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Unconstitutional Legalization

“The law on the extent of child custody involving circumcision of the male child” (for non-medical reasons)

I. Introduction

Despite ethical concerns, the legal debate about the legality of non-medically indicated, especially religiously motivated circumcision of boys intensified only in recent years and has since increasingly taken place in essays, commentaries and textbooks. There is general agreement now that the non-medically necessary circumcision, including religiously motivated circumcision, constitutes a personal injury (§ 223, Section 1 of the Criminal Code). The District Court in Cologne has joined this irrefutably correct opinion. The judgment attracted world-wide attention, especially among Jews and Muslims. In Switzerland, Denmark and France there are similar discussions. In order to eliminate confusion and legal uncertainty, the German Bundestag demanded a prompt resolution on July 19, 2012. This requirement to legalize the practice of circumcision through legislation, was quickly followed by a concept paper from the Federal Ministry of Justice (BMJ) “Circumcision of Boys - Key Elements of a Regulation” from September 24, 2012. The federal cabinet approved the BMJ concept on October 10, 2012 and approved a draft law. The Federal Council decided on November 2, 2012 to raise no objections to the draft. On December 20, 2012, 434 deputies voted for the bill and 100 voted against it, with 46 abstentions. In addition to the government’s draft, an alternative draft, initiated by 66 members of the opposition factions, was also voted upon. The only difference to the government’s draft was the provision of an age limit. The alternative draft intended to permit circumcision only after the age of 14. Only 91 deputies voted in favor, 462 against this draft with 31 abstentions. Thus, the Civil Code (BGB) was supplemented by the following regulation:

“§ 1631d circumcision of the male child

(1) The custody includes the right to consent to medically unnecessary circumcision of a male child who is not judicious and not able to reason, if the circumcision is carried out according to the rules of medical science. This does not apply if the child’s welfare is endangered by circumcision, also taking into account its purpose.

(2) In the first six months after the birth of the child, persons designated by a religious community to perform circumcisions are permitted to do so, without being a physician, as long as article (1) applies and they have received specific training that enables them to perform circumcisions comparable to a physician.”

With reference to the justification for the law, it can be said that it represents the facts mostly correctly. However, due to the lack of critical representations of medical-physiological and legal standpoints, it appears intentionally incomplete. According to the justification, the legal uncertainty that (supposedly) was created by the Cologne ruling shall now be “eliminated” by the intended provision. However, this uncertainty had already existed - mostly unspoken - prior to the Cologne ruling.

II. Medical aspects

Male circumcision is custom in Islam and Judaism, as well as in certain countries, such as the USA. Worldwide the rate is supposedly about 25%. In Germany 15% of men are circumcised for religious or partly medical reasons. In Judaism, circumcision (Brit Mila) is traditionally performed on the eighth day after birth, and in Islam between the seventh day after birth until the end of primary school age.

1. Rare medical indication

In early infancy and childhood the bonding of the foreskin to the glans is a normal finding. After completion of the first year of life, the foreskin can be retracted in about half the cases. After the age of 3, this rate increases to 90%, and with 16- to 17-year-olds it increases even up to 99%. A tight foreskin (phimosis), which is pathological, is a rare condition and is not to be confused with the common harmless condition often occurring among boys in infancy and childhood. The foreskin is also very treatable conservatively in most cases without surgery (skin movement, cortisone).

2. Treatment risks and pain associated with circumcision

The German Society for Pediatric Surgery writes about this under the heading “Complications”: “*Circumcisions are associated with a significant complication rate. Edema and postoperative secretion, wound infection and scarring are common risks. The post-bleeding rate is estimated to be 6%.*” Overall, the risk of complications in infancy amounts to 11%. It is not correct that with suppositories or ointment considerable pain and its impact on sensation in later life can be mitigated. There is no efficient general anesthesia available, which in itself is already an (unjustifiable) invasion of bodily integrity. For this reason in 2002, the local court in Erlangen revoked a Muslim parent’s right to custody of health care.

3. Consequences of circumcision

For the purpose of trivialization of circumcision, the federal government relies on the statements of the American Academy of Pediatrics, which contradict guidelines of the German medical societies. In the journal *Nature*, European experts promptly objected to the assessment of their U.S. counterparts, as did the German Professional Association of Child and Adolescent Physicians (BVKJ) and globally, 30 pediatric associations. In the wording of the legislative intent, the criticism is, at best, vaguely reflected. In circumcision, the foreskin is partially or completely removed. Here, the degree of amputation varies. The foreskin (frenulum) is one of the most sensitive parts of the body and is particularly densely occupied with nerve endings, which in the present-day form of circumcision are either damaged or completely removed. [Translator's Comment: *Foreskin is the densely innervated retractable sheath of epidermal and mucosal tissue that covers the glans (penile head) and frenulum is the highly erogenous elastic band of tissue that attaches the foreskin to the underside of the glans (penile head).*] With the subsequent constant contact with the air and rubbing on clothing, the unprotected glans necessarily loses its sensitivity. In the case of the completely removed foreskin, limited masturbation without lubricant is possible. Also during intercourse with a partner, the benefit of the foreskin's natural sliding function is omitted.

III. Legalization of bodily injury per ordinary legal act

The German circumcision provision is not part of criminal law (StGB), but is placed among legislation governing the rights of the child in the Civil Code (BGB). § 1631d, which makes it clear that parents under certain prerequisites can consent to circumcision of their son, has been attached to §§ 1631 to 1631c BGB governing the content and boundaries of custody rights of the persons concerned. If these prerequisites are present, circumcision cannot be punished as assault, following § 223, paragraph 1 StGB, and therefore, no liability for damages applies, as per §§ 823, Section 1, 2, 280 paragraph 1 BGB.

1. Infant circumcision with impunity (performed also by laymen)

The exact wording of the law allows consent to the circumcision on the grounds of parental custody rights, if the rules of medical science are respected. This does not apply if the child's welfare is at risk, “*also taking into account its purpose.*” The legislator thus starts from the premise that the purpose pursued by the parents initially does not imply child endangerment. The child’s welfare is, however, not primarily determined by what parents want. In addition, this premise implies that non-physicians can meet the rules of medical science. § 1631d para 2 BGB contains a special provision for the circumcisers (mohelim), who are not doctors: In the first six months after the birth of the child, they may perform the circumcision, “*without being a doctor if specially trained and capable to carry out circumcisions comparable to a physician.*” The circumciser has to comprehensively inform parents about the surgery, its consequences and risks. According to the law’s justification, this rule had already been applicable and therefore should not have to be explicitly included in the new law. Strange, and ultimately dubious from a legislative and methodological standpoint, is the deviation from the Patient Rights Law: Because there it states in § 630e Section 2 No. 1 BGB: “(2) *The clarifying information must first be given orally by the practitioner or by a person who has the necessary training to perform the treatment; and additionally, reference can be made to documents handed to the patient in text form...*”. With doctors, professional regulations and laws ensure that they are sufficiently trained; with non-medical circumcisers it is, according to the wording

of § 1631d para 2 BGB, already sufficient that they are “*persons, designated by a religious community for that purpose*”; their training or qualification is not regulated pursuant to paragraph 1; circumcision is “*defined to be performed according to the rules of medical science.*” Circumcisers are therefore privileged, in that they do not require supervised and regulated training, and are not subject to professional regulatory supervision.

2. Parental Consent

Circumcision is - without a medical indication - not a “curative intervention”. However, no action is unlawful if the injured party or his legal representative has stated a lawful consent (§ 228 StGB). Effective consent requires prior information/education - usually by a physician – as can be deduced as an obligation from the general personality rights (Articles 1, 2, Section 1 of the Basic Law), the right to physical integrity (Article 2, Paragraph 2 of the Basic Law), § 228 StGB (also from § 8a of the code of medical ethics) and from the treatment contract. Parents have obviously never had unlimited power of disposition over the physical integrity of their children. Whether sole parental consent to circumcision of infants without medical indication can be lawful or lawfully regulated is more than doubtful for the following reasons.

IV. Unconstitutionality of § 1631d BGB

The above-quoted decision of the Bundestag was not intended to take child protection as a priority into account, or to resolve alleged conflicts of legal interests of different entities, but to quickly legalize circumcision. Such limitation has the effect that foreseeable constitutional violations will hardly come as a surprise.

1. Violation against human dignity and general personality right of the boy

The protection of human dignity per article 1, paragraph 1 of the Basic Law prohibits as a supreme constitutional requirement (see article 79, paragraph 3 GG) the degradation of other people to mere objects by the State or public or private legal entities. The Basic Law compels the State - per case law of the Federal Constitutional Court - to protect human life and physical integrity. The Constitution “*not only prohibits immediate state intervention in life, it also commands the State to protect and promote this life, i.e. in particular, to also protect it against unlawful interventions by others. The reason for this duty of protection is spelled out in Article 1, paragraph 1 of the Basic Law, which expressly obliges the state to respect and protect human dignity; its object and its extent are determined by article 2, paragraph 2 of the Basic Law.*” This also applies to the protection of infants from any bodily injury. Infants whose rights to physical integrity are not respected, whose health is endangered without any medical reason and whose bodily function and sexuality is affected in the long term, are being degraded. Part of the general personality rights is also the right to self-determination of one’s (later) way of life in the sexual sense; the imposition of a limitation or sacrifice without a compelling reason does not take into account the full scope of the obligation to protect. In addition, constitutional status also befits child and youth protection under Article 1 paragraph 1 in conjunction with Article 2, Section 1 of the Basic Law. The Federal Constitutional Court has determined: “*Children and young people have a right to develop their personality in terms of these basic legal norms. They need protection and help in order to develop into autonomous individuals within the social community*”. The foreskin is not a worthless, useless and impure piece of skin. It is, on the contrary, of highly sensitive value for the sexual pleasure of a man and thus for his sexual self-determination.

The circumcision practice, on the other hand, leads to an unnecessary imposition and traumatic injury of infants. In accordance with § 1631 para 2 BGB, non-medical persons, such as mohels, may be nominated to then perform foreskin amputations. This would be a special law; because in Germany surgical procedures may be performed only by physicians. The trivialisation of pain is an expression of the ruthlessness of certain adults, which is even recognized by the legislature, who has not, despite its duty to protect infants under Article 2, Paragraph 2 of the Basic Law, taken any measure against it. Both the text of the law itself and its justification remain silent on this detail.

2. Violation of physical integrity and the State's duty to protect

Article 2, Paragraph 2 of the Basic Law requires that the legislature undertake measures to protect the most helpless infants, as they have not yet formed their own effective will of defense. Because the physical integrity may not be left unprotected, the new regulation is not compatible with the insufficiency prohibition (i.e., harm above a certain level must be prohibited and below which it cannot be prohibited). According to the jurisprudence of the Federal Constitutional Court, the legislature “*... is given wide latitude in assessing, and freedom of discretion in fulfilling, the State’s duty to protect the physical integrity...*”. This bill is based on the illegal and arbitrary assumption that the circumcision procedure

constitutes only a “*minor interference with bodily integrity*”. What is considered minor is determined, of all people, by those who pay no regard to the child’s interests. It can never be right that a religious community, or a parent associated with the same, takes away the right of the child to decide on this part of his body exclusively by himself. A law that allows the circumcision of children would allow and promote causing physical and emotional pain to boys. The far-reaching empowerment of parents that allows them to intervene in the physical integrity of their sons, contradicts the right of children to violence-free education (article 2, paragraph 2 of the Basic Law, § 1631 para 2 BGB). Children should not be beaten by their parents or receive degrading treatment. Circumcision of the penis is nothing more than direct violence.

In actual fact, the legislature renders male infants unprotected. In the present context, male infants cannot expect protection from their own parents, because they choose, as a rule, circumcision for their own religious - not even necessarily religiously mandatory - reasons. Under the Act, the consent for circumcision indeed requires an effective pain treatment and obligates the circumciser to educate the parents. But it is still unclear to which “pain management” in particular the non-medical circumciser should be empowered and how that should be verified. An effective pain management should, as such, only be performed by a specialist (anesthetist). A surgery by a medical specialist is performed under general anesthesia, supplemented by a conduction anesthesia (penile block, alternatively caudal anesthesia). Medical information/education can also only be given by physicians. The consent, questioning and informing of the child are not provided for in the law. It’s not that this omission could be plausible because, especially in the present context, infants are the ones being injured. The potential case of circumcision of a slightly older boy, capable of expressing his opposing will, is being legislatively ignored. There is no objective reason for considering the parental decision for an infant child as the only case of violation of the child’s interests, when the older child’s interests are omitted in the present regulation. Circumcision, with its permanent and irreparable consequences, does not correspond with the natural interest of the child; rather it negates his will which can only be articulated later, and thus decides on his bodily integrity and his religious affiliation. Circumcision irrevocably takes away these rights. Therefore, it is more than obvious to evaluate it disproportionate to, or even as a circumvention of, the child’s subsequent opportunity to decide for himself. In the case of a patient who is undoubtedly capable of giving consent, he himself is the sole judge and the guardians have no decision-making power. In cases of possible religious implications, it has to be considered whether the patient’s own volition has occurred. It seems disproportionate to rule out, from the outset, a “waiting” solution. The Bundestag has apparently either been indifferent to the question of how the affected infants can be protected, or it assumes that children up to the advanced age of 12 or 14 years (see § 5 law on the Religious Education of Children – RelKEG) are anyhow incapable of giving effective consent. Although the parliamentary legislative intent mentions this on the S. 13, it does not, however, consider that the bodily injury should mostly be carried out on a few-days or weeks-old infant.

3. No justification on the grounds of religious freedom of parents

Especially for the majority of parents of Jewish or Muslim faith, it is reported to be of great importance that circumcision should occur in the first six months, particularly since after the birth of the male child not only doctors perform circumcisions. The fundamental right of one legal entity certainly does not permit an intrusion into that of another legal entity. Freedom of religion of the one, here the parents, granted by article 4, paragraph 1, 2 GG, allows the conveying of religious ideas to their own children. However, it does not justify the religiously motivated surgical removal of body parts of others, including the own child. The practice of religion by Jewish or Muslim parents can occur unimpeded, if boys (initially) remain uncircumcised until they give effective consent later. The uncircumcised status does not lead to a loss of the religious affiliation of Jews and Muslims. In the name of religion and tradition, no circumcision of male infants is justified, because circumcision is not even a prerequisite for the Jewish identity or establishment of lineage.

The same applies to Muslims. The religious freedom of the parents is therefore not, or barely, affected because their membership is not affected. Yet through circumcision the religious freedom of their male child is disregarded. It deprives the child of the choice and the right to decide whether to move towards this religion, including the decision whether he really wants the loss of a body part. The law nevertheless expressly does not consider a religious motivation of the parents as relevant. Otherwise, legal practice would, as it was already phrased in the BMJ key points paper, “... *have the difficult task of having to determine the content of religious beliefs.*” After all, parents can “*deem as appropriate the widespread custom of circumcision of their son for various reasons*”. A regulation solely for a religiously motivated circumcision of boys is therefore not fair in the light of all the different objectives of circumcisions. Leaving out religious motivation for infant circumcision in order to prevent a sufficient social, medical and moral discussion and clarification, violates democratic legislative practices. The fact that (in pretense) no special regulation for religiously motivated circumcisions was created means that after the proposed wording of the law, the parental will alone is decisive, which in turn means opening the floodgate for wrong decisions due to aesthetic notions of hygiene or appearance reasons.

4. No justification based on parental rights

Article 6, paragraph 2 of the Basic Law protects parents against state interference in the family education process. However, the removal of body parts from defenseless children has evidently nothing to do with education or interference therein. The fulfillment of the state's mandated duty to protect the child's rights does not constitute interference with parental rights. Parental rights include education, and thus concern for the spiritual and intellectual development, including the religious and ideological education. According to the jurisprudence of the Constitutional Court, this religious and ideological education is an integral part of the parent-child relationship, which is particularly protected by the Basic Law. The systematic anchoring in family law is nevertheless particularly peculiar and problematic. The line to methodological law abuse appears to have been crossed here, because circumcision has nothing to do with "custody right"; it rather belongs to special criminal law. The regulation, by its incorrect legal reasoning, is bound primarily to parental rights, anchored in article 6 paragraph 2 sentence 1 GG, which in relation to one's own child is a fiduciary fundamental right primarily to the benefit of the child and includes a corresponding obligation in the interest of the child. Children's rights have obviously significant precedence over parental interests. The serious concerns cannot be considered addressed by the tokenistic-act of adding the child welfare conditional to the bill, because any non-medically indicated circumcision is a punishable bodily injury (§ 223 StGB) and never in the best welfare of the child.

5. Violation of the principle of equality and non-discrimination

A law that allows the circumcision of boys, particularly in the case of small babies by non-physicians, with a simultaneous prohibition of female circumcision, which remains prohibited, violates article 3, Section 1, 3 GG. The principle of equal treatment is not even mentioned in the legislative intent. The Federal Constitutional Court has specified that "*any unequal treatment based on the person is regularly subject to strict binding*".

The law justification sets apart clearly and in detail the supposedly allowed circumcision of boys from the strictly forbidden "female genital mutilation". Circumcision in boys is supposedly "fundamentally" different. Of course, children, regardless of gender, with capacity to consent may not be circumcised, no matter what body part, without their own prior effective consent, after being fully informed. Upon closer examination – something that should be expected from the German legislature – circumcision of boys is anything but harmless (see also above at II 2). Furthermore, objectively absurd and arbitrary differentiation is evident in setting the age limit that children up to six-months old may be circumcised by persons who are not physicians.

6. Violation of international human rights

To remove normal, healthy and functional tissue, is practically impossible to reconcile with Article 5 of the Universal Declaration of Human Rights of the United Nations, nor with Article 13 of UN Convention on the Rights of the Child. The Federal Republic of Germany ratified in 1990 the UN Children's Rights Convention; it therefore applies at least in the rank of a simple federal law. Article 24, paragraph 3 provides that the undersigned parties shall take all effective and appropriate measures "... *to abolish all traditional practices that are harmful to the health of children.*" Circumcision causes pain, trauma, and permanent loss of protective and erogenous tissue.

V. Conclusion

Infant circumcision without strict medical indication, such as only for religious reasons, constitutes violence and child abuse. Its implementation is not harmless, not without risk, and has lasting consequences. It cannot be compared with supposed trifle invasions such as vaccinations. Misjudging this means nothing else than disregard for human dignity and the unrestrictable right to physical integrity of infants, of the State's duty to protect, and of the religious freedom of children. Possibly for convenience and carelessness reasons, § 1631d BGB and its justification lack a thorough and adequate debate of the problem. Circumcision is and remains a bodily injury (§§ 223 ff StGB), which, in the absence of medical indication, may neither be conducted by a physician nor by a non-physician, and also not if the custodial parent(s) desire it for religious or other reasons. Religious ideas never justify the mutilation of children, under any kind of conceivable point of view. Even the parliamentary legislature cannot legalize this, not even with a majority vote on a constitutional amendment, because of child protection legal provisions under Article 1, Section 1, 2, Paragraph 2, 3, paragraphs 1 and 3, 4, Section 3, 79, paragraph 3 of the Basic Law itself. This has to be accepted .