

The Circumcision of Boys from the Perspective of the Science of Criminal Law¹

The ruling of the District Court of Cologne of May 2012 did not come as a complete surprise for those who were familiar with the discussion on the legal permissibility of circumcision. And yet one is stunned and also taken aback by the consistency, or phrased negatively: with which one-sidedness and – as the President of the Central Council of Jews in Germany Dieter Graumann put it – with which coldness religiously motivated, professionally performed circumcision was ruled a criminal offense. All parents who wish to have their sons circumcised for religious reasons, as well as all doctors and members of the clergy who perform such a procedure are thereby threatened with punishment for bodily injury, be it as offender or instigator.

The Ruling

In November 2011 the court of first instance, the Local Court of Cologne (Amtsgericht) acquitted the Muslim doctor who had performed a circumcision and who had been charged with malicious bodily injury based on the following reasoning: circumcision would prevent stigmatization of the Muslim boy; it serves as a traditional-ritual practice to document his belonging to the Muslim faith community. Since the circumcision additionally ruled out certain illnesses, the invasion of the child's physical well-being was therefore justified.

The Prosecuting Attorney's Office of Cologne then filed an appeal against the acquittal. This appeal was rejected by the District Court (DC) of Cologne. From a legal-sociological point of view it is noteworthy that the appellate ruling by the DC Cologne was not rendered by three professional judges, but rather, as is prescribed for the small criminal division as the court of appeal, by one professional judge and two lay judges, one of whom was a postal clerk, the other a civil servant of the post. The only reason why the DC Cologne did not convict the Muslim doctor was because it deemed that the doctor had mistakenly assumed the

¹ Translated by Katharina McLarren August 2013

lawfulness of the act; this mistake was unavoidable so that he acted without culpability. However, the DC Cologne made a fundamental statement in its ruling: circumcision is a criminal offense. This implies: every doctor who circumcises in Germany now knows this and can therefore no longer claim to have unavoidably erred as to the law.

The four essential arguments of the DC Cologne are as follows: 1) the consent given by parents to the circumcision contradict the best interests of the child and is therefore not significant. 2) The given consent is also inappropriate because it contradicts the right to a violent-free upbringing. 3) The body of the child is “changed” long-term and irreparably so. 4) A child should be able to determine for himself a later point in time whether it would like a circumcision. Unlike the lower court, the DC Cologne largely ignored the religious practice of the parents and their right to determine their child’s religious affiliation.

The Discussion in Criminal Law on the Circumcision of Boys

The ruling by the DC Cologne calls for an intensive and critical appraisal. All the same, in the following, this article focuses on – triggered by this individual case – the general legal assessment of circumcisions in jurisprudence. For the ruling by the DC Cologne has its history in the discussion on the criminal categorization of circumcision in criminal law. Up until 2008 there were hardly any commentaries on this topic in legal literature. This may be due to the fact that no criminal law scholar viewed circumcision as something objectionable or even as a punishable wrong. In this context the Passau criminal law professor emeritus Werner Beulke spoke of a “silent majority”. But this silence could possibly also simply derive from unawareness, passivity or simply an ignoring of the issue.

Then, in 2008, the Passau professor Holm Putzke, appeared on the scene with his position, which he disseminated in numerous articles in various journals and which he made popular thanks to his skillful rhetorical and didactic appearance. Based on articles in medical journals including the *Deutsche Ärzteblatt*, published jointly with representatives of the medical profession, the impression arose that it was more or less an imperative of criminal policy and legally irrefutable that religiously motivated circumcision of boys is a criminal offense. And this offense cannot be justified, particularly not with religion. Putzke was followed by further authors, especially his academic mentor Rolf Dietrich Herzberg, the Herzberg-student Horst

Schlehofer, the Jena criminal law professor Günter Jerouschek, and the Dresden criminal law professor Detlev Sternberg-Lieben.

Putzke identifies a medically non-indicated circumcision induced by the parents as a violation of the best interests of the child. Though the religious aim of the circumcision ritual should be taken into account in the mandatory weighing-off, in the end it is extraneous. The costs of the circumcision for the boy are disparately higher than the benefits. His academic mentor, the Bochum criminal law professor emeritus Herzberg rejects taking the religious beliefs into account when assessing the child's best interests, for him religiously motivated circumcisions are a form of violence. Jerouschek draws a similar conclusion, namely that the prohibiting in criminal law of bodily injury and the dignity of the child weigh stronger than religious aspects. Sternberg-Lieben believes that physical integrity and the own decision which faith community to belong to outweigh the parental right to upbringing and the religious freedom of the parents.

These (at least) five academics, who call for the punishment of religiously motivated circumcision are opposed by (at least) twelve voices from legal academia who do not regard circumcision as subject to prosecution. The latter include the Erlangen civil law professor Mathias Rohe, as well as Kai Zähle, Thomas Exner, the Würzburg public law professor Kyrill-A. Schwarz, the state and church law professor Michael Germann from the University of Halle-Wittenberg, the criminal law professor Bijan Fateh-Moghadam from Münster, the criminal law professor from Bayreuth, Brian Valerius, the Passau criminal law professor emeritus Werner Beulke and the criminal defense lawyer Annika Dießner, the criminal law professor from Gießen, Walter Gropp, and probably also the BGH-judge and criminal law commentator Professor Thomas Fischer, as well as the author of this article.

In light of this clear majority, it is disconcerting that several representatives of academia, the DC Cologne, and even the Research Services of the Deutsche Bundestag claim that the "prevailing opinion" supports culpability – when actually the opposite is the case. Such an assertion most likely is based upon the fact that the court was not aware of the extent and diversity of the academic discourse, that it was conveyed incompletely, or that many voices of the opposing view were simply ignored.

It is basically impossible to elaborate or discuss all positions of the prevailing opinion in this article. I would nevertheless like to summarize the essential assertions in support of impunity:

- 1) The procedure is minor and socially adequate, so that it remains in the scope of what is socially acceptable.
- 2) The right of the child to physical integrity and that of parents to religious upbringing collide with each other. If, however, the procedure is performed professionally by a doctor, this offsets the conflict.
- 3) Religiously motivated circumcision constitutes a permissible exercise of the basic right to practice religion, since it does not pose a considerable form of maltreatment and the parents have it performed without malice.
- 4) Circumcision induced by parents, according to Fateh-Moghadam, is always a permissible exercise of child custody by the parents; it does not depend on whether it is religiously motivated or not; a purely aesthetic or preventive medical indication is permissible, unless the child vetoes against the procedure. Only unacceptable decisions are not covered by child custody.
- 5) Since there is no indication in the German Civil Code (BGB) that circumcision is prohibited, and furthermore since religion poses a great significance for the best interests of the child, circumcision, which is a relatively low-risk procedure, is permissible.
- 6) The position of the author shall be summed up at the end: the circumcision of girls is (as a rule a dangerous) bodily injury, which can never be justified by religious freedom. The circumcision of boys however, is not unlawful, if it is medically or religiously indicated and performed *lege artis*. Some of the rights of parents include exercising child custody and their right of upbringing and to already enable children to belong to a religious community and to educate them religiously. When balancing the basic rights of parents with the right of the child to physical integrity and its general right of personality, the exercising the right to practice ones religion and custody weigh stronger than the legal position of the child, as the procedure is not so grave that it would need to be banned without exception. If, on the other hand, one would prohibit Jewish parents from having the act of circumcision performed, this would mean that their children would not

be allowed to become Jews until a certain age and their parents, if they did induce the circumcision, would become guilty of an offense. But also members of the Islamic faith would not be able to fulfill a significant command of the Islamic faith, which would be made punishable by the German legislator. This conclusion cannot be right. I would find such a conviction unconstitutional – punishment is the most severe interference of fundamental rights which our legal system provides for.

Planned Legislation

In order to obtain legal clarity and certainty, the German legislator now intends to regulate circumcision in law. Allow me to present a few dogmatic comments from a criminal law perspective:

1) So far there is no consensus in which law circumcision shall be regulated. The following would come into question: the future regulation of the relationship between patient and doctor in Book 2 of the German Civil Code, the family law terms in Book 4 of the German Civil Code, the law on religious education of children and finally the German Criminal Code. We lawyers have learned from the scholars that when in doubt of how to understand a legal provision permitting or prohibiting a particular action, the context in which the provision is given may well play a decisive role. Even though the legal categorization may not be overemphasized, I would nonetheless discourage from incorporating the provision in the future patients' rights law. The latter mainly includes statements on the contractual arrangements of the relationship between doctor and patient and on the protective rights of the patient in relation to the doctor; but this is not the topic of circumcision, not to mention the fact that circumcision is also performed by members of the clergy.

What speaks against categorizing the issue in the German Criminal Code is that the reasons for justification are of a more general nature, circumcision is not an offense listed in the Criminal Code, and the justification tailored to this particular situation is regulated outside the Criminal Code. Consolidating the issue in the law on religious child education, as for example the criminal lawyer Hans Michael Heinig from Göttingen proposes, has the

advantage that the religious character of the circumcision would be underlined; if however the new circumcision regulation should also include provisions/terms regarding medically indicated circumcisions or circumcisions induced by the parents without religious motivations or which are not medically indicated, then this law is not the right place. In my view the right field of law would be the family law in the German Civil Law, to be more exact: placing it in the context of the regulation of parental custody, for in the end the legal permissibility of circumcisions is assessed in the context of family law, whilst taking constitutional values into consideration.

2) The request of the political groups of the CDU/CSU, SPD, and FDP in the German Bundestag from July 19, reads that the circumcision of children should be “permissible” i.e. “not subject to prosecution”. It is important to consider the choice of wording which avoids criminal liability.

a. If one only declares circumcision not to be subject to prosecution, this can be interpreted to mean that outside the criminal law it is to be viewed as against the law. This would reveal that the law condemns circumcision: it is in conflict with the legal system, it is therefore prohibited under civil and public law, but simply not “so terrible” to trigger a sanction under criminal law. We have the same problem with the regulation of certain types of terminations of pregnancy. Should this really be the result of a decriminalization of circumcision? Is the outcome one is striving for not rather: the German legal system, in all respects and in all its fields of law – not only in criminal law, but also in civil and public law – accepts the circumcision of boys under certain conditions?

b. A further consequence of a solution merely of impunity would be that circumcision would be an unlawful attack on the child and would therefore justify self-defense. This would mean – comparable to extreme fanatic abortion opponents – that fanatic circumcision opponents would be permitted to prevent a member of the clergy who is about to perform a circumcision from doing so, even with the use of force, based on the grounds of justification of self-defense according to s.32 of the German Criminal Code. This highly questionable consequence could be prevented if one declared circumcision not to be unlawful. Of course one could imagine that the wording “do not make themselves liable to prosecution” is connected with legislator’s decision that self-defense in the interest of the child may not be performed. This however would have to follow from the parliamentary reasoning for enactment.

3. The question then arises, whether the procedure may only be performed by a doctor or also by a member of the clergy and what formal training the circumcising person must present. It should be made clear that only the circumcision of boys, but not of girls is permitted. It must also be emphasized that only the professional circumcision and no other acts of circumcision are provided for. Another question is whether there is a certain scope as to how the act of the circumcision is performed in the religious communities in order to guarantee that the procedure is performed as gently as possible. The reasoning for the law should determine which circumcision practices are still legally acceptable because they are religiously mandatory and whether there are those practices which one cannot tolerate legally. One must also determine whether only medically and religiously motivated circumcisions shall go unpunished or whether this also includes circumcisions for aesthetic or preventive reasons. The fact that both parents must give their consent is in accordance with the terms set out in the family law regarding other medical procedures on children. One would also have to clarify whether circumcision may only be performed using local anesthesia.

Concluding Remarks

During the debate it was frequently stated, for example by the Hamburg criminal law professor Reinhard Merkel, that circumcision without anesthetic was a “barbaric act” and that even with anesthesia the boy was “terribly tormented”. Everyone must decide for themselves whether or not it is appropriate to describe a circumcising ritual which has been practiced for thousands of years and which the great majority of those affected do not view as particularly grave as “barbaric”. Would, to name three names at random – the author Franz Kafka, the philosopher Emanuel Lévinas, or the former president of the Central Council of Jews in Germany, Ignatz Bubis have classified the circumcision of boys in general or on themselves in particular (most likely without anesthesia) as “barbarism”? If one asks male members of Islamic or Jewish faith communities whether they felt this act as traumatizing or barbaric, one mostly hears the answer “no”. They rather perceive circumcision as a physical signature of their faith. Apart from this, one should note that circumcision in Germany – in

particular amongst Jews and Muslims – as a rule is performed using local anesthesia and the remaining pain apparently passes quickly.

The ruling of the District Court of Cologne caused legal turmoil. One may only hope that the legislator will succeed in creating a legal regulation which will re-establish legal peace. The former should then also express that we live in a community which meets Jewish and Muslim communities, which are constituted of approximately 100 000 Jews and 4.3million Muslims, with tolerance and respect.