Developments

Criminalizing male circumcision? Case Note: Landgericht Cologne, Judgment of 7 May 2012 – No. 151 Ns 169/11

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A. Introduction

On Thursday 19th of July 2012, just prior to the parliamentary summer holidays, the *Deutscher Bundestag* (German Parliament) passed a resolution based on a rather irritating motivation. The parliament intended to guarantee that "Jewish and Muslim religious life will be further possible in Germany."[1] The resolution itself consisted in only one sentence: The German Government is requested to provide until fall 2012 – in due consideration of the constitutionally protected legal positions of the well-being of the child, the right to bodily integrity, the right to religious freedom and the parental rights in education – draft legislation in order to safeguard that professionally performed male circumcision, without unnecessary pain, is generally lawful under German law.[2] What had happened to provoke such extraordinary political action in defense of religious freedom? The resolution responds directly to a decision of the *Landgericht* (Court of Appeal) Cologne from 7 May 2012[3] which declared that male circumcision in children amounts to criminal battery, even if performed *lege artis* and with the consent of the parents unless there is a medical indication for the procedure. In doing so, the court followed a restrictive position within the German criminal law literature that has been advocating the criminalization of male

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[1] Deutscher Bundestag Drucksache 17/10332.

[2] Deutscher Bundestag Drucksache 17/10332.

[3] LG Köln, *Beschneidung,* Judgement of Monday, 7 May 2012, No. 151 Ns 169/11, Neue Juristische Wochenschrift (NJW), 2128 = LG Köln, *Beschneidung,* Urteil of Monday, 7 May 2012, No. 151 Ns 169/11, Juristenzeitung (JZ), 805. *Cf.* comments by Werner Beulke & Annika Dießner, "*(…) ein kleiner Schnitt für einen Menschen, aber ein großes Thema für die Menschheit.*" ("A small cut on a man, but a big issue for humanity"). *Warum das Urteil des LG Köln zur religiös motivierten Beschneidung von Knaben nicht überzeugt* (Why the judgment of the Court of Cologne for religiously motivated circumcision of boys was not convincing), 7 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK (ZIS) 338 (2012) and Barbara Rox, *Anmerkung zu LG Köln, Urteil v. 7.5.2012 - 151 Ns 169/11*, 67 JZ 806 (2012). An English translation of the judgment is provided by the ILM-Website of Durham University, available at: http://www.dur.ac.uk/ilm/news/?itemno=14984 (last accessed: 31 August 2012).

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circumcision since 2008 with almost missionary zeal.[4] From a comparative perspective the proposed blanked criminal prohibition of male circumcision in children – virtually excluding Jewish and Muslim religious life in Germany – would be an exceptional case. As far as it can be seen, there is no jurisdiction globally, that rules out religious male circumcision.[5] It is doubtful, however, that the Cologne Judgment is an appropriate interpretation of the German law.[6]

B. Facts of the case

The facts of the case are simple. The defendant, a physician, performed a circumcision on a then four-year-old boy in his medical practice in Cologne on 4 November 2010. The circumcision was requested by the Muslim parents of the child, without there being a curative medical indication for the procedure. The surgery was performed lege artis and under local anaesthesia. The physician used a scalpel, sutured the wound with four stiches and visited the child at home for aftercare in the evening of the same day. Two days later the boy was brought to the children`s emergency department of the University Hospital Cologne because of a secondary bleeding, which was treated successfully.

Reportedly due to communication problems with the mother of the child the medical team at the University Hospital developed doubts about whether there had been valid consent of both parents, which is why the prosecution service got notice of the case. Although the investigation of the prosecution service brought about that the surgery was performed in

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[4] Initially Holm Putzke, *Die strafrechtliche Relevanz der Beschneidung von Knaben*. *Zugleich ein Beitrag über die Grenzen der Einwilligung in Fällen der Personenfürsorge* (a contribution on the boundaries of consent with regard to the right to care and custody of the child), *in* STRAFRECHT ZWISCHEN SYSTEM UND TELOS. FESTSCHRIFT FÜR ROLF DIETRICH HERZBERG ZUM 70. GEBURTSTAG AM 669 (Holm Putzke, Bernhard Hardtung, Tatjana Hörnle, *et. al.* eds., 2008); Rolf Dietrich Herzberg, *Rechtliche Probleme der rituellen Beschneidung* (Legal problems of ritual circumcision) JZ 332 (2009). Meanwhile adopted by parts of the commentary literature Theodor Lenckner & Detlev Sternberg-Lieben, *Vor §§ 32 ff. StGB*, *in* STRAFGESETZBUCH. KOMMENTAR (Adolf Schönke & Horst Schröder eds., 28th ed., 2010), 554, Vorbem. §§ 32 *ff.*, margin number 41.; Horst Schlehofer, *Vor §§ 32 ff.*, *in* MÜNCHENER KOMMENTAR ZUM STRAFGESETZBUCH. §§ 1-37 STGB (Bernd von Heintschel-Heinegg ed., 2nd ed., 2011), at margin number 143.

[5] Due to the (preliminary) findings of the Max Planck Institute for Foreign and International Criminal Law in Freiburg i. Br., Germany, answering an urgent request of the Federal Department of Justice, no country could be identified that legally prohibits male circumcision of children.

[6] For a more detailed exposition of the lawfulness of male circumcision *cf.* Bijan Fateh-Moghadam, *Religiöse Rechtfertigung? Die Beschneidung von Knaben zwischen Strafrecht, Religionsfreiheit und elterlichem Sorgerecht* (Religious justification? Circumcision of boys between criminal law, freedom of religion and parental custody), 1 RECHTSWISSENSCHAFT ZEITSCHRIFT FÜR RECHTSWISSENSCHAFTLICHE FORSCHUNG 115 (2010); farther with variant reasoning: EDWARD SCHRAMM, EHE UND FAMILIE IM STRAFRECHT. 114 EINE STRAFRECHTSDOGMATISCHE UNTERSUCHUNG (A doctrinal investigation of the criminal law) 226 *ff.* (2011); BRIAN VALERIUS, KULTUR UND STRAFRECHT. DIE BERÜCKSICHTIGUNG KULTURELLER WERTVORSTELLUNGEN IN DER DEUTSCHEN STRAFRECHTSDOGMATIK, vol. 230 152 *ff.* (2011), and the critical comments on the Cologne Judgment of BEULKE & DIEßNER, *supra* note 3, and ROX, *supra* note 3.

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accordance with medical standards and with the consent of both parents, the physician was accused of causing dangerous bodily harm, an aggravated form of battery under § 224(2) no.2 of the *Strafgesetzbuch – StGB* (German criminal code): Causing bodily harm using a dangerous instrument.

The *Amtsgericht* (Trial Court) Cologne[7], as court of first instance, acquitted the defendant, arguing that the violation of the bodily integrity of the boy – undoubtedly meeting the objective definition (actus reus) of a criminal battery (§ 223(1) *StGB*) – was justified by the valid consent of both parents, which had been given in accordance with the well-being of the child (*Kindeswohl*) in terms of § 1627 *Bürgerliches Gesetzbuch – BGB* (German civil code). In balancing the rights of the parents concerning education and the care and custody of the child (Art. 6(2) *Grundgesetz – GG* (German basic law) and the right to religious freedom (Art. 4(1) (2) *GG*) against the right of bodily integrity of the child (Art. 2(2) *GG*) the court considers firstly that male circumcision is a traditional ritual practice, documenting the religious and cultural belonging to the Muslim community. For this reason it would, secondly, counteract an imminent stigmatization of the child. And thirdly, with regard to the right of bodily integrity of the child, the court emphasizes the importance of circumcision as a preventive medical measure, because of its positive hygiene effects, which had been proven by scientific medical evidence.

The *Landgericht* Cologne – on appeal of the prosecution – took a radically different view on the lawfulness of male circumcision under German criminal law. For the first time in history a German court ruled, that male circumcision, if not medically necessary, is punishable as criminal battery (§ 223(1) *StGB*), even if performed *lege artis* and with the consent of both parents. In the very case the defendant was acquitted, nevertheless, because the court assumed that he acted in good faith with the conscience that he was allowed to perform the circumcision of the boy for religious reasons. He therefore – the court concluded – acted on the basis of a misconception of the law in the sense of the excuse of § 17 *StGB* that was unavoidable, because the lawfulness of male circumcision had not been answered consistently in the case law and literature.

C. Reasoning of the court

Starting point of the reasoning of the *Landgericht* Cologne is the largely uncontested view that male circumcision – like all surgical interventions – meets the objective criteria of criminal battery (§ 223(1) *StGB*). In discussing a rather marginal opinion in the academic literature, the court – convincingly – rejects the concept of "social adequacy" as a negative element of the *actus reus*, which had been occasionally proposed to justify male circumcision.[8] And indeed, it is far from convincing to argue, as most recently Thomas

[7] AG Köln, *Knabenbeschneidung,* Judgement of Wednesday, 21 September 2011, No. 528 Ds 30/11; 34 Js 468/10.

[8] *Cf.* LG Köln (note 3), 2128 *ff*.

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Exner did, that on the one hand parents may not validly consent to male circumcision because this – according to Exner – would not be in the best interest of the child[9], whilst claiming at the same time that male circumcision is social adequate and therefore simply out of the scope of the criminal law.

The lawfulness of male circumcision – as both court decisions at least implicitly recognize – depends vitally on the scope and the limitations of parental consent. Nevertheless, the reasoning of the court concerning the crucial defense of proxy consent in the criminal law is remarkably short, not even significantly longer than the discussion of the negligible concept of "social adequacy". The conclusion of the court that the consent of the parents does not justify the circumcision of the boy is based on a balancing test. The court balances the basic rights of the parents (right to religious freedom; parental rights in education) against the basic rights of the child, particularly the right to bodily integrity and self-determination. Considering § 1627 1st sentence *BGB* the court assumes that the parental right to care and custody of the child (*elterliches Sorgerecht*) covers only educational measures which are in the best interests of the child. Against this background the court comes to the conclusion that

> *"[…] the circumcision of a boy unable to consent to the operation is not in accordance with the best interests of the child neither from the perspective of avoiding a possible exclusion from their religious community, nor in the light of the parental rights in education (elterliches Erziehungsrecht). The basic rights of the parents in Art. 4(1) and Art. 6(2) of the Basic Law (GG) are restricted by the basic rights of the child to bodily integrity and self-determination in Art. 2(1) and (2) 1st sentence GG."*[10]

The main argument in support of the proposed outcome, the court derives from the principle of non-violent education as established in § 1631(2) 1st sentence *BGB* and holds that when balancing the rights of the parents against the rights of the child, "the infringement of the bodily integrity caused by a circumcision for purposes of religious education is at least disproportionate, even if necessary to that end […]."[11] With respect to the hereby addressed principle of proportionality the court also emphasizes the permanent and irreparable nature of circumcision. "This change [of the child`s body] runs

[9] Exner supposes that male circumcision – albeit being lawful qua social adequacy – is contrary to the self-determination interests of children and might even be violating their dignity (THOMAS EXNER, SOZIALADÄQUANZ IM STRAFRECHT. ZUR KNABENBESCHNEIDUNG (Social adequacy in criminal law), vol. 216 55 *ff.* (2011)).

[10] LG Köln, *supra* note 3, at 2129.

[11] *Id*.

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contrary to the interests of the child in deciding his religious affiliation independently later in life."[12] Against this background, the court concludes, requiring from the parents to wait until their son is able to make his own decision about circumcision does not unacceptably diminish their rights in education. Finally the court refers – by way of an obiter dictum – to Art. 140 *GG* in conjunction with Art. 136(1) of the Weimar Constitution which states that civil and political rights shall not be restricted by the exercise of religious freedom, but leaves open if this would be sufficient to determine the decision.[13]

D. Comment

I. Freedom of religion versus well-being of the child?

In considering the rights of the child against the rights of the parents the Cologne Judgment does not bare a sort of prima facie plausibility. If the question is posed in the way the court does: 'freedom of religion versus well-being of the child', how could the answer not be in favor of the child? Looking more closely, however, the first-sight-plausibility turns out to be not more than a rhetorical effect of obscuring the – false – premises of the proposed balancing test. The entire reasoning of the court is presented as a process of weighing the rights of the parents against the – assumedly violated – rights of the child. The court does not elaborate why circumcision is supposed to violate the children`s basic rights and hereby is contrary to the well-being of the child. What is simply taken for granted here, in reality points at the core normative problem of the case: What is the legal standard for determining a violation of the well-being of the child, functioning as a limitation of parental proxy consent in the German criminal law? The court fails to explicitly expose its theoretical approach concerning the scope and limits of proxy consent in the criminal law, be it that it didn`t want to - or that it actually didn`t even recognize that there is a highly controversial question in criminal law theory to be answered.

Implicitly the court follows a doctrine that may be characterized as positive standard of the well-being of the child – as limitation of proxy consent – by way of an objective "best medical interest-test". The best medical interest-test consists in an objective consideration of medical risks and benefits by the court, excluding any degree of parental discretion. In the light of the doctrines of criminal law this implies that the well-established justification of proxy consent (*stellvertretende Einwilligung*), is tacitly substituted by an objective weighing of interests that is typical for the defense of necessity (*Notstand*). As a consequence, bodily interventions in children are supposed to be lawful only if the medical benefits of the procedure substantially outweigh its risks in terms of a curative medical indication. Conversely parents may not lawfully refuse to consent if there is a medical

[12] *Id*.

[13] *Id.*, following an argument introduced by HERZBERG, *supra* note 4, at 337.

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indication for the procedure. With regard to male circumcision this means, in principle, either all children have to be circumcised, independently of what the parents think about it or no children at all. By way of entering a hospital or medical practice, according to this model, parents seem to mysteriously lose their right to the care and custody of the child (*Sorgerecht*). The State pushes itself in front of the parents and decides as *parens patriae*, as father of the nation, positively and uniformly whether circumcision is in the best interest of all children of the nation or not.

Against the outlined interpretation of the ineloquent reasoning of the *Landgericht* Cologne one might argue that the judgment explicitly considers the rights of the parents in education and the right to religious freedom. Doesn`t this mean that the approach is not restricted to a best medical interest-test, as is claimed above? No, it does not, because the best medical interest-test in the Cologne Judgment operates to identify a violation of the well-being of the child, while the parental rights in education and the right to religious freedom are solely considered as possible reasons to justify an assumed violation of the well-being of the child. However, the consideration of parental rights by the court turns out to be merely rhetorical as it is not apparent how parental rights in education could ever justify a violation of the well-being of the child. In fact, it was the court`s premise that parental education power is limited by the well-being of the child. Effectively, the judgment depends solely on the determination of the well-being of the child in relation to circumcision and here the court fails to recognize that the definition of the well-being of the child is necessarily related to the parental right to the care and custody of the child (*elterliches Sorgerecht*).

II. Primacy of the parental right to the care and custody of the child

In determining the role of parents with regard to the definition of the well-being of the child, the constitutional conceptualization of the triangulated relation between state, parents and their children, has to be taken into consideration.[14] The basic decisions of the constitution have influence on the doctrines of the criminal law insofar as they imply that the criminal defense of proxy consent is basically guaranteed by the fundamental right of parental education as well as by the right to the care and custody of the child in Art. 6(2) *GG*. Consequently, a complete replacement of the parental discretionary authority by the principle of necessity, as implied by the standard of best medical interest, would be unconstitutional. The German basic law conceptualizes the rights of parents and their children not as antagonistic legal positions. It rather recognizes that children are dependent on their parents in order to exercise their constitutional basic rights, so that the

[14] *Cf.* for more details FATEH-MOGHADAM, *supra* note 6, at 131 *ff.*

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well-being of the child is necessarily at least co-determined by the parents.[15] So the well-being of the child is no objectively defined essentialist entity, but at least partly open to different subjective interpretation by the parents. In the German criminal law literature this is expressed by the notion that with the defense of proxy consent "the law assigns the exercise of the right to self-determination of the child to the persons having the care and custody of the child."[16] Whenever parents decide about curative, preventive or aesthetic bodily interventions like vaccines, plastic surgery, ear-piercing or male circumcision, the interests of children with regard to bodily and religious self-determination are primarily substantiated by their parents. The concretion of the well-being of the child primarily rests with the persons having the care and custody of the child. This constitutionally guaranteed primacy of the parental care and custody of the child restrains the state to the role of a guardian (*Wächteramt,* Art. 6(2) *GG*), who negatively controls whether the decision of the parents is *indefensible* in particular cases.[17] This is a *negative standard*[18] and implies that there is some elbow-room, even when parents decide about bodily interventions. The parental discretionary authority is exceeded only if the decision amounts to an abuse of the right to care and custody of the child. According to the basic decisions of the German Constitution, in summary, it is not the state, nor the physicians, but the parents who primarily determine the well-being of the child.

III. Limitations to parental (proxy) consent to medical treatment

In the process of determining whether parental consent is void due to an abuse of parental rights, three different aspects have to be taken into consideration: Firstly, the nature and quality of the bodily intervention, its direct negative health consequences and the medical risks involved. Secondly, the curative and preventive medical benefits as well as non-medical benefits of the procedure, including the benefits following from the exercise of freedom of religion.[19] Finally, the particular circumstances of circumcision have to be free from modalities that directly violate the well-being of the child as in the case of bodily or

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[15] *Cf.* Christian Walter, *Beschnitten. Der Staat muss sein Wächteramt ernst nehmen. Aber religiöse Gefahrenabwehr darf nicht in Religionsabwehr umschlagen* (Circumcised: The state must take its role on guardian seriously; but defense of religious dangers must not turn into defense of religion), FRANKFURTER ALLGEMEINE SONNTAGSZEITUNG (FAZ) 6 (2012); ROX, *supra* note 3, at 808.

[16] CLAUS ROXIN, STRAFRECHT ALLGEMEINER TEIL. GRUNDLAGEN. DER AUFBAU DER VERBRECHENSLEHRE, vol. 1 §13, margin number 92 *ff.;* margin number 16 (2006).

[17] *Cf.* Matthias Jestaedt, *Art. 6 Abs. 2 und 3*, *in* BONNER KOMMENTAR ZUM GRUNDGESETZ (Rudolf Dolzer, Christian Waldhoff & Karin Graßhof eds., 139th ed., Dezember 1995-1996), 1, margin number 42.; WALTER, *supra* note 15; ROX, *supra* note 3, at 808.

[18] JESTAED, *supra* note 17, at margin number 44.

[19] *Cf.* BEULKE & DIEßNER, *supra* note 3, at 344, emphasizing that the parents are entitled to exercise the right to freedom of religion by proxy of the child.

mental punishment, debasement, humiliation or cruel and excessive treatment. If one of these specific transgressing modalities is at hand, the nullity of consent is not open to consideration, they function as strict barriers to consent (cf. § 1631(2) 2nd sentence *BGB*). Whereas with regard to the balancing of the risks and benefits of the procedure it depends on whether the consideration of the parents is plainly indefensible.

Applying this three-stage-test[20] on the case of male circumcision leads to the following conclusions: Male circumcision is a relatively simple intervention that, if performed by trained professionals, has no negative health consequences and only a small risk of relatively light complications.[21] These risks are counterbalanced by significant preventive benefits as proven by evidence-based medicine and recognized by the World Health Organization (WHO). Circumcision does not only directly prevent illnesses related to the foreskin, like phimosis and para-phimosis. Furthermore there exists conclusive medical evidence[22] that circumcision reduces the risk of urinary tract infections, genital cancer, various genital diseases and most prominently the risk of HIV-Infection up to 60%. With regard to these benefits, the WHO refers to "preventive indications" for male circumcision, which form the basis of extensive circumcision programs in the southern Africa.[23] The American Academy of Pediatrics (AAP) in its long awaited renewed Policy Statement on Male Circumcision concludes that "the health benefits of newborn male circumcision outweigh the risks and that the procedure's benefits justify access to this procedure for families who choose it."[24] This indicates a further step in favor of preventive male

[20] *Cf.* FATEH-MOGHADAM, *supra* note 6, at 133 *ff.* A quite similar test is proposed for the English common law principle of the best interest of the child, Sir James Munby, *Consent to Treatment: Patients Lacking Capacity and Children*, *in* PRINCIPLES OF MEDICAL LAW 491, 556 at paras. 10.177 (Andrew Grubb, Judith Laing, Jean McHale & Ian Kennedy eds., 2010).

[21] Joint United Nations Programme on HIV/AIDS (UNAIDS), MALE CIRCUMCISION. GLOBAL TRENDS AND DETERMINANTS OF PREVALENCE, SAFETY AND ACCEPTABILITY 17 *ff.*, available at: http://whqlibdoc.who.int/publications/2007/9789241596169_eng.pdf (last accessed: 31 August 2012): "Neonatal male circumcision is a relatively simple, quick and safe procedure when performed in a clinical setting under aseptic conditions by trained professionals. Complications rates are between 1 in 500 and 2 in 100 and are usually minor."

[22] *Cf.* Aaron A. R. Tobian & Ronald H. Gray, *The Medical benefits of Male Circumcision*, 306 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 1479 (2011); Joint United Nations Programme on HIV/AIDS (UNAIDS), *supra* note 21, 15 *ff.* with further references.

[23] *Cf.* Bertran Auvert, Dirk Taljaard, Emmanuel Lagarde *et. al.*, *Randomized, Controlled Intervention Trial of Male Circumcision for Reduction of HIV Infection Risk: The ANRS 1265 Trial*, 2 PUBLIC LIBRARY OF SCIENCE MEDICINE 1112 (2005); Ronald Gray, Godfrey Kigozi, David Serwadda *et. al.*, *Male Circumcision for HIV Prevention in Men in Rakai, Uganda: A Randomised Trial*, 369 THE LANCET 657 (2007); Robert Bailey, Stephen Moses, Corette Parker *et. al.*, *Male Circumcision for HIV Prevention in Young Men in Kismu, Kenya: A Randomised Controlled Trial*, 369 THE LANCET 643 (2007); Centers For Disease Control And Prevention, CDC HIV/AIDS SCIENCE FACTS: MALE CIRCUMCISION AND RISK FOR HIV TRANSMISSION AND OTHER HEALTH CONDITIONS: IMPLICATIONS FOR THE UNITED STATES.

[24] American Academy of Pediatrics, TASK FORCE ON CIRCUMCISION, Circumcision Policy Statement, PEDIATRICS Volume 130, Number 3, September 2012, 585-586, originally published online August 27, 2012, available at:

circumcision. Although neonatal circumcision is still not recommended as routine procedure, the AAP urges physicians to inform parents about its health benefits and argues for third-party payment for circumcision of male newborns. The statement is based on a systematic evaluation of English-language peer-reviewed literature from 1995 through 2010 which is published in a comprehensive accompanying technical report.[25] Even if the AAP`s policy statement presumably will not remain uncontested within the medical community, it proves at least one thing: With regard to the evaluation of the medical risks and benefits of male circumcision, it is argued for different, even incommensurate but still rational positions. Opponents of male circumcision cannot ignore that systematic reviews provided by WHO, AAP and CDC clearly emphasize the preventive health benefits of male circumcision. Against the background of a remaining rational disagreement about the risk-benefit rationale of male circumcision, it is convincing what the American Academy of Pediatrics supposes, namely that "parents ultimately should decide whether circumcision is in the best interests of their male child."[26]

In any case, it is plainly out of question to qualify parental consent to male circumcision, given in accordance with the guidance of some of the globally most important public health institutions, as being an abuse of parental authority that justifies criminal punishment.

In addition to preventive medical benefits, parents may also legitimately take into account cultural, religious, and ethnic traditions, when deciding about male circumcision.[27] Free exercise of religion (Art. 4(2) *GG*) and the parental rights in education (Art. 6(2), 7(2) *GG*) include the right to decide about the religious denomination and education of the child as is also explicitly guaranteed by § 1(1) 1st Sentence *Gesetz über die religiöse Kindererziehung - RelKErzG* (statute law on religious education). In this respect the reasoning of the Cologne Judgment concerning a possible violation of the right to self-determination of the circumcised child reveals a stunning misconception of the constitutional framework of the relation of parents and children with regard to religious education. The view of the court implies that the right to self-determination in religious questions is achieved best, if religiously important decisions are postponed until the child reaches an age of consent. This is not the position of the law, however. The law assigns the right to free exercise of

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http://pediatrics.aappublications.org/content/early/2012/08/22/peds.2012-1989 2012 (last accessed: 31 August 2012).

[25] American Academy of Pediatrics, TASK FORCE ON CIRCUMCISION, Technical Report, Male Circumcision, 130(3) PEDIATRICS 756-758, originally published online on August 27, 2012, available at: http://pediatrics.aappublications.org/content/early/2012/08/22/peds.2012-1990 (last accessed: 31 August 2012).

[26] American Academy of Pediatrics, TASK FORCE ON CIRCUMCISION, Circumcision Policy Statement, *supra* note 24).

[27] *Id.* at 585 *ff.*

religion of the child to his parents (Art. 4(1), 6(2), 7(2) *GG* in conjunction with the *RelKErzG*) until it reaches maturity with regard to religious affiliation.[28] That religious education may – in particular cases – have rather traumatic effects on children is often reported, not least by the great autobiographical literary works of Thomas Bernhard, but this – for good reasons – didn´t lead to a corresponding restriction of the fundamental right to freedom of religion.

Moreover, the assumption of the court that male circumcision sort of irreversibly determines the religious affiliation of the child and thus runs contrary to its self-determination interests is empirically wrong. Circumcision is not only common in different religious communities like Judaism and Islam but is equally performed for non-religious reasons like curative and preventive medical benefits all over the world as the example of the U.S. shows, where the prevalence of non-religious male circumcision is at least between 50 and 60 percent.[29] So, from the mere fact of a boy being circumcised one must not – as the court could have recognized with a little effort – jump to the conclusion of his belonging to a certain religious community or a religious community at all. Why then the circumcision of a boy might compromise his possibilities to decide about his religious affiliation later in life remains a secret of the court.

With regard to the third stage (absence of transgressing modalities), finally, male circumcision in children regularly is not performed in a way that qualifies as a transgressing modality in terms of punishment, debasement or cruel and excessive treatment. Particularly in the case of religious circumcision following Jewish and Muslim tradition the boy is not being exploited or treated instrumentally, but rather dignified as a full member of the religious community, which is symbolized by traditional presents, ceremonial clothes et cetera. This is why the reference of the Cologne Judgment to the principle of non-violent education in § 1631(2) *BGB* is misleading. The norm prohibits bodily punishment, psychological injuries and other debasing measures (§ 1631(2) 2nd sentence *BGB*), but none of these criteria are met by a properly performed male circumcision, at least as long as potential veto rights of further developed boys are recognized.

Concluding, with regard to parental consent to male circumcision there is no abuse of parental authority, and therefore no violation of the well-being of the child, unless the operation is performed not in accordance with medical standards.

IV. Comparative analysis: Best interest versus best medical interest

What is interesting from a comparative perspective is, that the restriction of the best interest of the child to the best *medical* interest as proposed by the Cologne Judgment is

[28] *Cf.* BEULKE & DIEßNER, *supra* note 3, at 344.

[29] Joint United Nations Programme on HIV/AIDS (UNAIDS), *supra* note 21, 7 *ff.* reports 75%.

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not only incompatible with the German concept of proxy consent, but also clearly exceeds the standard of best interest as acknowledged in the Common Law tradition. In the Common Law of England and Wales the best interest of the child is defined objectively and functions as a positive standard. Due to the *parents patriae jurisdiction*[30], a concept unknown in the German Law, the English courts are entitled to decide positively and in place of the parents what is in the best interest of a child with regard to an imminent circumcision. Remarkably, however, the English courts regularly allow non-therapeutic male circumcision in children for religious reasons.[31] An outcome that is in accordance with the medical law literature, stating that "[…] male circumcision for ritual or other non-therapeutic reasons […] may […] be justified as being, overall, in the patient`s best interests."[32] The reason for this outcome is that the best interest of the child is not restricted to the best medical interest.

Best interest is a complex concept, taking into consideration all circumstances of the individual case and particularly the religious and cultural context of the child`s family. That is why English Courts simply imply that a circumcision is in the best interest of the child if performed with the consent of both parents.[33] Only in cases of conflict between the parents the courts take into consideration the religious and cultural context in which the child is actually brought up.[34] By way of prominently considering the consent of the parents, the English law standard of best interest, although coming from a different starting point, draws near the outlined negative standard of the German law. The rationale for opening the objective standard of best interest in a way that allows for parental elbow room, explicitly addresses the challenge for the law to deal with religious and cultural plurality: "Best interests have to be assessed by reference to general community standards, making due allowance for the entitlement of people, within the limits of what is permissible in accordance with those standards, to entertain divergent views about the moral and secular objectives they wish to pursue. Within limits the law will tolerate things which society as a whole may find undesirable. Thus the court passes no judgment on religious beliefs or on the tenets doctrines or rules of any particular section of society so long as they are 'legally and socially acceptable' […]."[35] This leads to some closing remarks,

[30] SIR MUNBY, *supra* note 20, 492 *ff.* (para 10.02 *ff*).

[31] (CA (Civ Div)) Court of Appeal (Civil Division), *Re J (A Minor),* Specific Issue Order of Thursday, 25 November 1999; Family Division, *Re J (A Minor),* Specific Issue Order of Thursday, 6 May 1999, No. [1999] 2 F.L.R. 678; (CA (Civ Div)) Court of Appeal (Civil Division), *Re S (Children)* Specific Issue Orders of Friday, 30 July 2004, No. [2004] EWCA Civ 1257, Westlaw.

[32] SIR MUNBY (note 20), 556 (para 10.178).

[33] (CA (Civ. Div.)) Court of Appeal (Civil Division), *supra* note 30; Family Division, *supra* note 30.

[34] Family Division *supra* note 30.

[35] SIR MUNBY, *supra* note 20, at 555 (para. 10.173 a.10.174).

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drawing a larger picture of the different legal standards in the treatment of children unable to consent.

V. Pluralism and the religious neutrality of the criminal law

The different criminal law approaches to the limitations of parental consent reflect very basic differences in how the law should cope with what John Rawls called the fact of reasonable pluralism in modern societies.[36] The positive standard of the well-being of the child in combination with a restrictive objective best medical interest-test – as proposed by the Cologne Judgment – reduces the scope for different religious and secular world views about what amounts to a 'good life' down to zero, at least if children are concerned. It is an attempt to legally enforce a single comprehensive doctrine of good education, tacitly accepting the exclusion of Jewish and Muslim families for the sake of the intactness of the body. The 'sacralization of the foreskin' is reminiscent of early catholic theologian doctrines of the necessity of bodily completeness, based on the assumption that we are not the rightful owners of our bodies, which in fact belongs to God – a paradox that Johanna Schiratzki has pre-eminently related to as "banning God`s law in the name of the holy body."[37] The secular taboo of circumcision, as proposed by the Cologne Judgment, is in its consequences anti-religious, anti-pluralistic and therefore all together anti-modern if one accepts the insight of political liberalism that the fact of pluralism is one of the permanent characteristics of modern democratic cultures and therefore a challenge that all modern law systems have to meet.

The wide definition of best interest of the common law tradition and even more the German Law`s doctrine of proxy parental consent, on the other hand, reflect a different constitutional and philosophical approach to the fact of pluralism. These legal doctrines, by way of granting parental discretionary authority, deliberately open the space for different, even incompatible, but still reasonable ethical conceptions of what constitutes a good life – and what constitutes good education. It abstains from authoritatively defining the one positive standard of the well-being of the child in favor of a negative standard that allows state interventions into parental decisions only in exceptional cases of an abuse of the parental right to the care and custody of the child. From the Law`s perspective a liberal interpretation of proxy consent is fully compatible and even a consequence of the law`s religious and ethically neutrality[38]: It allows for the exercise of different world views in

[36] JOHN RAWLS, POLITICAL LIBERALISM xix, xxiv, 4, 36, 37 (1993).

[37] Johanna Schiratzki, *Banning God's Law in the Name of the Holy Body - The Nordic Position on Ritual Male Circumcision*, 5 THE FAMILY IN LAW 35 (2011).

[38] *Cf.* STEFAN HUSTER, 90 DIE ETHISCHE NEUTRALITÄT DES STAATES. EINE LIBERALE INTERPRETATION DER VERFASSUNG (The ethical neutrality of the state. A liberal interpretation of the constitution, 2002).

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ethical questions of the good life, within the limits of an universal legal framework as defined by the negative standard of the well-being of the child. From the perspective of a pluralistic civil society, the law`s religious neutrality demands something, however, that the Cologne Judgment, as well as its academic facilitators, refuse to appreciate: Tolerance towards different religious, secular and cultural conceptions of life. It is exactly this dialectic of universalistic principles and particularistic values that Jürgen Habermas describes as one of the core elements of political enlightenment. In explicit criticism of the Cologne Judgment on male circumcision Habermas states that the "universalistic concern of political enlightenment is not fulfilled until the particularistic claims for self-assertion of religious and cultural minorities experience fair recognition"[39].

E. Conclusion and policy issues

Summing up, the Cologne Judgment misjudges the constitutional framework of the criminal law defense of proxy consent. Male circumcision in children, if performed lege artis and with the consent of the parents, is lawful, because it does not exceed the general legal limits of parental consent. Parents who circumcise their sons following Jewish or Muslim tradition do not claim for a legal privilege or "reasonable accommodation"[40], they rather utilize the parental right to the care and custody of the child and freedom of religion as guaranteed by the general law. The justification of male circumcision therefore does not follow from a *religious or cultural defense* but from the well-established principles of parental proxy consent. Hence, also the – circular – argument of the Cologne Judgment with reference to Art. 140 *GG* in conjunction with Art. 136(1) of the Weimar Constitution is misleading, because male circumcision does not exceed the limits of the general law in the first place.

With regard to a possible statutory regulation of male circumcision, as intended by the *Deutscher Bundestag*, it has to be emphasized, that such a regulation is not necessary in order to provide a special right or legal exception for religious male circumcision. Legislative action is reasonable, however, because of the legal uncertainty produced by the misleading judgment of the *Landgericht* Cologne. There are mainly two reasonable alternatives for the legislator to consider. Firstly the legislator could aim to simply clarify that parents may validly consent to male circumcision, due to already effective general principles of criminal and family law. Such a 'minimally invasive' regulation could be positioned within the family law section of the *BGB* or in the section about "consent to

[39] Jürgen Habermas, POLYFONIE DER MEINUNGEN. WIE VIEL RELIGION VERTRÄGT DER LIBERALE STAAT? (Polyphony of opinions. How much religion is compatible with the liberal state?), available at: http://www.nzz.ch/aktuell/startseite/wie-viel-religion-vertraegt-der-liberale-staat-1.17432314 (last accessed: 31 August 2012).

[40] JOCELYN MACLURE & CHARLES TAYLOR, SECULARISM AND FREEDOM OF CONSCIENCE 65 *ff*. (2011).

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treatment" that is about to be introduced into the *BGB*.[41] Alternatively the parliament could provide a special statute on male circumcision, which regulates the requirements of lawful male circumcision in detail. In doing so, the legislator could i.a. safeguard that male circumcision is performed only by trained professionals according to medical standards and with the informed consent of both parents. The statute law could as well explicitly provide for a veto right of children, who are too young to consent on their own, but are old enough to generally understand what circumcision is about. The details of a legal framework for male circumcision – in any case – will have to be defined in the process of democratic deliberation. The legislator has to keep in mind, however, that legal barriers for male circumcision interfere with the basic rights of parents and children and therefore have to be justifiable with regard to the right of freedom of religion and the parental rights in education.[42] With regard to the primacy of parental care and custody, the right to religious freedom and the outlined risk-benefit rationale of male circumcision, a blanket prohibition of male circumcision in children would be held unconstitutional by the *Bundesverfassungsgericht – BVerfG* (German Federal Constitutional Court) with near certainty.[43]

At least inappropriate are proposals which require a serious religious motivation as a necessary element of lawful circumcision.[44] The requirement of a "religious indication" is not only doubtful under the aspect that the secular state is not entitled to engage in the true interpretation of personal religiosity, at the worst by way of an ethics committee. It rather disproportionally diminishes the possibility of male circumcision for secular reasons like preventive-medical benefits. If a Jewish or Muslim citizen may lawfully circumcise his son for religious reasons, why then should a professor of medicine not be entitled to do so for medical reasons as it is common practice in the U.S.? Or consider the not very unlikely

[41] *Cf.* draft statute on the rights of patients, available at: http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/RegE_Gesetz_zur_Verbesserung_der_Rechte_von_Patientinnen_und_Patienten.pdf?__blob=publicationFile (last accessed: 31 August 2012).

[42] *Cf.* Kyrill-A Schwarz, *Verfassungsrechtliche Aspekte der religiösen Beschneidung* (Constitutional aspects of religious circumcision), 63 JZ 1125 (2008); Kai Zähle, *Religionsfreiheit und fremdschädigende Praktiken*. *Zu den Grenzen des forum externum* (Freedom of religion and practices that do harm to others), 134 ARCHIV DES ÖFFENTLICHEN RECHTS (AöR) 434 (2009); Michael Germann, *Der menschliche Körper als Gegenstand der Religionsfreiheit* (The human body as an object of religious freedom), *in* JURISPRUDENZ ZWISCHEN MEDIZIN UND KULTUR. FESTSCHRIFT ZUM 70. GEBURTSTAG VON GERFRIED FISCHER, 35 (Bernd-Rüdiger Kern & Hans Lilie eds., 2010); SCHIRATZKI, *supra* note 36.

[43] Whereas the occasionally reported warning, a statute that allows for male circumcision might on his part be unconstitutional, is rather unconvincing. The *BVerfG* grants the legislator a comprehensive discretionary authority in deciding how to fulfill its duty to protect the basic rights of children. A constitutional duty to prohibit male circumcision by the criminal law is therefore highly implausible. There are good reasons to believe that the right to bodily integrity of the child might be better protected by way of providing the possibility of lawful circumcision in medical settings; *see* SCHIRATZKI, *supra* note 36, at 50 *ff.*

[44] *Cf.* SCHRAMM, *supra* note 6, at 229 *ff.*

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case of the professor of medicine and the religious Jew or Muslim being one and the same person. Male circumcision might turn out to be an ambiguous social practice that cannot always be reduced to a single determinant. This might be disturbing for narrow minded individuals who are used to think in black and white, but it should not be for a modern law system of the 21st century.

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