# Male Circumcision in Contradiction to Human Rights?

30.11.2013 | Friedhelm Pieper

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## 1. Introduction

As far as I know I was chosen for this presentation on the question “Does Male Circumcision stand in contradiction to Human Rights?”, because of a Landgericht court (“the Court”) ruling in Cologne, Germany, in May last year. - Now, decisions by a regional court normally do not attract international attention. But this one did. The court ruled that non-therapeutic circumcision of male children based solely on religious grounds has to be perceived as an unlawful bodily injury, and it is therefore a criminal offense.

As you might have noticed in mid 2012, this Court ruling received wide range international attention and provoked intense debates. - I will begin this workshop with explaining some background on that Court decision and will present the core arguments of that Court ruling, which I will then discuss and comment from my perspective.

## 2. Cologne May 2012

A decision at first instance found no criminal offence however when the issue was subsequently dealt with by an (appellate) Landgericht court, that Court ‘ruled’ - as mentioned - that religious circumcision of male children has to be perceived as an unlawful bodily injury, and it is therefore a criminal offense under the German Criminal Code (“KPO’). This ruling of the Court was effective only in the area under its jurisdiction, but suddenly, male circumcision was put into question in all of the German-speaking countries and even led to a decision in a Swiss Hospital to suspend any medical procedures of this kind until clarification of the legal situation.

In an article at Global Legal Monitor (Library of Congress) about the Cologne Court ruling, Wendy Zeldin, described the legal arguments given by the court:

*“According to a decision handed down by the Cologne regional court (Landgericht Köln) on June 26, 2012, circumcision of young boys is a criminal act, prohibited by law, even if parents have consented to the procedure. The decision is grounded on the reasoning that such circumcisions cause 'illegal bodily harm' to the children, and that the child's right to physical integrity supersedes parents' rights and the freedom of religion.”*

Here we get the basic arguments: The court arrived at its judgment by applying human rights provisions addressing the fundamental Right of the Child to physical integrity - and deciding that this fundamental right would supersede parents’ rights and the right to freedom of religion.

Now how the Court arrived to such a conclusion not been heard of in any court in modern democratic Germany previously?

Wendy Zelding also described some background of the Cologne´s case:

*“The case involved the circumcision of a four-year-old Muslim boy that was performed by a doctor at the parents' request. However, complications occurred with the operation that resulted in the Cologne public prosecutor bringing suit against the doctor. The district court, hearing the case in the first instance, acquitted the doctor, on the grounds that there was parental consent and that he had performed the procedure as a ritual act based on Islam.”* [1]

So the lower court came to a different conclusion at first instance. The Court argued that the doctor did not breach the law when acting on behalf of the parents’ religious will and on the basis of a tradition of a respected religion. So the lower court viewed the parent´s’ rights and religious freedom as sufficient basis for the boy's circumcision which was carefully performed by a doctor - although not carefully enough as the following complications revealed.

Good for the boy - the complications were treated in a Children’s Hospital to the boy´s well-being again.

In the meantime, the public prosecutor in Cologne disapproved of the lower court´s ruling and brought the case before the Regional Court in Cologne.

And here now this Court on the one hand approved the lower court's ruling with regard to the doctor, namely that what he did was not unlawful or illegal - but it did so for different reasons and in so doing, provided a ‘judicial opinion’ which was not essential to the decision but which was ultimately the genesis of the current debate.

The court argued: that *“….. the doctor had believed he would be acting lawfully, in the context of an unclear legal situation surrounding the practice."*

And on that basis the doctor was acquitted again. But only on the background that he could not know the legal problems of his operation due to the lack of clarity of relevant legal determinations.

And here now the Court then decided to give a legal assessment of male circumcision on religious grounds in order to contribute to the clarification of the legal situation. As mentioned, the legal assessment was not essential to the decision to acquit the doctor but was a legal opinion that the Court felt should be given.

In this legal opinion, the Court stated that religious circumcisions are illegal because *"…they violate the child's right to physical integrity and self-determination."* The Court held that religiously based circumcisions haves to be perceived quite differently from those conducted for medical reasons. Here we hear an additional argument, stating that religiously based male circumcision would also violate the child´s right to self-determination.

Before I  am going to discuss the arguments we have heard so far, let me also present some further  background to the case.

## 3. The Impact of the Ruling

Wendy Zelding states, that *"…although the judgment was local, it set a legal precedent…"* that courts in Germany's other 15 states would have to take into consideration in similar cases. She referred to the German criminal law expert Professor Holm Putzke, whose opinions and articles played a decisive role in the whole matter. Putzke stated that although the Cologne decision was not binding on other courts, it had to be seen as having *"a signaling effect."* And indeed: The directors of Berlin´s Jewish Hospital suspended performance of male circumcision pending what

the outcome of the effect of the Landgericht ruling in order to prevent any possible prosecution as did other hospitals. How did we arrive at such a situation?

### 4. A legal debate in Germany

Already some years ago Professor Holm Putzke initiated a legal debate over circumcision and he was very much in agreement with the Cologne ruling. He had published several articles in legal journals. He examined the Law in this area and considered legal cases and their interpretation. He continued to do so ever since one evening a few years ago, when he was invited to dinner by his colleague Rolf Dietrich Herzberg, a criminal lawyer who had two Muslim guests[2]. At this dinner they discussed the issue of circumcision and also some books which gave very critical reports about the circumcision experiences of Muslim boys. After wondering why there seems to be no legal assessment of this old religious tradition, Prof. Putzke promised he would attend to the matter. The legal articles he then began to produce were taken by the appellate Court in Cologne as authoritative legal references for its legal assessment.

Taking this into account, we have not only a single ruling by a regional court but we have a legal debate that is ongoing in specialized journals without much awareness by the public. In this debate some legal experts indeed argued that male circumcision violates Human Rights.

## 5. The impact on religious communities

The ruling - as we could imagine,  - raised intense reactions from the Jewish and Islamic communities , - and also from others beyond these groups who had at least some foresight into how deep the irritation of Muslim and Jewish communities must have been after hearing that a ritual act standing very near to the centers of their religious identities was ruled to be illegal. A leading German Jewish representative said: "If this should be the law then we would have to leave." The article ***"Circumcision and Law"*** in Wikipedia gives a good overview over the reactions of religious communities to the Cologne court [3]:

The Council of the Coordination of Muslims in Germany condemned the ruling, as *"…a serious attack on religious freedom."* The Churches in Germany came out in clear criticism of the Court´s ruling: The Roman Catholic Archbishop of Aachen, Heinrich Mussinghoff, said that the ruling was *"very surprising"*, and the contradiction between *"basic rights on freedom of religion and the well-being of the child brought up by the judges is not convincing in this very case."* Dr. Hans Ulrich Anke, the President of the Protestant Church Office in Germany and himself a Jurist, said *"the ruling should be appealed since it didn't "sufficiently" consider the religious significance of the rite".*

In July 2012, a European group of rabbis, imams, and others said that they viewed the ruling against circumcision as *"…an affront on our basic religious and human rights."* The signatory group included the Rabbinical Centre of Europe, the European Jewish Parliament and the European Jewish Association, as well as Germany's Turkish-Islamic Union for Religious Affairs and the Islamic Center Brussels.

Fortunately, the German Government immediately sensed the severe pressure that the Court´s ruling put on the Jewish and Muslim communities. German Chancellor Angela Merkel´s spokesman Steffen Seibert stated: *"For everyone in the government it is absolutely clear that we want to have Jewish and Muslim religious life in Germany. Circumcision carried out in a responsible manner must be possible in this country without punishment."*[4]

On 19 July 2012, a resolution of the Christian Democratic and the Social Democratic factions jointly introduced with the Liberals into the Bundestag requested the Government to draft a law to legally enable circumcision of boys subject to the condition it should be conducted *"without*

*unnecessary pain"* and *"in accordance with best medical practice."*

## 6. Medical opposition

Until December 2012, when the new law on male circumcision was passed by the German Parliament, we witnessed a heated debate in Germany. In this debate, several Institutions dealing with Child Health argued strongly against non-therapeutic circumcision of boys. So besides the legal debate, we also witnessed intense opposition against male circumcision based on medical and other arguments. This put even more pressure on the government to come up with a proposal for a legal regulatory solution.

## 7. Antisemitic reactions

Gudrun Trepp, the widow of the late Leo Trepp – of blessed memory - wrote in *“Jewish Weekly”* in October 2012 about the tensions created by this then unresolved but hot situation in Germany as well as about some ugly parts of it[5]. She wrote:

*"According to surveys, almost half of the German population supported the verdict (of the Cologne regional court). That might seem strange to Americans, especially American Jews. Why would Germans be that opposed to something fairly well known and so essential for the Jewish faith? But let’s forget about the numbers for the moment. One could even argue that the reaction was foreseeable because circumcision is not common in Europe, and because there is a strong trend of secularization in European society. Let’s focus instead on the content of these debates. Doctors in favour of a circumcision ban talk about a 'ritual of the Stone Age' and a 'harmful practice'. Some politicians called it 'mutilation' or want to overturn it as 'we overcame the suttees', the burning of widows in India.*

Reader comments in newspapers and other media turned out to be the most disturbing. They were so revealing that, as a journalist, I got downright hooked on them. Never before have I seen so much disdain, prejudice and hatred against Jews in the writings of ordinary people. Expressions such as 'barbaric', 'brutal' or 'inhumane' were common, as were statements such as: 'How can people torture their own children?', 'Don’t they understand that we had the Enlightenment?', 'What kind of religion is it to command parents to harm their own children?' 'If they can’t accept our constitution, let them go back to their country'. Somebody wrote, 'Our historic responsibility commands us not to once again ignore the rights of the defenceless'. I couldn’t help laughing.”

I had my own experience in a critical newspaper debate with defenders of the Cologne court´s ruling. My experience was that the debate started with the pros and cons of allowing male circumcision and then turned into the direction of a general discussion of the role of religion in modern society.

So part of the debate was indeed influenced by the growing critical discourse about religion and its role in society especially in Europe. To this we have to add that – as Gudrun Trepp wrote - people in Europe are not very familiar with circumcision (a very different situation to the US) so that for many, the whole issue appeared quite strange. Taking all this together, you might get some sense of the atmosphere of the debate and of the problems that defenders of male circumcision had to face.

## 8. The Parliament's ruling

Finally on 12 December 2012, after several parliamentary debates and following the holding of hearings on the matter as well as consultations, the Bundestag passed and implemented the proposed law allowing the practice of not medically necessary male circumcision under certain conditions and it is now part of the German Civil Code (”ZPO”).

After the vote, Germany’s Justice Minister, Ms. Leutheusser-Schnarrenberger, said:. *“With this legislation, the German Government makes clear that Jewish and Muslim life is clearly welcome in Germany.”*

The legislation regulates male circumcision so that specially qualified members of a religious community are allowed to perform circumcision of boys only within the first six months of the child’s birth; afterwards, it must be conducted by a doctor. Both parents have to consent to the operation, but they **do not** need to give a reason, religious or otherwise.

At the Jewish Hospital in Berlin, the passing of the law was welcomed warmly as enabling the continuation of its decades-long  practice of the practitioners attached to the hospital performing male circumcision.

## 9. Does Male Circumcision stand in Contradiction to Human Rights?

The determinations we have learned from the case are:

Male circumcision would violate

- the child´s right to physical integrity; and

- the child´s right to self-determination

But the Ccologne court´s ruling already needed to state that these two basic rights would have to be seen as superseding two other rights:

- the parent´s’ rights; and

- the right to freedom of religion.

Given these conclusions by the court it would seem that the court determined in its assessment that

**Male circumcision cannot simply be defined as standing in contradiction to Human Rights.**

But we have to first clarify what we are talking about and to recognise that several rights are

involved when one is talking about male circumcision. Taking into account all the four rights above-mentioned, we thus have to acknowledge that there is a tension between the rights of the child on the one hand and the rights of the parents and of each religion on the other.

So perhaps the more accurate basic question put to our workshop should have been:

**“How does Religion in a modern world deal with male circumcision in the context of conflicting Human Rights?”**

Regarding the child´s right to self-determination, one clearly has to defend the right of the parents to give their child a religious education and the incorporation of the child into a religious community. The very modern secular approach to postpone any religious ritual so as to “include” the child when the child can decide for himself has to be questioned. To **not** integrate the child in a religious tradition is as much a religious influence on a child as integrating the child in one´s faith group. It would contain the message that faith has nothing to do with the child´s life, hopes and challenges. As we do not leave the child without learning a language until the chil has reached an age when he can decide which language he wants to speak, we do welcome the child into our respective faith communities and by this way we build the grounds on which the child can decide for himself as he grows up. It must also be said that this question is of broader application and thus relates also to the integration of girls into a faith community.

Regarding the child´s right to physical integrity, it is clear, that this right has to be taken very seriously, indeed. But given the fact that medical experts (not all, but quite a number) do view male circumcision as **not** doing harm to the boy but instead contributing to the boy´s health, I cannot see the ‘postponement’ argument as a forceful argument against the practice. We do tolerate surgical operations for the children requested by parents solely for aesthetic reasons - for instance ‘pinning’ of the ear in order to pull it back so that it does not look so prominent if the ear/s stick out - so that the children may more easily be integrated into social networks, kindergarten and schools.

So it seems to me that “physical integrity” cannot be put against male circumcision, as this practice cannot be perceived simply as “bodily harm” but has to be seen in a broader medical perspective which includes research revealing the positive effects of this ritual when being conducted with good medical practice.

**I therefore have to conclude that male circumcision does not stand in contradiction to Human Rights.**

A modern society should be able to tolerate male circumcision as long as the Jewish and the Muslim communities see this ritual close to the centre of their religious identities in order to integrate their children into their respective communities.

But taking the child´s right to physical integrity as serious as it deserves, male circumcision has to be performed by persons who have received the necessary medical training so that it can be conducted with utmost responsibility.

**I also therefore do concur with wording of and need for the German Law on non-therapeutic male circumcision adopted last December in Berlin, which now supersedes the Cologne court´s ruling from which it started.**

[1] Wendy Zeldin, Germany: Regional Court Ruling Criminalizes Circumcision of Young Boys, 2012, in: Library of Congress, Global Legal Monitor: http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403226_text.

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[2] s. Philip Eppelsheim, Das Urteil, Frankfurter Allgemeine Zeitung, 15.07.2012: http://www.faz.net/aktuell/politik/inland/beschneidungen-das-urteil-11820431.html.

[3]http://en.wikipedia.org/wiki/Circumcision_and_law - as of June 28th, 2013

[4] ibd.

[5]http://www.jweekly.com/article/full/66749/does-circumcision-debate-show-germanys-true-colors/.

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