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4) Circumcisions (genital mutilations). Genital mutilations are common worldwide and can also be found in Germany (boys' circumcisions at least 20,000 a year, increasing significantly); in regards to judicial practice they are meaningless until now. Genital mutilations and circumcisions are usually performed for religious or cultural reasons, mostly in the context of ritual celebrations at transitions between life stages (acceptance into a religious community, initiation); typically not the affected themselves, but their family members (custodians) decide about the consent to the mutilation.

A) Circumcisions of male persons. Circumcisions of boys and men are, just like genital mutilations of female persons, criminal assault (above 11). In case of persons able to consent - not necessarily only after majority (according to Jerouschek NSTZ ("New Periodical for Criminal Law") 08, 313, 318; Putzke, Herzberg-FS [2008] 669, 684) - an unproblematic justification results from effective (above 23n) consent. Within the limits of §228 every mentally healthy person able to consent is free to shape their own body (through assault) at their discretion.

B) Justification. A justification of the circumcision of male children unable to consent, however, can usually only result from the consent of the custodians. The by the predominant opinion assumed effectiveness of justifying consent (see also Schwartz JZ 08, 1125; Fateh-Moghadam Jurisprudence 10, 115n; Schramm 2011 [above 42], 229n) has been questioned by voices in literature for a long time. (See e.g. Jerouschek NSTZ 08, 313, 317n, Putzke MedR ("Medical Law", periodical) 08, 268, 270n; id. Herzberg-FS [2008] 669, 682n; Stehr/Putzke/Dietz DÄBI 08, A 1778; MK-Schlehofer 143 before §32; S/S-Lenckner/Sternberg-Lieben 41 before §32). Others partially affirmed a justification through a connection to the validity of basic rights, "child's well-being" and religion (exemplary is Beulke/Dießner ZIS ("Periodical for International Criminal Law Dogmatics") 12, 338, 344n; similarly Rox JZ ("Jurists' Newspaper") 12, 806, 807): According to these opinions, the custodians *realize* through the circumcision a child's right to demand one - for reasons of Art. 4 I GG (constitution). According to different opinions, on the other hand, an excuse derived from Art. 4 I GG came into consideration (Jahn, JuS ("Judicial Education", periodical) 12, 850, 852). This legal problem has always been treated cautiously by the jurisdiction and predominant opinion; mostly for reasons of legal policy.

46) The LG Köln (state court of Cologne) (small criminal chamber) decided in 2012 (NJW ("New Judicial Weekly", periodical) 12, 2128 = NSTZ 12, 449; critical remark Bartsch, StV ("Criminal Attorney", periodical) 12, 604) the custodian's consent does fundamentally **not** conform to the **child's well-being** (cf. §1627 no. 1 BGB (civil code)), because it is aimed at a permanent, fundamentally irreparable alteration of the child's body: It might serve the self-determination of the *custodian*, but does not respect (or realize) the *right* to self-determination of the child. A justifying impact thus does neither result from a medical necessity (as prophylaxis) nor from the basic right to religious freedom (equally already Herzog JZ 09, 332, 333n, 339; id. ZIS 10, 471).

46a) The verdict has initiated a broad, partly polemical debate and has led to **legislative activities**. Soon highest office bearers remarked the verdict was erroneous. This transgression of competence at the judiciary's cost did not attract much attention in the general turmoil of good intentions (appl. Eschelbach in Beck-OK §223). A resolution by the Bundestag (cf. BT-Drs. 17/10331) demanded an immediate legislative regulation that "allows our Jewish and Muslim citizens to freely exert their faith (!)" (id. 2). Thereby it has been assumed that genital mutilations of boys are about "**religion**". In the law from 12.10.2012 (below 49) the intention has been

realized; a *religious* motivation is explicitly *not* required (but cf. §1631d II): henceforth all citizens are allowed to cut off their boys' foreskin - **for whatever reasons**. The supporters praised this as a discrimination-free broadness of worldview. Against the backdrop of the *simultaneous* campaign against genital mutilations of **female** persons - cf §226a - the process, argumentation and results appear **irrational**. In resolution no. 1952 (2013) from October 2013 the European Council declared the increase in genital mutilations and circumcisions as **alarming** and demanded better protection of all children.

47 C) Exercise of religion. Individual and collective freedom of religion have to be executed within the public order of law. Circumcision is not about a trade-off between physical integrity (Art. 2 II GG) and freedom of religion (Art. 4 I GG). Few weeks or months old children do not have a religion because they are unable to decide on this fundamental right; the custodians decide for them. This is thus about legal goods and interests of **distinct holders of legal goods**. A "weighing up" of the religious freedom of believers and the physical integrity of those who do not (yet) believe does not exist; religious freedom as such does not justify the purposeful assault to the detriment of third parties: In Germany, nobody may **tattoo** their children with religious images or torture them physically for **exorcism**, no matter how much they believe in the effectiveness of such rituals. This does not only apply to the infliction of pain, but (also) to the procedure's success.

48) Circumcision is not an "exercise of religion" of the custodians (!) protected by Art. 4 GG, because the entitlement to practice personal religious beliefs through irreversible injuries to the bodies of *others (even of your own children)* does not arise from Art. 4 GG. Likewise it is not the exercise of religion of the affected children themselves (**of other opinion** Schwarz JZ 09, 1125, 1128), because they are not religiously mature, just as they are not capable of self-determination in regards to offenses against their physical integrity. Admittedly, custodians can (must) exercise the child's rights on its behalf; according to general opinion this includes the right to *become* a member of a religious community *or not*. It is questionable, though, if this may happen by the means of medically not indicated, irreversible intrusions into physical integrity. It is thus about a "weighing-up" between the **physical integrity** of children and the **educational right** of custodians. Whether they base their educational measures on religious, ethical, philosophical or other considerations is *within the limits of the law* up to them and *irrelevant*; religion plays only a *possible* and thus at most a secondary role. *How* - that is in what forms, by what means and to what goals - the right to education is exercised is legally bound to the (constitutional/legal) recognition of the **child as a person**: It is not about the custodian's self-determination, but about the **child's well-being** (§ 1631 I, § 1666 BGB). Thus, a **restriction of parental power** is necessary, also in as much it is religiously or traditionally motivated. It can principally not serve the child's well-being to amputate the child's body parts as long as viable medical reasons don't necessitate it. Relevant for the child's interest can thus only be the motif to be **integrated** into the custodian's religious community and to not be regarded as an "outsider". This argument is of course ambivalent and may not put the legal limits under the provision of a *self-referential exterior-rule*: The rigidity with which a social group enforces its internal rules among its members, which is aimed at enforcing actions that cause injuries, is no legally viable justification for such actions. Remaining as a basis for such a justification is thus - and: at best - the social self-evidence with which a certain rite is deemed "acceptable" and thus constitutive for a constitutionally protected personal identity. This argument accepts the dominance of irrational, but community-inducing rites even at the cost of the most helpless holders of constitutional rights with the argument that it is "traditional" and deeply rooted in the culture of certain sections of the population. One can only hope that with progressing rationalization and cultural intermingling such argumentations that are seemingly helpless and sway unclearly between constitution and political correctness resolve itself.

D) Prevailing legal situation. The legislator has implemented the Bundestag resolution (above 46) with the law on the scope of custody in regards to the circumcision of the male child" from 12.10.2012 (BGBl I 2749, Mat.: BT-Drs. 17/11800; 17/11814; 17/11430; 17/11815; 17/11816; 17/11835) by which a domain-specific regulation was introduced, and thus chose an approach based on civil law for justification (BT-Drs. 17/11295, 14; Rixen NJW 13, 257). According to §1631d I S. 1 BGB custodianship includes the right to consent to a not indicated circumcision of male children unable to reason "if it shall be executed by the rules of medical practice". According to paragraph (2) also "persons designated by the religious community" who are not physicians, but are "equally qualified" may execute circumcisions within the first six months. The right to consent is omitted if the circumcision jeopardizes the child's well-being even under consideration of its purpose (§1631d I S. 2 BGB). This can be the case if medical reasons are an obstacle to the procedure; but also, if the aimed at integration into a (religious) cultural circle is impossible from the outset in a given case. The regulation of §1631d is not (analog) applicable to the custodianship over mature persons (§§1896, 1904 BGB). It remains to be seen if the restriction of no. 2 will ever take effect in practice.

Already from the wording results that children who are able to reason can decide about the consent themselves (and alone); also, that all consent is ineffective that objectively or subjectively does not refer to procedures "**according to the rules of medical practice**". The latter especially concerns, in addition to questions of infection prophylaxis, questions of **risk disclosure** and **anesthesia**. A circumcision without effective anesthesia cannot be considered *lege artis*, just as an extraction of a wisdom tooth without anesthesia can't. Today, the standards of "medical practice" allow for an effective suppression of pain without exceptions, even for infants. If that's not guaranteed, the procedure is illegal. Otherwise one will have to wait - and verify at the appropriate time - if the promises of legal policy will be fulfilled even in the slightest: That is, if the presence of justifying reasons for genital mutilations of male persons will be strictly examined by public prosecutions and, at the same time, if the persecution of genital mutilations of female persons will be executed with the full force of §266a.