beginning with the currently biased order of the legislature, to ensure that circumcision remains possible to practice with impunity, will – as far as can be here assessed – accept indefinite and underestimated risks to the well-being of the child in order to ensure the religious freedom of the parents.

5. Interim conclusion

With § 161d BGB, the legislature has created a bad, perhaps unconstitutional law. This is not because it has ensured the impunity of circumcision, but rather because of the manner in which it has pursued this goal. Before the question of whether other solutions that guarantee impunity are possible and preferable is considered, we should momentarily turn our attention to the sociopolitical context in which this prime example of failed legislation came to be.

III. Political and social aspects

Already from the remarks thus far it is apparent, the extent to which political aspects of various sorts have influenced the legislative process. Designating these aspects does not mean that they are irrelevant or even illegitimate. They definitely have importance, but they are to be differentiated from the classical (“established” and normatively undisputed) considerations and assessments of the legislature.

1. Waves of indignation

The decision of the Cologne District Court yielded a (tidal) wave of indignation on the side of Jewish and Muslim communities immediately after it became known to the public. This indignation is very well understandable. The judgment did “suddenly” declare old and important traditions that had not seriously been objected to in Germany to date to be a criminal offence.

Not so easily understandable is a second wave of indignation. It arose everywhere, where the rights of children and the well-being of children was intensively debated. I have no doubt that circumcision was already critiqued in these circles even before the Cologne decision; but it appears that this critique first gained attention with the judgment and in reaction to the wave of indignation of the Muslim and Jewish communities. Not unrealistically, it also appears that much of the – aforementioned – general knowledge about circumcision of Jewish and Muslim children only became concrete knowledge through the debate that the (critical) statement prompted. The particularly harsh tone of this critique might sometimes also be grounded in “guilty conscience” about the fact that for a long time (over)due critique was not expressed.

2. The reaction of politics

In any case the politics had briefly to do with a potentially dangerous *mélange* of opposed reasons of indignant citizens, that additionally also developed an international dimension. The reaction of politics can serve as a lesson in symbolic politics. Within a few weeks, the federal government was prompted by a wide parliamentary majority to establish within a few months that the child’s well-being would be taken into consideration but circumcisions would remain impunitive. The mention of both the well-being of the child and religious freedom and parental rights might (possibly also fostered by the incipient summer vacation, which slows down political discourse) have significantly contributed to placation. The debates within disciplines have already not sustained the same – and due – attention. The extensive discontent of the juridical community indeed found a certain reverberation in the media, but not in the broader public. The status of the debate aligned itself with the one before the Cologne decision: Those who reflected on circumcision (particularly juridically) without being directly affected treated it rather critically; but only a few gave any thought to it at all.

The role of the media

The times in which the politics of rights and criminality could take the time that they need are a thing of the past. The emergence of the extensively determinative media society is primarily responsible. Without the scandal potential and appetite for scandal in the media, a criminal-political half year like the second half of 2012 would be hardly conceivable. This concerns both the fast (and fast-moving) discussion and the role of the media as agents of intensification and simplification of the discussions. The surely existent anti-Semitic and anti-Islamic resentments, the valid protest against it and the protest against the identification of skepticism about circumcision with an anti-Semitic stance are, in this form and velocity, only possible in a media society.

This applies also for the balance between the rationality and emotionality of the discussion. The dissemination and aggravation of voices “friendly to circumcision” and “sceptical about circumcision” in the media has brought about an astounding emotionalization of the debate. (Actually) serious discussion participants, who otherwise often shared common positions, were suddenly positioned as “enemies”: as natural as the urgently important protection of the child appeared to the one, so natural appeared the important impunity, indeed acceptance of circumcision. The linguistic heedlessness with which the debate was carried out is also amazing. One can justifiably, like *Schwarz*, stumble against *Jerouschek*’s term “circumcision lobby,” even if his sensitivity appears to be hypersensitivity when one reads closely. As a result, one can perhaps say that the normative principles of our increasingly pluralistic society are far less firmly established than we like to think. Realizing this in due time with the help of the media must not be a disadvantage

C. Recap and prospects

After the – perhaps useful – sensational dust has settled, one can more coolly approach the questions, which really need to be decided.

Secular and less secular societies will not get around changing findings in medicine (and changing hygienic conditions). Everything is therefore indicates that this will have effects on the practice of circumcision.

The German legislature was allowed to far overshoot the goal in that it allowed those entitled to custody the right to consent even to motiveless circumcisions. A necessity therefor is unapparent especially in light of the fact that the widely more problematic provision of § 1631d par. 2 BGB is discernibly a provision tailored for the Jewish and Muslim communities.

Besides the reminder of the legislature, to fulfill the minimum demand of rational criminal policy, to seal “subjective assessment” and ultimately “caprice,” and its duties, of which *Hans-Heiner Kühne* early and insistently reminded, to use juridical and *empirical* methods.

Earnestly there are three concrete things to consider:

Is the secular state allowed to accommodate religious communities so broadly that it expressly allows circumcisions by non-physicians and without medical supervision or involvement and in unverified hygienic circumstances?

Must the secular state, in the interest of the child who is unable to consent (but also in the interest of the parents), ensure that a comprehensive medical clarification by people who are not a part of the religious ceremony takes place?

And thirdly: Would it not be preferable to follow the recommendation of *Tonio Walters*, and to declare circumcision impunitive instead of its explicitly permitting it.

The consensus that the criminal law in a heterogeneous and pluralistic society is at any rate not qualified to “resolve” questions of this type would in any case conduce peace under the law. Here as in other places, the dangerous inflexibility of the state, which knows not only prohibitions on penalization but also imperatives to penalize, manifests itself. Even if the idea of a legal vacuum is uncomfortable in a state under the rule of law, the thought of spheres free of criminal law should be – or once again become – a matter of course.