Law and ritual - a great judgment of a small criminal division

The decision of the Regional Court of Cologne, the first accurate small Criminal Division, dated 7 May 2012, has made legal history. The sustainability and intensity of the debate, which also is taking place in the general public, shows that it is a complex problem, not only in legal aspects. At this point it may be impossible to represent all the implications, as to how it came about that a legal opinion could reflect in the judgment—which has its origin in a commemorative essay article from the year 2008 [and] which therefore only for four years has been the subject of legal discussions and previously seriously interested no one among lawyers—let alone that someone had worked intensively with the issue. This is not surprising because many of the problems still seem to be underestimated, especially with regard to issues of child protection. At the center here are the decision and the criticism already voiced about it, in other words, it is about a dogmatic analysis of the grounds of the decision.

I. Facts and course of the proceedings

In November 2010, had a resident doctor, a medical specialist for surgery and by his own account a devout Muslim, with the consent of likewise Muslim parents performed a medically unnecessary circumcision (circumcision) on a four-year-old boy; the procedure was done under local anesthesia and for religious reasons. Although the doctor - according to an expert - had performed the surgery *lege artis*, it led to bleeding after two days. The mother brought the boy into the children's emergency room at the University Hospital of Cologne, where a urologist operated on him under general anesthesia and the bleeding was able to be stopped. Because the doctor who treated him had the supported suspicion that the circumcision was not done according to the rules of medical science, the hospital informed the police. Inevitably, the prosecution came to know of the matter and brought charges against the circumiser—because the doctor had used a scalpel, even for grievous boidly harm under to § 224 para 1 No. 2 of the Criminal Code.

Inevitably, the prosecution received knowledge of the matter and brought charges against the circumciser—because the doctor had used a scalpel, even for grievous bodily harm according to § 224 para 1 No. 2 of the Criminal Code. The AG Cologne,opened the trial, was initially based on a conviction that is likely spoke, the accused then free to durchgeführter trial for legal reasons, because he acted justified by the consent of the legal guardian. The Cologne AG opened the main procedings, initially cropped out from a probability of conviction, convicted the man, but then that he was released on legal grounds after the trial was carried out, because his actions were justified by the consent of the legal guardian.

In the process the district court judge acknowledged the priority to freedom of religion from Article 4, Section 1, paragraph 2 GG and the parental right under Article 6 paragraph 2 sentence 1 GG, opposed to a guarantee to the child's right to physical integrity under Article 2, paragraph . 2 sentence 1 of the Basic Law, because circumcision belongs "as a traditional ritual practice to document the cultural and religious affiliation to the Muslim community." Moreover, it would "counteract the threat of stigmatization of the child." He also takes circumcision "from a medical viewpoint as a preventive, precautionary measure, an important position," because "among other things it will in prevent other potential cancerous diseases."

The public prosecutor appealed against it, which was rejected by the LG. In contrast to the AG, however, the chamber affirmed the illegality. But at the same time she presumed an unavoidable error in favor of the accused. Although the public prosecutor was able to appeal against that decision, they waived this.

II Analysis and Assessment of the Court's Opinion

First offense of bodily harm

First, it should be noted that a religious circumcision, like any surgery, constitutes the offense of assault under § 223 paragraph 1 PC. It is true that this belongs to "square one of the lawyers" (at least on the ground of prevailing opinion). In this context the court problematizes [raises the question] if the figure of "social adequacy" is a necessary correction of the facts of the case. As recently as Exner tried in a dissertation to revive the declining thinking of social adequacy based on Welzel. Social adequacy is "standard, approved by the general public, and in terms of criminal law in social life entirely unsuspicious, because in the context of freedom of action, [it is] lying [perhaps in the sense of existing?] actions," must be added as a guiding point [literally, as the guiding point of the face or vision] [of] the historical custom. Although Exner himself finds that " a specific medical connotation" is lacking in ritual circumcisions, they are based "not on medical reasons," rather it would be a significant risk of complications and traditional circumcision performed without anesthetic actually could "cause significant psychological consequences of somatic impact," he comes to the surprising conclusion that the circumcision of boys is "a traditional part of the cultural identify of the Federal Republic of Germany" and constitutes "with the label 'socially acceptable' [one] performs…no punishable act." This was already a bold theory before the judgment of the Court of Cologne, and the chamber has issued a rejection of this idea with convincing reasons.

Since that time, there are things missing from the Exner social dispute, which is why now more than ever it can not represent the position that religious circumcisions are "generally accepted" and thus socially acceptable.

b) That the court has denied a dangerous assault, citing the Supreme Court, is not, however, convincing. For the intended use in the hands of a physician changes nothing as to the dangerousness of the tool, nor does the assessment depend on whether the procedure was done *lege artis.*

2. Unlawful bodily injury

Since the ability to consent is not yet present for a four-year-old, [the action] took the consent of the parents. As to its efficacy, the court comes to a clear conclusion: “In accordance with § 1627 S. 1 BGB, only educational activities that serve the interest of the child are covered from custody.” The Appeals Chamber refers to the “most dominant opinion” and then considered exemplary deals with different arguments.

a)

The Appeals Chamber refers to the "most dominant opinion" and then exemplarily grapples with the different arguments. The chamber denied that “in circumcision for religious education [there is] inherent violation of physical integrity…if it should then become necessary, in any case [it is] unnecessary,” not least because the “body of the child permanently and irreparably [will be] changed by circumcision.” In the literature, referred to by the court, detailed justifications are to be found as to why physical integrity prevails; the procedure is therefore inappropriate.

aa)

It would be appropriate in the case of medical necessity, for example, pathological phimosis. Having said that, circumcision—in any case with children—has no epidemiologically significant advantages whatsoever from a medical and health perspective: genital hygiene adequately reduces the risk of infection; urinary tract infections, inflammation of the glans, or cancer of the glans penis already occur rarely; the risk of being infected with HIV or contracting cervical cancer for women only can be realized with sexual maturity.

The protection against infection is therefore no argument for separating boys irreversibily from their foreskins. This is exactly what the AG Cologne has misunderstood if it believes that "circumcision from a medical perspective has an important role as a preventative, ‘precautionary’ measure.”

It is freely invented, by the way, that the WHO endorses circumcision in general as a preventative measure. This is exactly what Volker Beck and Renate Künast claim: “For example, so does the WHO recommend circumcision, among other reasons on the grounds of HIV prevention.” Such an undifferentiated statement is unsound. It is correct that the WHO recommends circumcision depending on the risk of infection and in any case not in children, unless they understand the consequences of the operation—in other words, they are capable to give consent.

The disadvantages, however, are obvious: first, the boy irreversibly loses without medical grounds a healthy part of his body. This part is by no means insignificant. That the foreskin is not unimportant, but rather important functions are provided by it, is no longer disputed by serious scientists. On the one hand the foreskin fulfills a protective function, to preserve, following birth, the glans and the urethral meatus from friction and dehydration. Secondly, the foreskin is an erogenous zone, it has a deep sensitivity that are otherwise only found in the fingertips, lips, and eyelids.

It is therefore not surprising that studies show that a circumcision has the result of a loss of sensibility, which can have negative effects on sexual function, for example erectile dysfunction. In consideration of this, the statement that the circumcision of boys has "practically no debilitating…results" can only be explained with ignorance or the intent to deceive.

Precisely because the foreskin has a function, it is also right both to look on it as a part of the body and also to take its removal literally, describing it as amputation. One who hears this choice of words without having dealt intensively in the matter probably will reject the concept with indignation. It is, however, no dramatization, but a sober description, which even now describes circumcision medically. It would be false and deceptive by no means to the objectification of the discussion, to whitewash circumcision as a consideration of (religious) feelings.

Second, the child suffers pain, even with drugging, both during the operation and in the form of postoperative pain from the wound. In Judaism, circumcision is even predominantly performed without anesthetic. Research shows that this is pain for delicate infants; traumatic pain is the result. As to the often exculpatory [claim] that is adduced [literally "brought into the field"; this appears to be idiomatic] that the following seemingly peaceful sleep, it should if anything be seen as a pain-induced exhaustion.

Third, surgical risks and complications occur: although serious complications are rare. But the risk that this will happen has long been known. And even because of the lack of any medical indication, it is in no case that which jurists call a "permitted risk." Apart from this, the complications (bleeding, infection, meatal stenosis) are sometimes more than ten percent.

The bottom line is that the has an erogenous part of his body irreversibly amputated, which leads demonstrably to a loss of sensation; he suffers pain in the process, which can lead to trauma, and he is exposed to considerable surgical risk and complications.

Should such a medically unnecessary surgery serve the child's wellbeing? Those who, in light of these circumstances, contest that there is a massive intrusion into the bodily integrity belittle and trivialize. This also applies to an equation with ear piercing or vaccination. In contrast to a circumcision, neither is a child's body part cut off in an ear piercing nor are the complications similar; [it is] otherwise with vaccinations, particularly because a health benefit is immediately available ecause the child is protected against dangerous diseases.

Beulke / Dießner pretend indeed to put the child's welfare at the center, but in their opinion they misappropriate that an erogenous part of the body is removed irreversibly, thereby causing pain and trauma; there is a loss of sensation; and there are surgical risks and complications. Whoever so obviously neglects medical facts and reduces the best interests of the child to membership in a religious community arouses suspicion that he is in fact not even there to help [bring] colliding fundamental rights to optimal effectivies [i.e. to reach an optimal solution], but to legitimize religious circumcision unconditionally. For how can one bring rights into a practical concordance, when one does not know how intensely affected they are? Beulke / Dießner make a balanc that does not deserve the name.

b)

The Chamber applies another argument that might be relevant to the determination of the child's welfare: “Avoiding exclusion within the respective religious social environment”; it ascribes a right to this aspect but with no decisive significance. Then nothing else must—at least with regard to mild forms—apply for female genital mutilation. There, too, the fact of exclusion in the absence of genital manipulation plays a significant role. Those who pleads that circumcision of girls and boys are not comparable fail to differentiate between degrees of intensity. Although it is commonly referred to as genital mutilation and the other, “garden-variety trivialized” as circumcision, but this distinction is factually unfounded, because even mild forms with unanimous verdict is held as “genital mutilation,” for example cutting off the clitoral hood; yes, even a mere piercing or incision of the female genitalia. Therefore it is not plausible, that in comparison to this the cutting off of the foreskin, doubtless by intensive surgery, is exempted from the verdict “genital mutilation.”

For that reason alone it is correct, that the “exclusion criterion” is disallowed. There is another ground: when interpretative authority is granted by the state to religious communities without restraint as to what is identity, there will be control of the law from that authority, which would be nothing other than a capitulation of the rule of law. Therefore the criterion of religious integration may be neither the only nor the decisive one.

Again: one who grants decisive weight to this aspect must explain why the injury of the female genitalia must be forbidden when it does not extend past the degree of harm of a boy’s circumcision. He thus must be in the position to explain to a believing Schāfi’iten why it should be forbidden to allow his daughter’s clitoris to be circumcised in Cologne even though according to the Schāfi’iten legal rules it is held even to be a religious duty for girls, and how this prohibition falls under Article 3 para 3 sentence 1 GG, which also contains the statement that no one may be discriminated against because of his religious views.

c)

If a behavior contradicts the child’s wellbeing, the religious freedom of the parents also cannot justify this behavior. The exercise of freedom never justifies on constitutional grounds harming the bodily integrity of another person, unless for reasons of self-defense or a state of emergency.

Also from the perspective of education law the court correctly found that the right of parents “is not unreasonably imparied, if they are obliged to wait, if the child later, when he is mature, himself chooses circumcision as a visible sign of belonging to Islam.” Reasonableness is determined solely from the fact that in Islam there is no religiously mandatory time for circumcisions. Tradition alone cannot justify an irreversible injury to the genitals of a child in any case.

With regard to Judaism the court has not ruled. A lack of understanding of the grounds of the verdict may explain the outrage coming out of the Jewish side. As far it is directed against the ruling, it is off the mark. Uncoupled therefrom, it is indeed understandable, because the criticism of the religious custom is a fundamental one, and applies to the genital manipulation both in Judaism and in Islam. But the outrage is not justified, because the bottom line for the Jewish ritual is no different from that for the Islamic. For one thing, many biblical commandments

and prohibitions over the millennia have changed themselves and are no longer taken literally. Already there are Jews (and Muslims) who replace circumcision with a bloodless alternative or postpone the surgery, without which their religious affiliation or self-understanding would be damaged. It is to be expected of religious communities (it is quite the same if they are Christian, Islaim, Juewish, or otherwise) that they will seek alternatives even for ancient customs, if these harm bodily integrity and together with it protected fundamental rights.

d)

In its assessment, the court added a further aspect, that [the practice] aims at the permanent and irreversible alteration of the body. This is not in the interest of the child; to the contrary "he can himself decide about his religious affiliation." The wording of the sentence misses the mark, because it does advance the misunderstanding, that in the face of a religious circumcision a religious conversion is completely impossible, for example that a Muslim could not later become a Christian. Insofar as that a circumcised penis does not constitute an obstacle, the court should have been clear. Nevertheless, the argument, which aims at a closer inspection of the impact of religious self-determination, is apt. For the child is provided with an immutable characteristic of religious belonging. It plays no decisive role, that the fact of being circumcised has multiple meanings—for example it can have medical, aesthetic, cutlural, or hygenic reasons—and thus is does not allow for an unambiguous religious assignment. This is not so, however, for the person affected. For him, a religious circumcision is a lifelong identification.

It is also overlooked by Beulke/Dießner, when they attempt to legitimize the harm of a child's bodily integrity with a fundamental right owed to him: "On closer inspection, however, there is another fundamental right add that has been neglected in the debate so far. It this is the fundamental right of the child to practice religioun" (Article 4 paragraph 2 GG). This aspect is by no means neglected; much more have Beulke/Dießner neglected the indicate, that this idea is not original, but other have already planned it. Indeed it is right to take the alleged interest of the child into consideration, yet it really acts as nothing other than his welfare. It poses the question, then, why in the perceived interest of a child it should be, that [the child] only out of religious tradition would seek to cut off irreversibly an erogenous part of his body, under the cost of pain, loss of sensation, and also significant existing surgical risks and complications, especially as the ritual is not an underpinning of the religion. One who holds these aspects as irrelevant in determining the alleged interest mus texplain why it should be in the alleged interests of a girl from a Schāfi'iten circle to be circumcised in the clitoris.

3. Acquittal for Lack of Guilt

While the court (convincingly in its results) accepted an unavoidable violation, it has not withdrawn a closer examination either "trickily" or with a "legal dodge," but it failed in duty to defer to the law (§ 339 StGB). It is unqualified therefore only to call the decision "annoying," because the court acknowledged that the accused [made] an unavoidable violation. It would not only be annoying, but

unlawful, if the court would have held to its his conviction and affirmed the preventability of the error, for the sole purpose of enabling a high court clarification.

III. Conclusion and outlook

The first small criminal division of the Court of Cologne has announced a great verdict. It is right to end religious freedom and parental rights in education where the child's welfare is at stake. This is not in the case of medically necessary circumcisions. Therefore, the state is obliged to protect children and to allow such interference if the child is able to make that decision for himself. From the judgment comes a clear and correct message: whether of a boy or girl, the genitals of young children may not be injured without medical necessity—even for religious reasons.